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MOTORES DE MEXICALI, S. A., a corporation of the United States of Mexico, Petitioner,

v.

The SUPERIOR COURT of the State of California IN AND FOR COUNTY OF LOS ANGELES, Respondent.

Erwin G. Resnick, William D. Cowan and R. William Cowan, Real Parties in Interest.*

Civ. 22930.

District Court of Appeal, Second District, Division 2, California.

May 12, 1958.

Rehearing Denied June 6, 1958.

Hearing Granted July 9, 1958.

Mexican corporation sought alternative writ of mandate to require the Superior Court in and for the County of Los Angeles to proceed with the trial of issues joined by Mexican corporation's petition for order to show cause why certain judgment, initially rendered only against California corporation, should not be corrected by adding names of individuals as real parties in interest as judgment debtors. The District Court of Appeal, Kincaid, J. pro tem., held that where Mexican corporation sold used automobiles to individuals doing business under fictitious firm name used by California corporation, and Mexican corporation obtained default judgment against California corporation for amount owing on unpaid drafts given in fictitious firm name for automobiles, but could only collect part of judgment becase of bankruptcy of California corporation, and Mexican corporation filed petition for order to show cause alleging that California corporation was a mere instrumentality or an alter ego of individuals, who were sole officers, directors, and owners of all financial interest in California corporation, and that individuals were the true defendants and debtors, Superior Court had jurisdiction to determine the matter on the merits, and, if allegations of petition were properly established, to include individuals as judgment debtors.

Writ of mandamus issued.

Ashburn, Acting P. J., dissented.

1. Judgment 🔑310

Court, which has acquired jurisdiction of person of defendant and subject of action, necessarily possesses power to correct misnomer by ordering judgment amended to correctly designate parties actually involved.

2. Judgment 🔑310, 320

Where Mexican corporation sold used automobiles to individuals doing business under fictitious firm name used by California corporation, and Mexican corporation obtained default judgment against California corporation for amount owing on unpaid drafts given in fictitious firm name for automobiles, but could only collect part of judgment because of bankruptcy of California corporation, and Mexican corporation filed petition to show cause alleging that California corporation was a mere instrumentality or an alter ego of individuals, who were sole officers, directors, and owners of all financial interest in California corporation, and that individuals were the true defendants and debtors, Superior Court had jurisdiction to determine the matter on the merits, and, if allegations of petition were properly established, to include individuals as judgment debtors. West's Ann.Code Civ.Proc. § 187.

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* Opinion vacated 331 P.2d 1.

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Utley & Houck, Los Angeles, for petitioner.

Geo. W. Rochester, La Hobra, for real parties in interest.

KINCAID, Justice pro tem.

Petitioner seeks an alternative writ of mandate requiring the respondent court to proceed with the trial of the issues joined by the petition for order to show cause why a certain judgment, initially rendered only against Erbel, Inc., a California corporation, individually and doing business under the fictitious name of Bi Rite Auto Sales, should not be corrected by adding the names of each of the real parties in interest as judgment debtors therein.

The respondent court has refused to hear the matter on its merits and has by minute order and otherwise announced its intention to dismiss said proceeding to add the names of the real parties in interest as judgment debtors to said previous judgment, solely on the ground that it does not have jurisdiction to hear and determine the proceeding on its merits or to do otherwise than to dismiss the proceeding. The hearing and trial have been continued by the respondent court in order to enable petitioner to file the petition for writ of mandate herein.

Another department of the respondent court had previously denied motions to dismiss and had ordered that the matter be transferred to the master calendar department of the respondent court for trial on the petition for said order to show cause and answers thereto; the issues to be tried to be limited to the petition and answers but otherwise the proceedings to be subject to the same rules of procedure including memorandum of setting and pretrial, as any plenary trial.

A summary of the relevant facts as alleged in the petition for order to show cause discloses that in early 1953 the petitioner sold certain used automobiles to the real parties in interest (hereinafter called: Resnick and the Cowans) who were doing business under the fictitious firm name of Bi Rite Auto Sales. However, as later alleged in said petition and as hereinafter set forth, petitioner did not then know and did not learn until long after it secured judgment against Erbel, Inc., that Resnick and the Cowans were in fact the persons who were engaged in doing business under the fictitious firm name of Bi Rite Auto Sales or that Erbel, Inc., was the alter ego of Resnick and the Cowans.

Petitioner was given certain bank drafts issued in the name of Bi Rite Auto Sales in the total sum of $26,447 in payment for said used automobiles; that said bank drafts were dishonored upon presentation; that, following the dishonor of such drafts, petitioner searched the appropriate public records and found certificate showing that a California corporation known as Erbel, Inc., was engaged in the automobile business and doing business under the fictitious name of Bi Rite Auto Sales; and that, acting in reliance thereon, petitioner filed complaint against said Erbel, Inc., individually and doing business as Bi Rite Auto Sales, to recover the amount owing on said unpaid drafts. On June 25, 1953, a judgment by default by clerk for the total sum of $27,151.48 was entered in favor of petitioner against said Erbel, Inc., a California corporation, individually and doing business under the fictitious name of Bi Rite Auto Sales. Certain payments in partial satisfaction were recovered by levy and from a trustee in bankruptcy. In the latter connection, it is alleged that, subsequent to the entry of the aforementioned judgment against it, Erbel, Inc., upon its voluntary petition was adjudicated a bankrupt; that petitioner filed creditor's claim and received certain partial payments or dividends; that the assets of said bankrupt estate have been wholly liquidated;

and that there are no further funds or assets of Erbel, Inc., which can be applied in satisfaction of the unsatisfied balance which still remains owing upon petitioner's judgment.

With more specific reference to Resnick and the Cowans, said petition for the order to show cause further alleges in substance that, subsequent to the time when the said judgment so rendered against Erbel, Inc., became final, petitioner has discovered the facts with respect to and learned the true identity of the judgment debtors in said action and the identity of the persons who were in truth and in fact engaged in doing business as Bi Rite Auto Sales; and that said facts were so discovered in connection with various subsequent proceedings, including the case of Automotriz Del. Golfo De California S.A. De C. V. v. Resnick, 47 Cal.2d 792, 306 P. 2d 1. That in truth and in fact it was Resnick and the Cowans who were engaged in the business of buying and selling used automobiles under the fictitious name of Bi Rite Auto Sales and they were so engaged as joint venturers pursuant to an oral agreement by which their profits to be realized from the operations of said business were to be divided 50 per cent to Resnick and 25 per cent to each of the Cowans.

It is further alleged that Erbel, Inc., was a mere instrumentality, adjunct and conduit designed and used by Resnick and the Cowans for the purpose of diverting all income and proceeds from said business to themselves as salaries, loan repayments and otherwise, and yet escaping personal liability for the obligations incurred in said business, including the obligation to pay petitioner the sums due under the bank drafts hereinabove mentioned.

A detailed recital of facts allegedly so showing that Erbel, Inc., was a mere instrumentality of and alter ego of Resnick and the Cowans is then set forth, the substance of said allegations being as follows: That Resnick and the Cowans were the sole officers and directors of Erbel, Inc., the sole owners of all financial interest in said corporation, and in full control and management of its affairs; that no stock was ever issued nor permit to issue stock ever applied for; that said corporation was deliberately inadequately capitalized; that Resnick and the Cowans paid to themselves from the income and proceeds of said business substantial sums as salaries, reimbursement for expenses and repayment of loans made by them, well knowing that such diversion of the funds of said business would inevitably force the corporation into bankruptcy; that Resnick and the Cowans caused title to various automobiles purchased in the operation of said business to be taken in the name of William D. Cowan and sold in the usual operation of said business without segregation from automobiles held by said business in its own name; that Resnick and the Cowans represented to persons dealing with said business, including petitioner, that they were individually responsible for the obligations of said business, that it was adequately capitalized, and that any drafts given for purchases on behalf of said business would be honored immediately upon presentation.

Finally, it is alleged in said petition for the order to show cause that, by reason of the matters set forth in said petition, Resnick and the Cowans were and are the alter egos of said Erbel, Inc.; that they were and are individually responsible for the drafts and obligations of the business conducted under the fictitious firm name of Bi Rite Auto Sales, including the obligation to pay petitioner the amounts remaining due on said bank drafts; and that Resnick and the Cowans were and are the proper persons to be identified as the judgment debtors in the judgment previously entered against Erbel, Inc., a California corporation, individually and doing business under a fictitious name of Bi Rite Auto Sales.

The real parties in interest have filed their return by way of answer to the foregoing petition.

The respondent court, acting pursuant to section 187 of the Code of Civil Procedure, adopted a suitable procedure for the purpose of determining whether Resnick and the Cowans were in fact the alter egos of Erbel, Inc., and as such, the real parties who should be bound by the judgment, the misnomer, if such should be so found, to be corrected. In event of such determination Resnick and the Cowans would be found to have been the real parties who were doing business as Bi Rite Auto Sales as the alter egos of Erbel, Inc. and carrying on the business under the latter name. As such they would be the real defendants and would be individually liable for the debts of Bi Rite Auto Sales due petitioner.

[1] This procedure gave the real parties in interest the safeguards, rights and attributes of a plenary action, the basis of the rule being that the court, having acquired jurisdiction of the person of the defendant and the subject of the action, it necessarily possessed the power to correct a misnomer by ordering the judgment amended to correctly designate the parties actually involved. Mirabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 60, 47 P.2d 530.

The real parties in interest argue that this procedure constitutes in effect a denial to them of due process. Although they were allegedly the sole officers, directors and owners of all financial interest in Erbel, Inc. and one of them was served with the summons and complaint in the original action, they chose to ignore the charges therein contained and permitted default judgment to be taken. Had they been advised that they might be held liable individually they contend they would have had the privilege of not only denying the allegations as to their status as alter egos but could have raised any affirmative defense available to them. Not being apprised that there was any thought of holding them personally liable they say they were not obligated to make a defense on behalf of the corporation.

The real parties in interest were at all times in the best possible position to know whether or not they were using the corporate name as a front or instrumentality through which they were transacting their operations as a business convenience or for the purpose of deluding those with whom such business was being conducted. Knowing all the facts they could have caused their individual appearances to have been entered in the action and by proper pleadings, have asserted all relevant matters and defenses. Instead they chose to remain anonymous permitting the judgment against their alleged corporate front to go by default.

A somewhat similar factual situation was presented in Thomson v. L. C. Roney & Co., 112 Cal.App.2d 420, 246 P.2d 1017. Plaintiff had sued L. C. Roney & Co. on a business debt and recovered a judgment from which no appeal was taken. After the judgment had become final he learned, through supplementary proceedings, that said defendant had, at a time before his suit was instituted, sold out to the Southwestern Development Company which was owned and controlled by the same interests as the selling corporation. Plaintiff thereupon filed a petition for an order to show cause why the name of Southwestern Development Company, a corporation, should not be added to the judgment as a judgment debtor. The order to show cause was issued and attacked by writs of prohibition filed in both the District Court of Appeal and the Supreme Court. These petitions were denied. A hearing was held on the merits and, after evidence was taken and considered, plaintiff's petition was granted.

On appeal the validity of the order amending the earlier judgment was challenged on the ground (112 Cal.App.2d at page 425, 246 P.2d at page 1020): (1) "the trial court acted in excess of its jurisdiction in adding the name of the Southwestern Development Company to a final judgment, and (2) no showing was made that would warrant a disregard of the separate corporate existence of L. C. Roney Inc., and support a finding that it was the *alter ego* of appellant." In rejecting these contentions this court stated: "The order here under consideration does not effect an enlargement of the original judgment nor is it a modification thereof to correct a supposed error of law. It is simply an amendment whose purpose is to designate the real name of the judgment debtor. (Citations.)"

And again at pages 426, 427 of 112 Cal. App.2d, at page 1020 of 246 P.2d: "Appellant endeavors to distinguish the Mirabito case (Mirabito v. San Francisco Dairy Co., supra, 8 Cal.App.2d 54, 57, 47 P.2d 530), in which the relations between the two corporations were established during the trial and an express finding of an *alter ego* relationship made, by pointing out that in the original trial of the case at bar (1) no testimony was offered to indicate the existence of any relationship between appellant and L. C. Roney, Inc., and (2) no finding was made in the original proceeding that L. C. Roney, Inc., was appellant's *alter ego*. There is nothing in the language or the logic of the Mirabito decision which would limit its application solely to a situation where the connection between the two corporations is developed in the original trial. The limitation contended for by appellant would fetter the court's ability to do justice between the parties and award a premium to a litigant's capacity to conceal his real identity. The liberality with which a court permits amendments of judgments where the record itself clearly reflects a clerical error should apply equally to the use of extrinsic evidence to clarify the name of the real defendant. (Citations.) Where a court may with propriety amend a judgment, evidence dehors the record is admissible, upon proper notice to the adversary party, in order to make the judgment speak the truth. (Citation.) See Freeman on Judgments (5th Ed.), vol. 1, p. 939. Since the court had jurisdiction over the defendant, it had jurisdiction to make its judgment reflect the defendant's true name. (Citations.) A question having arisen as to the identity and character of the defendant upon whom the judgment was binding the court possessed the power to adopt a suitable procedure for the purpose of determining that question. Code Civ.Proc. sec. 187. Under the authority of this section the court properly exercised its power by taking evidence, after proper notice, in order to determine the true name of defendant." It will readily be seen then that the procedure adopted by the trial court herein for the determination of the matters presented by the petition is not for the purpose of correcting any clerical error as such but for the purpose of ascertaining and designating the real name of the judgment debtor or debtors and amending the original judgment accordingly.

The real parties in interest and the respondent court further take the position that said court is without jurisdiction because the proceeding under the petition is in reality one to pierce the corporate veil of the judgment debtor corporation, Erbel, Inc. and to secure an adjudication that Resnick and the Cowans were in fact the alter egos of said corporation. This position ignores the additional allegations of the petition to the effect that the automobiles were sold to Resnick and the Cowans who were doing business under the fictitious firm name of Bi Rite Auto Sales; that it was Resnick and the Cowans who were engaged in the business of buying and selling used automobiles under the fictitious firm name of Bi Rite Auto Sales, and they were so engaged as joint venturers pursuant to an oral agreement; and that Resnick and the Cowans were and are individually responsible for the debts and obligations of the business conducted under the fictitious firm name of Bi Rite Auto Sales. Accordingly and without regard to the allegations that Erbel, Inc., was a mere instrumentality and that Resnick and the Cowans were its alter ego, there are direct and positive allegations stating in legal effect that Resnick and the Cowans were the true defendants and debtors and, in view of said allegations, it seems clear that there is no justification for the trial court's belief that the petition for the order to show cause solely and only sets forth a cause of action to pierce the corporate veil of Erbel, Inc. and to have it adjudicated that Resnick and the Cowans were the alter ego of Erbel, Inc. These allegations present all the elements necessary to justify piercing the corporate veil and establishing the alter ego relationship. Wilson v. Nobell, 119 Cal.App.2d 341, 348, 259 P.2d 720.

Furthermore, it was made clear in Thomson v. L. C. Roney & Co., supra, 112 Cal. App.2d 420, 246 P.2d 1017, that the trial court, on a petition for an order to show cause similar to the one herein, does have jurisdiction to hear and determine such matters. The court there stated (112 Cal. App.2d at pages 427, 428, 246 P.2d at page 1021): "Where injustice would result from a strict adherence to the doctrine of separate corporate existence, a court will look behind the corporate structure to determine the identity of the party who should be charged with a corporation's liability. (Citation.) Since the separate personality of a corporation is but a statutory privilege it must not be employed as a cloak for the evasion of obligations. The conditions which must be present before the corporate veil will be pierced are outlined in Minifie v. Rowley, 187 Cal. 481, 487, 202 P. 673, 676, where the court points out that before the obligations of a corporation can be regarded as those of another person, the following circumstances must appear: 'First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.' The second requirement suggested in Minifie v. Rowley, supra, is further refined in the following expression: '* * * where the recognition of the fiction of separate corporate existence would foster an injustice or further a fraud the courts will refuse to recognize it. (Citing cases.) It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice. (Citing cases.) Here confusion would be promoted and an unjust result be accomplished if the maintenance of the two entities controlled by the same persons and having an identical name were permitted to frustrate a meritorious claim.' Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 522–523, 203 P.2d 522, 527."

[2] A suitable procedure having been established for hearing and determining the issues presented by the petition and the answers thereto, the trial court should proceed to take evidence for this purpose. Petitioner is entitled to have these matters determined and if the allegations of the petition are properly established the alter ego corporate identity of the real parties in interest will be disregarded and the judgment corrected to include them as judgment debtors, the court having full jurisdiction to grant that relief.

Let a writ of mandate issue directing the respondent court to proceed in accordance with the views expressed herein.

HERNDON, J., concurs.

ASHBURN, Acting Presiding Justice (dissenting).

I cannot concur in the judgment because I think it denies due process to the real parties in interest, namely, Erwin G. Resnick, William D. Cowan and R. William Cowan. The prevailing opinion holds that although they were not made parties to the action which resulted in a default judgment against the corporation, Erbel, Inc. (the only party-defendant to the action), they can be brought into the case to answer to a judgment already rendered against the corporation, and that this can be done under the guise of correcting the record to show the true names of the judgment debtors. In my opinion this is neither due process of law nor do the cases upon which petitioner relies support such a ruling.

On June 9, 1953, Motores de Mexicali, S. A., a Mexican corporation, filed an action in the superior court of Los Angeles County for recovery upon six automobile purchase drafts executed by defendant Erbel, Inc., under its fictitious name, Bi Rite Auto Sales, and delivered by defendant Erbel, Inc., to plaintiff; the complaint alleged that Erbel, Inc., was doing business under the fictitious name, Bi Rite Auto Sales. Erbel, Inc., was the only defendant named in the complaint. It was served by delivery of summons and complaint to its president, William D. Cowan, one of the real parties in interest herein. No service was made upon him in his personal capacity and neither of the other real parties in interest, Erwin G. Resnick or R. William Cowan, was served. Defendant Erbel, Inc., defaulted and default judgment was rendered against it, "individually and doing business under the fictitious name of Bi Rite Auto Sales" in the sum of $26,900.83, plus interest and costs. Soon Erbel, Inc., went into bankruptcy and turned over its assets to the trustee in bankruptcy. Motores de Mexicali, S. A., filed a claim on the judgment and received by way of dividends from the bankruptcy estate $1,765.45, plus $4,617.81. It had attached defendant's place of business, stock of secondhand automobiles, etc., when the action was started, and by that means collected $240.60 from the sheriff. The bankruptcy estate is exhausted and there is an unpaid balance of over $26,000 owing upon the judgment.

On March 6, 1957, Motores de Mexicali, S. A., filed in the superior court a petition for an order to show cause "why said judgment of June 25, 1953 should not be corrected by adding the names of each of the respondents [Resnick, William D. Cowan and R. William Cowan] as judgment debtors therein." The judgment had long since become final.

The petition for the order to show cause says, among other things, that "plaintiff sold certain used automobiles to Erwin G. Resnick, William D. Cowan and R. William Cowan, who were then and there doing business * * * under the fictitious name of Bi Rite Auto Sales;" also that said individuals represented to plaintiff "that they were individually responsible for the obligations of said business, that it was adequately capitalized, and that any drafts given for purchases on behalf of said business would be honored immediately upon presentation." These allegations, read together, show sales to the individuals and the incurring of a primary liability for the purchase price on their part. See Kilbride v. Moss, 113 Cal. 432, 435, 45 P. 812; Russ Lumber & Mill Co. v. People's Trust & Savings Bank, 76 Cal.App. 438, 244 P. 934; 24 Am.Jur. § 3, p. 874. The petition also alleges: "The respondents caused title to certain of the automobiles purchased in the operations of said business to be taken in the name of respondent William D. Cowan, and such titles were held by him until said business acquired funds to pay for said automobiles. In the meantime the automobiles so purchased were reconditioned, shown, and sold in the usual operation of said business without segregation from automobiles held by said business in its own name." A pretrial statement signed by the attorneys for petitioner in the instant proceeding says: "The proof will show that it [Motores] was relying upon the credit of respondent W. P. Cowan, and was told that he was individually behind Bi-Rite Auto Sales." When the drafts were dishonored and before filing suit petitioner's attorneys checked the public record of fictitious firm name certificates, found the one filed by Erbel, Inc. and elected to sue it rather than the individuals upon whose credit Motores had relied.

It seems to me that this proceeding is governed by cases such as Burlingame v. Justice's Court, 1 Cal.2d 71, 33 P.2d 669, 670. In that instance plaintiff Kaufman sued O. A. Burlingame and wife and named no other defendant. He did, however, deliver a copy of summons and complaint to R. A. Burlingame, the son of the named defendants. After judgment had been rendered by default against O. A. Burlingame plaintiff sought to substitute R. A. Burlingame as the judgment debtor, although he had not been named as a defendant and had not appeared in the action. The justice's court made an order of substitution and the superior court annulled it. On appeal from the last mentioned order appellant insisted "that what the justice's court really did was to make an order 'correcting the record so as to make it speak the truth,' and that therefore the order was valid." 1 Cal.2d at page 73, 33 P.2d at page 670. The argument was rejected in these words: "The answer to the appellant's position is that it was alleged in the petition and is therefore admitted that the order of substitution was one substituting R. A. Burlingame 'as the judgment debtor in the place and stead of the defendant in said action, O. A. Burlingame, the father of your petitioner.' The appellant is bound by that allegation and the order must be deemed void. This is not an action where R. A. Burlingame was sued under a false or fictitious name or has been sued by an inaccurate designation of his own name; but it is an action wherein he was never sued at all, was not sought to be sued and no attempt was made to bring him into the case until long after the entry of the judgment, which, so far as the record discloses, has never been set aside." 1 Cal.2d at page 73, 33 P.2d at page 670. The order of the superior court was affirmed.

Chapman v. Western Irrigation Co., 75 Kan. 765, 90 P. 284, involved a motion to substitute Western Irrigation Company as the debtor upon a judgment rendered against Western Irrigation & Land Company. In affirming a denial of the motion the court said, 90 P. at page 285:

> "The court rightly refused to substitute one defendant for another in the judgment in this summary way * * *. As will be observed, it is not a case of misnomer, or defective designation, but a proposed substitution of defendants more than five years after the judgment had been rendered. It was not a correction of a clerical error, nor to make the judgment conform to one actually rendered, but, under the name of an amendment, the court was asked to introduce the name of a new defendant into the judgment in lieu of the one against whom the judgment was actually rendered. * * * Here there was no confusion of names nor inadvertence in rendering the judgment against the Land Company. * * * The Irrigation Company was not made a party to the action, no cause of action was alleged against it, nor was there ever any purpose of rendering a judgment against that company. The judgment pronounced was within the pleadings of the case, and just such a judgment as the court was asked to render. Plaintiff is asking to have the judgment corrected so as to make it show what she thinks should have been done but which in fact was not done, and this in a summary way, five years after the expiration of the term at which the judgment was rendered.
>
> "She contends that the Land Company is a creature of the Irrigation Company, and that the latter is masquerading in the name of the former. * * * In general terms, the plaintiff alleged that the Irrigation Company was fraudulently wearing the cloak of the Land Company, but, if fraud is to be made the basis of relief, and a liability established against a new defendant, it should be fully pleaded and issues directly tendered in a proper action. It cannot be summarily accomplished on a motion to amend a judgment rendered against another party."

The effect of granting the motion now under consideration would be to foreclose these individuals from advancing any defense or offset that they may have had, or thought they had, to the original action. It would confine the trial to a canvassing of the issue of alter ego, the question of whether defendants should be held individually liable upon a judgment already rendered in their absence. That would be a denial of due process of law.

It is of the essence of due process that one charged with liability in a judicial proceeding shall have notice of the claim against him and an opportunity to refute it with evidence. Follette v. Pacific Light & Power Corp., 189 Cal. 193, 203, 208 P.

295, 23 A.L.R. 965; Matter of Lambert, 134 Cal. 626, 634, 66 P. 851, 55 L.R.A. 856; People v. Lawrence, 140 Cal.App.2d 133, 137, 295 P.2d 4; 11 Cal.Jur.2d § 313, p. 788. "The notice essential to due course and process of law is the original notice whereby the court acquires jurisdiction, and is not notice of the time when jurisdiction, already completely vested, will be exercised." Gray v. Hall, 203 Cal. 306, 318, 265 P. 246, 253.

The law seems well settled to the effect that a new party cannot be added to a judgment by motion to amend it; that the farthest reach of such a motion is to bring within the record of the judgment persons who are actually bound by it but not named therein as judgment debtors. Cases upon which petitioner relies are in that category.

Mirabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 47 P.2d 530, is one of them. It was a personal injury action brought against San Francisco Dairy Company, based on negligence of one Vogel who was alleged to be employed by said company. Before the accident San Francisco Dairy Company had conveyed all its assets to Dairy Delivery Company, Inc., which continued to transact part of its business in the name of San Francisco Dairy Company. The defense to the action was conducted by Dairy Delivery Company, Inc., in the name of San Francisco Dairy Company. The question of alter ego was raised and canvassed at the trial; that claim was sustained both in the trial court and on appeal where the judgment was affirmed. The judgment ran against Vogel and San Francisco Dairy Company. After it became final plaintiff made a motion to add Dairy Delivery Company, Inc., as a judgment debtor; the motion was granted and the judgment was amended accordingly. Upon appeal from an order refusing to vacate the last mentioned order it was held that the amendment was proper as a correction made to show the true name of the judgment debtor. It is to be noted that Dairy Delivery Company, Inc., had been present throughout, conducting the defense to the action through attorneys who represented both corporations and that it bore such portion of the expense as exceeded San Francisco Dairy Company's ability to pay; that the issue of alter ego was there decided against Dairy Delivery Company, Inc. The judgment had omitted its name and was corrected to show the identity of the real defendant. At page 60 of 8 Cal. App.2d, at page 532 of 47 P.2d the court said: "The rule has long been declared in California that where the facts warrant, courts may amend pleadings to correctly designate the parties actually involved, even though the statute of limitations has run in favor of the party substituted. Thompson v. Southern Pacific Co., 180 Cal. 730, 183 P. 153; Smith v. Pickwick Stages System, supra [113 Cal.App. 118, 297 P. 940]; Walsh v. Decoto, 49 Cal.App. 737, 740, 194 P. 298. The basis of the rule is, of course, that the court having acquired jurisdiction of the person of the defendant and of the subject of the action, it necessarily possessed the power to correct a misnomer. In the cases last mentioned, it is true, no judgment had been rendered at the time of the amendment. Where, however, as here, the Supreme Court has stated the evidence is sufficient to warrant the conclusion that in effect the two corporations are identical; where, as here, the action was fully and fairly tried with at least the direct financial assistance of appellant; and where, as here, nothing appears in the record to show that Dairy Delivery Company could have produced a scintilla of evidence that would have in any way affected the results of the trial, there is no basis for a different rule." It then distinguished the Burlingame and Chapman cases, supra, saying: "The Supreme Court having heretofore declared San Francisco Dairy Company to be merely the *alter ego* of appellant, the cases of Burlingame v. Justice's Court, 1 Cal.2d 71, 33 P.2d 669; Chapman v. Western Irr. Co., 75 Kan. 765, 90 P. 284, and Walters v. Dock Commission of City of Portland, 126 Or. 487, 245 P. 1117, 266 P. 634, 270 P. 778, upon which appellant relies, may be readily distinguished from the instant case, and the principles therein declared are not applicable herein." This language implies recognition of the rule that a new party cannot be charged with liability through an amendment to the judgment.

Thomson v. L. C. Roney & Co., 112 Cal. App.2d 420, 246 P.2d 1017, decided by this court, advances one step beyond Mirabito. It upheld an amendment adding the name of the real defendant to the judgment although the alter ego issue was not developed until motion to amend was made after judgment had become final. But it was the real defendant that was added, and that was a corporation which had actually conducted the defense at the trial. At page 429 of 112 Cal.App.2d, at page 1022 of 246 P.2d: "Further, the attorney for both corporations was the same, and though the complaint was brought against L. C. Roney, Inc., the litigation was in effect carried through and subsidized by appellant corporation, which at all times was fully apprised and cognizant of plaintiff's claim and of the legal action it had taken against L. C. Roney, Inc." The ruling was based upon the power of the court to amend its record to show the true fact, the real name of the judgment debtor. "It is simply an amendment whose purpose is to designate the real name of the judgment debtor." 112 Cal.App.2d at page 425, 246 P.2d at page 1020.

It is possible to follow and accept the reasoning of Mirabito and Thomson cases, supra, for they merely add to the judgment the name of the corporation which actually conducted the defense and was heard upon the question of liability upon the alleged cause of action. But it does not follow that those decisions sanction the addition to the judgment debtor in a default judgment the names of other who were not parties, were not served as such, and who did not appear or otherwise conduct a defense of the action.

These individual real parties in interest well may have concluded that there were good defenses or offsets to the drafts but, as the corporation was insolvent, it would be advisable to wash out all its actual or possible liabilities through the bankruptcy court. Had they then known that claim of individual liability was to be made against them and that they could be brought into the action by indirection, they presumably would have advanced those supposititious defenses and perhaps have defeated the action. It seems to be immaterial whether they actually had any such defenses, for the requirements of due process strike deeper than the mere *ad hominem* arguments which petitioner presents to sustain its position. This case should be governed by Burlingame v. Justice's Court, supra, 1 Cal.2d 71, 33 P.2d 669.

In my opinion the writ should be denied.

160 Cal.App.2d 93

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Ben I. RANKIN and Joseph B. Garvin,
Defendants and Appellants.
Cr. 6101.

District Court of Appeal, Second District,
Division 2, California.
May 5, 1958.

Hearing Denied July 2, 1958.

Defendants were convicted in the Superior Court of Los Angeles County, Herbert V. Walker, J., on ten counts of violating Corporations Code subsection, and they appealed. The District Court of Appeal, Ashburn, J., held that arrangement, under which defendants were to make location and include as locators persons who advanced money for defendants' services in perfecting claim through which title as tenants-in-common was to be acquired, was nothing more than a contract for services, and held that location notice copies furnished to defendants' co-owners had not constituted "securities" within meaning of statute.

Reversed as to certain counts and affirmed as to others.

Herndon, J., dissented in part.

1. Licenses 🔑18½(10)

Any deed, certificate of interest or like instrument of conveyance or assignment falls within the Act only when it appears, directly or inferentially, that buyer contemplates receipt of profits from activities of other persons, such as carrying on business, drilling oil well, or sinking and operating a mine; and mere conveyance to him of fractional interest in piece of land or other type of property is not subject to statute if buyer must look only to thing bought or his own efforts to produce profit to himself. West's Ann.Corp.Code, §§ 25008, 26104(a).

2. Mines and Minerals 🔑29(1)
Tenancy in Common 🔑3

The location of a mining claim upon public land vests in locator an estate which is the equivalent of a fee with respect to all persons other than the government; and when made by or on behalf of a number of locators, it amounts to a single claim in which each owns an undivided interest.

3. Mines and Minerals 🔑14(2)

Joint location of mining claim upon public land may be made by one of participants on behalf of all; and such location vests specified interest in each named locator even though he did not authorize or know of it, provided he elects to ratify same.

4. Licenses 🔑18½(16)

Arrangement, under which defendants were to make location and include as locators persons who advanced money for defendants' services in perfecting claim through which title as tenants-in-common was to be acquired, was nothing more than a contract for services, and location notice copies furnished to defendants' co-owners did not constitute "securities" within meaning of statute. West's Ann.Corp. Code, §§ 25008, 26104(a).

5. Statutes 🔑183

"The letter killeth, but the spirit giveth life," and literal interpretation should not be exalted over substance and spirit of law.

6. Licenses 🔑42(4)

Convictions, under certain counts of indictment charging violation of Corporations Code through sale of undivided interests in and issuance of certificates of interest in, mining title and lease without first securing permit from Commissioner of Corporations, were sustained by evidence. West's Ann.Corp.Code, §§ 25008, 26104(a).

7. Licenses 🔑18½(16)

Even though defendants had cast each sale in form of an agreement to make joint location of new mining claim, trial judge was justified in piercing form in order to view realities and in concluding that sales of undivided interests in mining titles, violative of Act, were involved. West's Ann.Corp.Code, § 25100(*l*, m).

◆

Ellis D. Reiter and Burke Mathes, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Albert Bianchi, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Appellants were convicted of ten counts of violation of § 26104(a), Corporations Code, through the sale of undivided interests and issuance of certificates of interest in a mining title and lease without first securing a permit from the Commissioner of Corporations. Each appeals from the judgment and an order denying his motion for new trial.

Appellants' main argument is that there could be no violation of the statute because they merely induced the complaining witnesses to join with them in locating mining claims on public lands and collected $250 for each one-eighth fractional interest in consideration of their services in perfecting the filing, recording, monumenting and other acts necessary to complete the claim through which they and the alleged victims acquired title as tenants in common; that their furnishing co-owners with copies of the location notices was not the issuance of a certificate of interest in a mining title or lease within the purview of § 25008, Corporations Code. As will appear, we find that the evidence justifies this factual contention in certain instances but not in others. Hence it first must be determined whether such a situation does violate the law.

Section 25008, Corporations Code, defines "security" as including "any certificate of interest in an oil, gas, or mining title or lease; * * * or beneficial interest in title to property, profits, or earnings." Section 26104(a) declares every person guilty of a felony who "[k]nowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in noncomformity with a permit of the commissioner then in effect authorizing such issue, * * *".

It is not the purpose of the law to stigmatize or to have the Commissioner of Corporations regulate every cotenancy transaction. For instance, it specifically exempts "[a]ny partnership interest in a general partnership, or in a limited partnership * * * except partnership interests when offered to the public," and "[a]ny bona fide joint adventure interest, except * * * when offered to the public." Corp.Code, § 25100, subds. (m) and (n).[1] "The Corporate Securities Law does not contain an all-inclusive formula by which to test the facts in every case. And the courts have refrained from attempting to formulate such a test. Whether a particular instrument is to be considered a security within the meaning of the statute is a question to be determined in each case. In arriving at a determination the courts have been mindful that the general purpose of the law is to protect the public against the imposition of unsubstantial, unlawful and fraudulent stock and investment schemes and the securities based thereon. * * * An agreement to render personal services for compensation cannot be considered a security, even though the sale of a beneficial interest in such an agreement may come within the statute. * * * [N]either numbers of participants nor possible fraud in its creation may transmute the instrument into a security which in legal effect it is not. If fraud be involved redress must be found elsewhere than in the penal provisions of the Corporate Securities Law." People v. Syde, 37 Cal.2d 765, 768, 769, 235 P.2d 601, 602. "It has been the consistent policy of the state, as reflected in the various definitions of 'security,' to subject to regulation all schemes for investment, regardless of the forms of procedure employed which are designed to lead investors into enterprises where the earnings and profits of business or speculative ventures must come through the management, control, and operations of others and which, regardless of form, have the characteristics of operations by corporations, trusts or similar business structures." Moore v. Stella, 52 Cal.App.2d 766, 778, 127 P.2d 300, 306.

[1] It is settled law that any deed, certificate of interest or like instrument of conveyance or assignment falls within the act only when it appears directly or inferentially that the buyer contemplates receipt of profits from activities of other persons, such as carrying on a business, drilling an oil well, or sinking and operating a mine; the mere conveyance to him of a fractional interest in a piece of land or other type of property is not subject to the statute if the buyer must look only to the thing bought or his own efforts to produce a profit to himself. The court, speaking through Mr. Justice Shinn, said in Moore v. Stella, supra, 52 Cal.App.2d 766, 772, 127 P.2d 300, 303: "A deed to mineral rights may or may not be a security. The determination of its true character requires an inquiry which goes be-

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[1] Now Corp.Code, § 25100(*l*, m).

yond the mere name of the instrument or the nature of the interest conveyed. In deciding whether a given instrument is a security the courts have invariably looked through mere form to substance." Again, 52 Cal.App.2d at page 777, 127 P.2d at page 305: "In holding that the deeds to mineral rights issued by the defendants without a permit were invalid, we of course do not hold that every conveyance of a fractional interest in prospective oil land or of a segregated parcel thereof is a security or, more specifically, that it is a certificate of interest in an oil title." Austin v. Hallmark Oil Co., 21 Cal.2d 718, 727, 134 P.2d 777, 782: "If the transaction is one in which the assignee is merely an investor who for a consideration is given the right to share in the profits or proceeds of an enterprise to be conducted by others, the instrument representing such interest is a security. Where, however, as in the present case, the assignee is to share in the conduct of the enterprise, the instrument representing an assignment of a fractional interest in the production of oil is not a security within the act." See, also, People v. Davenport, 13 Cal.2d 681, 685, 91 P.2d 892; Domestic and Foreign Petroleum Co. v. Long, 4 Cal.2d 547, 555, 51 P.2d 73.

[2, 3] As a matter of general law the location of a mining claim upon public land vests in the locator or locators an estate which is the equivalent of a fee with respect to all persons other than the government. Watterson v. Cruse, 179 Cal. 379, 382, 176 P. 870; 33 Cal.Jur.2d § 83, p. 133. When made by or on behalf of a number of locators it amounts to a single claim in which each owns an undivided interest. Miller v. Chrisman, 140 Cal. 440, 450, 73 P. 1083, 74 P. 444. Such a joint location may be made by one of the participants on behalf of all. Moore v. Hamerstag, 109 Cal. 122, 124, 41 P. 805; Morton v. Solambo C. M. Co., 26 Cal. 527, 528, 534; 33 Cal.Jur.2d § 50, p. 94. Such a location vests the specified interest in each named locator even though he did not authorize or know of it, provided he elects to ratify the same. Moore v. Hamerstag, supra, 109 Cal. at page 124, 41 P. at page 806; Morton v. Solambo C. M. Co., supra, 26 Cal. at page 534; Thompson v. Spray, 72 Cal. 528, 530, 532, 14 P. 182.

[4, 5] The evidence as to some of the counts in this case (I–IV) shows that defendants invited the complaining witnesses to join them in locating claims; that these persons paid their money upon that understanding; although they did not sign location notices each received at a later date a copy of such a notice or of a certificate of location bearing in type at the end of the document his or her name as a locator, followed by a fraction such as one-eighth or one-sixteenth. In those instances there was no representation before the transaction was completed that the claim was already in existence or owned by one of defendants, or that they were offering for sale an interest in an existing asset. The alleged victims so testified.[1] Early in

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[1] In the case of Myrtle R. McLean (count I), the $250 was paid on August 4, 1954, and at that time she was given a location notice, typed in her presence, which acknowledged payment for her interest in Lucky Strike No. 2, and bore date August 9, 1954, as that of location; later she received from Rankin, through the mail, another copy of a notice of location which stated August 4, 1954 as the date of same, showed recordation on September 28, 1954, and was certified by a notary under date of November 29, 1954. As the witness testified that Rankin did not represent he was selling an interest in any mining claims but said he would fill in her name and the names of others as locators, and she understood she was to be one of the original locators, that she was acquiring an interest in a claim to be filed in the future, the placing of August 4, 1954, in the recorded notice (bearing her name as a locator) as the date of location does not amount to substantial evidence that the claim had been located by Rankin before his first conversation with her, or that he was purporting to sell an interest in an existing claim. See, as to what constitutes substantial evidence, In re Guardianship of Sturges, 30 Cal.App.2d 477, 497, 86 P.2d 905; Citron v. Fields, 30 Cal.App.2d 51, 63,

the trial the following colloquy occurred between court and prosecutor:

> "The Court: Well, it is the People's position that the testimony would be different on some other counts, then, than that ultimately given by the doctor.
>
> "Mr. Arterberry: I think they are all similar; there's a little variation, but they are all very similar—I will say that.
>
> "The Court: Well, do you agree with me? I notice the doctor in his initial testimony said that he was buying an interest in a lease, as he started out.
>
> "Mr. Arterberry: He was buying an interest in this group of claims that were going to be located; that is what he said."

Clearly, there was no sale of an interest in a mining title in the foregoing instances, and the furnishing of a copy of the mining location could not be a certificate of interest within the purview of the statute. It did not represent any interest sold or offered for sale by defendants. It amounted only to evidence of the title which vested in the locator through the location made for him in his name. The arrangement that defendants would make the location and include the other party's name as one of the locators was nothing more than a contract for services which, as pointed out in People v. Syde, supra, 37 Cal.2d 765, 768, 235 P.2d 601, cannot be considered a security within the terms of the act. To hold that the copy of a location notice furnished to the alleged victim was a certificate of interest within the meaning of the statute would exalt literal interpretation over the substance and spirit of the law. This is forbidden by People v. Davenport, supra, 13 Cal.2d 681, 685, 91 P.2d 892, and a legion of other cases. See, People v. Villegas, 110 Cal.App.2d 354, 357–358, 242 P.2d 657; In re Clarke, 149 Cal.App.2d 802, 805, 309 P.2d 142; 23 Cal. Jur. § 113, p. 734. "The letter killeth, but the spirit giveth life."

[6, 7] Other transactions (counts V–X) cannot withstand the court's peering through form to substance. By that is meant that the evidence is in such shape that the judge was warranted in drawing inferences adverse to the defendants upon all the essential elements of the crime charged. Their failure to testify emphasizes the weight of such inferences. People v. Ashley, 42 Cal.2d 246, 268, 267 P.2d 271. The transactions with Marion R. Carter (counts IX and X) are illustrative. She turned over $1,750 to defendants at the rate of $250 for each one-eighth interest in a uranium claim. She testified at one place that defendants did not say they owned the claims, but she thought Rankin did own them, just assumed it; she did not recall if he actually said so; at another time she testified he said "he had them located," "said he has them," "we have this and it is so good." She also said that Rankin sold the claims to her and Mrs. Jennie Smith and stated that the money was to be used for core drilling

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85 P.2d 534; Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 89, 109 P.2d 650; Hall v. Osell, 102 Cal.App.2d 849, 853, 228 P.2d 293; People v. Casillas, 60 Cal. App.2d 785, 793–794, 141 P.2d 768; People v. Stephens, 117 Cal.App.2d 653, 659, 256 P.2d 1033.

It was stipulated that the testimony of Emma P. Smith (count III) would be substantially the same as that of Miss McLean. Her money was paid to Rankin on August 16, 1954, and the notices given her bore the same dates as in the instance of Miss McLean.

Like stipulation was made as to the testimony of Lena A. Moulton (count IV), who paid her money on August 11, 1954, and later received through the mail a notice of location dated July 30, 1954, pertaining to Lucky Strike No. 1.

In the case of Dr. John R. Buckingham (count II), the transaction was had on October 6, 1954, and he later received copies of certificates of location showing locations made on December 12, 1954, with him named as one of the locators. He testified that he was one of the original locators and that this was understood at the time he paid over the money on October 6th.

and developing the property; that they had turned down an offer of $4,000 plus a royalty for each claim; had had an offer to take over the claims for stock of a company. Rankin also said that every time he sold a claim he gave Garvin $50.

Mrs. Carter and Mrs. Jennie M. Smith (counts VII and VIII) were together when some of their purchases were made. Mrs. Smith testified that Garvin had telephoned her that Rankin had uranium claims he wanted to sell and that Garvin brought him to Mrs. Carter's home. There he said that Rankin had uranium claims to sell and the latter asserted they were worth buying. It was also said that Rankin was to work the claims and they (Mrs. Carter and Mrs. Smith) were to get dividends. Mrs. Smith also testified she did not know the difference between a claim already filed and one to be filed, but she thought the claims were already in existence. She also gave considerable testimony supporting defendants' claim that the two ladies were to join in locating claims and that it was not represented that any claims defendants presented to them were already in existence or being sold. Of course the trial judge had the right and duty of accepting and rejecting such parts of conflicting statements of any witness or witnesses as he deemed respectively credible or unbelievable. "The trier of fact may believe and accept a portion of the testimony of a witness and disbelieve the remainder. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment. (Citations.) A judgment cannot be set aside on appeal unless it clearly appears that on no hypothesis whatever is there sufficient substantial evidence to sustain it. (Citation.)" People v. Thomas, 103 Cal.App. 2d 669, 672, 229 P.2d 836, 838.

Generally speaking, these same observations apply to the testimony of Mrs. Emma L. Miller concerning counts V and VI.

The court well may have concluded that the defendants were offering to sell to these women interests in existing mining claims. If they did so offer it is immaterial whether they owned the claims or whether the same actually were in existence. It is also fairly inferable that the buyers were to reap profits from the activities of defendants in developing and working a mine. Hence it would follow that the sale itself would violate the act. The testimony of Mrs. Smith, Mrs. Carter, Mrs. Miller, and the accompanying exhibits disclose that defendants cast each sale in the form of an agreement to make joint location of a new mining claim. But the trial judge was justified in piercing this form in order to view the realities and in concluding that these were sales of undivided interests in mining titles and violative of the act, as explained in such cases as Moore v. Stella, supra, 52 Cal.App.2d 766, 127 P.2d 300; Ogier v. Pacific Oil & Gas Corp., 132 Cal.App.2d 496, 282 P.2d 574; People v. Shafer, 130 Cal.App. 74, 19 P.2d 861; McFaul v. Deck, 30 Cal.App.2d 424, 86 P.2d 890; Domestic & Foreign Petroleum Co. v. Long, supra, 4 Cal.2d 547, 51 P.2d 73; and People v. Sidwell, 27 Cal.2d 121, 162 P. 2d 913. In these circumstances the furnishing to each buyer of a copy of the mining location showing her to be a locator of an undivided interest constituted the issuance of a participation certificate in a mining title.

The transactions covered by counts I to IV, inclusive, of the information fall within the class first discussed herein. The evidence does not warrant a finding that there was a sale or the issuance of a participation certificate. The fact that defendants did not testify does not supply affirmative evidence against themselves; it only serves to fortify legitimate inferences flowing from evidence actually in the record, People v. Ashley, supra, 42 Cal.2d 246, 268, 267 P.2d 271; nor does the fact that transactions involved in counts V to X, inclusive, amounted to sales followed by issuance of participation certificates fill the hiatus in the proof on counts I to IV, inclusive. The evidence upon the former counts would be confirmative of adverse evidence upon the latter, but it cannot fill the gap therein. It might furnish one or more elements of the alleged crime but could not supply the entire structure.

The judgment and order denying new trial upon Counts I to IV, inclusive, are reversed as to each defendant. The judgment and order denying new trial upon Counts V to X, inclusive, are affirmed as to each defendant.

FOX, P. J., concurs.

HERNDON, Justice (concurring and dissenting).

I concur in the conclusion of the majority that the judgment and order as to Counts V to X, inclusive, should be affirmed. I dissent, however, from those portions of the majority opinion which hold that the judgment and order should be reversed as to Counts I to IV, inclusive.

Discussions between court and counsel in the court below as contained in the record before us discloses that the learned trial judge had clearly in mind the well settled rules of law by which it is to be determined whether the instruments involved are "securities" within the purview of the applicable statute or whether they represented interests in a bona fide joint venture, which are expressly exempted from its application. The evidence supporting the trial court's judgment on all counts impresses me as being not only substantial but clear and convincing.

I find myself in complete accord with the apparently unanimous view of counsel for appellants, the district attorney, the attorney general, and the trial judge that all ten transactions are substantially the same in character. As appellants correctly state in their opening brief, "[T]he testimony given by all of the witnesses was very similar in context." And the district attorney responded as follows to the inquiry of the court below whether the testimony on the other counts would be different from that given by the first witness with reference to Count II: "I think they are all similar; there's a little variation, but they are all very similar—I will say that."

As I view the record, all of the transactions described in the testimony of the seven elderly witnesses are essentially the same, both in form and in substance. It is unmistakably clear from the record that the conduct of the appellants with reference to each and every one of said transactions constituted a part of a common plan, scheme, and design so that the evidence as to each is competent to prove the unlawful intent of the others and to prove the illegality of the scheme as a whole. 18 Cal.Jur.2d § 138, p. 588, and cases cited. The lack of any material difference in the transactions and their identification with the common scheme is further emphasized by the fact that some of the sales involved in the first four counts related to interests in the very same mining claims which are involved in the last six counts.

As will be shown by a summary of the evidence relating to Count I, shortly to be set forth, the scheme is a classic example of a common form of swindle technique. Quite typically, six of the seven victims who testified at the trial were elderly women. The essence of the scheme was to cast the transaction in such form that the victims would appear to be bona fide joint venturers with appellant Rankin in locating and perfecting mining claims upon portions of the public domain whereon Rankin, as he represented, had previously discovered rock rich in uranium content. In all instances, the "investors" were cast in the role of original locators and appellants have sought to characterize the payments of $250 for each fractional one-eighth interest as contributions to the costs and expenses of locating, perfecting and developing the claims. All of the victims received documentary evidence of their interests in the form of copies of location notices showing them as locators and setting forth their respective fractional interests. In form these "muniments of title" were essentially the same in every instance.

The record reveals that nearly all of these purported "joint venturers", other than Rankin, were complete strangers to each other. Except for Mrs. Jennie Smith (Counts VII and VIII) and a Miss Marion Carter (Counts IX and X), who were friends, the complaining witnesses met for the first time when they appeared in court to testify at the preliminary hearing.[1]

The victim of the transaction involved in Count I was Miss Myrtle McLean, a retired clerk-typist. She had known defendant Garvin for several years. On or about August 9, 1954, Garvin brought defendant Rankin to her home and introduced him to her. The following excerpts from Miss McLean's testimony will more adequately describe the presentation:

> "Q. Well, when they came in, who spoke first? A. Mr. Garvin did.
>
> "Q. What did he say? A. Well, he introduced me to Mr. Rankin.
>
> "Q. What did he say about Mr. Rankin? A. Well, he had some claims of uranium and wanted to talk to me.
>
> "Q. Did he tell you who Mr. Rankin was, or anything about him? A. Well, he told me that he had known him for a long time.
>
> "Q. Yes? A. And they showed me some credentials.
>
> "Q. What kind of credentials were they? A. Well, I didn't read the whole letter; it was in regard to an executive position with some company —oil company.
>
> "Q. What oil company was it? A. I think it was Standard.
>
> "Q. Standard Oil Company in Nevada? A. I think so.
>
> "Q. What position did he hold with the Standard Oil Company in Nevada? A. Well, I understood it was the vice president, or some such—some such office; I don't remember now.
>
> "Q. Go ahead and tell the court now as near as you can everything they told you about these uranium claims. A. Well, I can't remember everything that was said. * * * He explained the whole thing to me, you know—that it was—the potential, and so forth. * * * And it all sounded very good to me; so I purchased an interest.
>
> "Q. And what interest did you get? A. An 8th interest.
>
> "Q. In what? A. In three claims.
>
> "Q. In three claims; and what did you pay for that interest? A. $250.00.
>
> "Q. How did you pay it? A. I paid it in cash."

The following are excerpts from Miss McLean's testimony given on cross-examination:

> "Q. Mrs. McLean, when you first discussed the matter with Mr. Rankin, did he tell you that he was getting a group together, or ask you if you would like to join some other parties in filing on some uranium claims? A. Well, I assumed that there were other parties asked to join in the group.
>
> "Q. And did he tell you that you would be a locator of the claim, or one of the parties who would be locating some claim? A. I didn't get that.
>
> "Q. I say, did he tell you that you would be one of the original locators of the claims? A. Well, that's what I understood.
>
> "Q. And he didn't tell you that he was selling you an interest in any claims—any mining claims? A. No.
>
> "Q. All right; now, at the time he got the second $250.00, did he not tell you that that was needed for the loca-

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[1] The evidence discloses that there were numerous other participants in addition to the seven whose "purchases" or "contributions" were the subjects of the ten counts of the information.

> tion and assessment work? A. That's right.
>
> "Q. And it was not for the location work—in other words, one of the $250.00 was for the first location of the first claim, and then there was a second one for another $250.00?
>
> "Mr. Arterberry: I didn't so understand her testimony.
>
> "Mr. Seay: I am trying to refresh her; it's a little confusing to me.
>
> "The Witness: I paid $250.00 for the claims at first, and then $250.00 for assessment work; and that's all I paid."

It will be observed that Miss McLean's testimony is somewhat self-contradictory as to whether at the time she paid her first $250 she understood the claims to be "then existing" or thereafter "to be located." Since to my mind it is wholly immaterial whether defendants' representations and her understanding relative to this detail was one way or the other, I shall assume the correctness of defendants' version of her testimony in this respect. The same confusion appears in the testimony of several of the aged witnesses.[2] For example, Miss Marion Carter (Counts IX and X) testified as follows in response to questions of the district attorney concerning one of the several[3] checks for $250 which she had issued to appellant Rankin:

> "Q. And on the back it bears the endorsement of Mr. Rankin. Tell the Court what that was for. A. That was for an eighth claim, or the expenses on an eighth claim of uranium.
>
> "Q. Well, now, which was it? Do you know, or are you able to state which it was? A. Well, it was all the same to me; it was ⅛th claim, and I knew that it was for monuments—some of the money had to go for monuments and different work on the claims, or drilling, maybe; it was for ⅛th claim of the uranium; whatever it was—the area or district."

Miss McLean did not recall signing any document at any time, nor did she receive any document at the time she paid over her money to the defendants. Shortly thereafter, however, she received through the mail from Rankin a document on a printed form entitled "Notice of Location" dated August 4, 1954, locating a claim to be designated (quite euphemistically) as "Lucky Strike No. 2." The location notice carried as "Names of Locators" the names of Rankin, Myrtle R. McLean and two other women. After the names of the "locators" other than Rankin were designations indicating their interest as "¼ interest", or "⅛ interest."

Thereafter, Miss McLean received from Rankin through the mail the documents identified at the trial as People's Exhibits Nos. 6 and 7. Exhibit No. 6 was dated December 12, 1954, and headed "Certificate of Location." It certified that Lucky Strike No. 3 was located by Rankin and others, and bore the names of Rankin, McLean and three others with fractional designations after each name of ½, ⅛, or 1/16. Exhibit No. 7 was dated August 9, 1954, and was headed "Location Notice—Lode Claim." It purported to give notice of the location and claim of "Lucky Strike No. 2" and at the foot it designated the locators as follows: "Ben I Rankin Tonopah Nevada Fishlake Valley RT Myrtle R. Mc.Clean. 5748. 7th Ave. L. A. 43 Ca as locator of ⅛ interest of the above claim

Lucky*s*trike No. 2. Rec Payment for *intrest* to date.

Locator Address

Witness: s/Ben I. Rankin"

In my view, the trial court was amply justified in finding and holding that defendants sold to Myrtle McLean a security in the form of an interest in a mining title. The documents which she received through the mail quite obviously were designed to serve the office of "certificates" in the sense that they were intended to evidence and represent the investor's ownership of the indicated interest in the mining claims described and her right to participate in the earnings and profits thereof.

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[2] As the majority opinion points out, substantially the same conflict appears in the testimony of Mrs. Jennie M. Smith, whose purchases were the basis of Counts VII and VIII.

[3] Miss Carter, who had been a nurse for about forty years, invested at least $1,500. The ten sales charged in the information were only representative examples of a much larger number.

The effect of the majority opinion with respect to Counts I to IV is to sustain appellants' argument that the transactions amounted to a bona fide joint venture in that appellants merely invited the complaining witnesses to join with them in locating mining claims on the public domain, and collected $250 for each one-eighth interest in consideration of appellants' services in perfecting the claims by monumenting, recording and filing the notices of location, etc.

There is a short answer to this argument. Even this description of the transactions in the light most favorable to appellants portrays illegal sales of interests in a mining venture. Obviously the documents which appellants delivered to the "investors" were intended to evidence the respective interests which they were acquiring. Hence, they are securities within the definition of subdivison (a) of section 25008 of the Corporation Code, which includes "(a) * * * any certificate of interest or participation; any certificate of interest in a profit-sharing agreement; any certificate of interest in an oil, gas or mining title or lease; any * * * investment contract, or beneficial interest in title to property, profits, or earnings."

Appellants have sought the shelter of subdivision (n) of section 25100 of the Corporations Code which exempts from the application of the Corporate Securities Law "[a]ny bona fide joint adventure interest, except such interests when offered to the public." But the evidence in this case is more than sufficient to support findings (1) that there was no bona fide joint venture; and (2) that the interests sold were "offered to the public." It is apparent from the record that appellants offered and sold these interests indiscriminately to a large number of people who were total strangers to each other. As I shall point out shortly, the transactions bear none of the hallmarks of a true joint venture.

As stated in People v. McCabe, 60 Cal.App.2d 492, 498, 141 P.2d 5458: "If such a writing so issued by an individual creates a present right to a present or a future participation in the profits of an enterprise undertaken for profit it is a security under the Act. The fact that the interest in the profits conveyed was not to be realized until the sale of the process does not make it any the less a security. People v. Oliver, 102 Cal.App. 29, 36, 282 P. 813; People v. Claggett, 130 Cal.App. 141, 143, 19 P.2d 805; People v. Shafer, 130 Cal.App. 74, 19 P.2d 861."

To my mind, it makes not the slightest difference either in reason or in law whether the present right to future participation in the profits of the mining venture appertained to claims which had been "located" in the legal sense, that is, by the erection of monuments, etc., or to claims which Rankin intended to locate upon land known to him and upon which he claimed to have discovered mineral. Discovery of mineral is the first step in a series of steps that must be taken to perfect a mining title. Adams v. Crawford, 116 Cal. 495, 48 P. 488; 33 Cal.Jur.2d § 55, p. 100.

Thus, it makes no practical or legal difference whether the sale of the interest was made before or after the claim was located in the legal sense. As stated in People v. Oliver, 102 Cal.App. 29, at page 36, 282 P. 813, at page 817: "If the instrument of sale creates a present right to a present or a future participation in either the income, profits, or assets of a business carried on for profit, it is a 'security,' as defined in the Corporate Securities Act. Because the interest created will not return a profit until the performance of a future act, such as the sale of an interest in a patent, or the grant to a licensee of the right to use it, does not bring it without the provisions of this act. Agnew v. Daugherty, 189 Cal. 446, 209 P. 34. To hold otherwise would make the real test of the legality or illegality of the sale the ultimate success or failure of the venture. The law was passed to protect the investors against unprincipled promoters, as well as to keep valueless securities off the market. It is the act of selling that is primarily placed under the examination of the commissioner of corporations, and his action in granting or withholding his permit to sell cannot be made contingent upon the future success or failure of the business venture. To hold otherwise would put a premium on fraud and permit a promoter to sell a mythical security without any intention of ever attempting to engage in the business in which he purported to sell an interest." To the same effect are People v. Shafer, 130 Cal.App. 74, 76, 19 P.2d 861 and People v. Jaques, 137 Cal.App.2d 823, 832, 291 P.2d 124.

Certainly it was not contemplated that this mining venture would be completed or terminated when the claims had been located and perfected. Quite obviously the location of the claims was only the beginning of the venture. The investors were led to envisage earnings and profits.[4] The record is replete with evidence that plans for development, for the construction of a mill and for the shipping of ores were discussed with various of the investors at various times.[5]

Thus, we are led logically to a consideration of the test laid down in the following language from Austin v. Hallmark Oil Co., 21 Cal.2d 718, 727, 134 P.2d 777, 782: "If the transaction is one in which the assignee is merely an investor who for a consideration is given the right to share in the profits or proceeds of an enterprise to be conducted by others, the instrument representing such interest is a security. Where, however, as in the present case, the assignee is to share in the conduct of the enterprise, the instrument representing an assignment of a fractional interest in the production of oil is not a security within the act."

The foregoing test is entirely consistent with the declaration in Moore v. Stella, 52 Cal.App.2d 766, 778, 127 P.2d 300, 306, that it is the policy of California law as indicated by the various definitions of "security" to subject to regulation "all schemes for investment, regardless of the forms of procedure employed which are designed to lead investors into enterprises where the earnings and profits of business or speculative ventures must come through the management, control, and operations of others * * *."

Manifestly, it was contemplated that the "management, control and operations" of the mining claims involved in this case would be left in the hands of the defendants. Any suggestion that the parties contemplated active participation in these operations by the six elderly ladies or by the practicing physician would be little short of ridiculous. The test laid down in Austin v. Hallmark Oil Co, supra, 21 Cal.2d 718, 727, 134 P.2d 777, is designed to differentiate between an investment in an enterprise to be conducted by others and a participation in a joint venture. The question whether a joint venture was created was primarily one for the trial court to determine from the evidence and the inferences reasonably to be drawn therefrom. Goldberg v. Paramount Oil Co, 143 Cal.App.2d 215, 220, 300 P.2d 329.

There seems to be no disagreement concerning the oft-stated principle that the courts will look through the form to discern the true substance of a transaction. It seems to me that no X-ray vision is needed to see through the transparent subterfuge of form with which the defendants in this case attempted to camouflage the transactions here involved. In the last analysis, none of them amounted to anything more or less than sales of interests in uranium mining ventures from which the purchasers were led to expect early returns in the form of "royalties" or "dividends."

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[4] Mrs. Jennie M. Smith, who also had worked as a nurse for forty years, "invested" $1,400. Rankin told her that she could expect to begin receiving her "dividends" by March of the following year. Garvin promised Miss Carter that she "would be getting royalties before Christmas", but Rankin thought these "royalties" might not be forthcoming before the following March.

[5] After he had made his investment, the witness Buckingham received letters from Rankin telling of plans regarding the building of a mill, the shipping of ore, etc.

I would affirm the judgment on all counts.

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160 Cal.App.2d 211

GORDON ARMSTRONG COMPANY, Inc., an Ohio Corporation, Petitioner,

v.

SUPERIOR COURT of the State of California, In and For the County of Los Angeles, Respondent,

and

Donald Coulter by Fred Coulter, His Guardian ad litem, and Fred Coulter, Real Parties in Interest.

Civ. 22956.

District Court of Appeal of California,
Second District, Division 2.
May 7, 1958.

Hearing Denied July 2, 1958.

Ohio corporation filed a petition for writ of mandate against the Superior Court in and for the County of Los Angeles to require the Superior Court to quash and vacate service of summons. The District Court of Appeal, Herndon, J., held that where solicitation by Ohio corporation of sales of its baby incubator in California was extensive, regular, and continuous over period of many years, so that California sales represented about one twelfth of corporation's total sales throughout the United States, and there were repeated appearances in California by corporation's executives and representatives to exhibit, demonstrate, sell, and repair incubators, corporation was "doing business" in California in such manner and to such extent as to make it amenable to service of process and to jurisdiction of California Superior Court in action for injuries sustained by infant as result of fire in incubator in California hospital.

Petition for peremptory writ denied.

Corporations 🔑642(4½)

Where solicitation by Ohio corporation of sales of its baby incubator in California was extensive, regular, and continuous over period of many years, so that California sales represented about one twelfth of corporation's total sales throughout the United States, and there were repeated appearances in California by corporation's executives and representatives to exhibit, demonstrate, sell, and repair incubators, corporation was "doing business" in California in such manner and to such extent as to make it amenable to service of process and to jurisdiction of California Superior Court in action for injuries sustained by infant as result of fire in incubator in California hospital. West's Ann.Code Civ.Proc. § 411, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Doing Business".

◆

Jarrett & Morgan, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

Raoul D. Magana, Los Angeles, Richard J. Collins, Pacific Palisades, and Daniel C. Olney and Victor E. Kaplan, Los Angeles, for Real Parties in Interest.

HERNDON, Justice.

The sole question presented by this proceeding is whether or not petitioner Gordon Armstrong Company, Inc., a foreign corporation, was "doing business in this State" in such manner and to such extent as to make it amenable to service of process and to the jurisdiction of our superior court.

Petitioner, a corporation organized under the laws of Ohio, is one of two defendants in an action brought in our superior court to recover damages for personal injuries. The plaintiffs are Donald Coulter, an infant, and his father, Fred Coulter. The defendants are the petitioner and St. John's Hospital, a non-profit corporation organized under the laws of California. The action is based upon injuries sustained by said infant as a result of a fire that occurred on June 22, 1955, in a baby incubator owned by the hospital and manufactured by petitioner. The complaint states causes of action (1) upon breach of an implied warranty of fitness and (2) upon negligence in the manufacture, sale, operation and use of the incubator.

Defendant St. John's Hospital answered the first amended complaint on September 19, 1956. The order for substituted service upon petitioner providing for service upon the Secretary of State and the mailing of the copy of the summons and complaint to petitioner at 1501 Euclid Avenue, Cleveland, Ohio, was dated December 20, 1956.

Petitioner's motion in the trial court to quash and vacate the service of summons was denied on November 25, 1957. Thereafter, and within the time allowed petitioner for the filing of its answer, petitioner filed herein its petition for writ of mandate under section 416.3 of the Code of Civil Procedure.

The Factual Presentation.

The evidentiary material presented to the trial court upon the motion to quash, and now presented to us in this mandate proceeding, is unusually voluminous. Petitioner's factual showing is contained in two affidavits of its president, Gordon Armstrong, and in an affidavit and a deposition of its attorney, Mr. Jarrett. Plaintiffs filed not less than eleven affidavits in opposition to the motion to quash. Both sides make reference to Mr. Gordon Armstrong's answers to forty-one written interrogatories submitted by plaintiffs and filed by them in opposition to the motion to quash. Petitioner has filed a separate bound book of exhibits consisting of photostatic copies of the pleadings, affidavits, depositions and other papers pertinent to the proceedings in the trial court.

(a) *Petitioner's portrayal of its California activities.*

The affidavit of Mr. Gordon Armstrong, petitioner's president, contains the following:

"Affiant states that the Corporation is an Ohio corporation and has only one office anywhere in the world and that is located at Cleveland, Ohio. It is a small corporation and has only nine (9) employees, including the officers of the corporation. It has no salesmen anywhere. It sells by mail only and never takes orders within the State of California. Its officers and employees are not stationed in the State of California, nor have they ever solicited or accepted any orders in the State of California, nor has the corporation at any time ever had any salesmen in the State of California even at medical conventions. No person has been hired, engaged or employed by the corporation as a salesman or representative for the State of California, nor has any person been designated by the corporation as a salesman, sales agent, dealer, agent, distributor, or representative of any kind or nature, nor even an independent contractor, of the corporation in or for the State of California. That the corporation has no sales office in the State of California, nor any other office in the said State. No display rooms or show rooms are maintained in the State of California. The corporation maintains no telephone directory listing or other listing in the State of California; has no bank accounts in the State of California; maintains no listing of the corporation on any office door or directory in the said State of California. The corporation does not own, lease or possess any warehouses or warehousing or storage facilities or any real or personal property in the State of California, nor does it distribute any samples in the State of California.

"Affiant states that whenever any California buyer of the corporation's products sends his order to the corporation, it is accepted at Cleveland, Ohio, and the corporation sells directly to the buyer, F.O.B., Cleveland, Ohio. The orders are received at the Cleveland, Ohio office, are accepted there, and the products are shipped from the State of Ohio, and payment is made to the corporation at its Cleveland, Ohio address."

Petitioner alleges that with certain exceptions, hereafter noted, its contacts with California residents have been solely through the medium of the mails and other media of interstate communication, that its sole method of soliciting sales in California has been through advertising in magazines with national circulation and direct mail advertising conducted on a national basis.

Petitioner admits certain additional California contacts which it describes as "occasional and sporadic." These consist of attendance at certain national or regional conventions of hospital associations held in California in 1953, 1954, and 1955. At these conventions petitioner's incubators were exhibited and explained by certain of its executives. Petitioner testified that it did not make any sales, or attempt to make any sales, during the course of these conventions.

Petitioner also admits that in 1953 Miss Leslie Jones, field assistant to the President, spent eighteen days in California checking service of a new model of equipment previously sold to certain California hospitals, and she also attended medical conventions in California in 1954. Mr. and Mrs. Gordon Armstrong attended the hospital conventions in 1953, 1954, and 1955, accompanied by Mr. Jay Dorsak, the latter holding the title of vice-president in charge of engineering. Mr. and Mrs. Armstrong also made courtesy calls on certain business clients on two other occasions while in California on vacation or enroute to Hawaii. The hospital conventions above referred to usually continued from three to five days.

(b) *Plaintiffs' version of petitioner's California contacts.*

Plaintiffs' affidavits present the following facts in support of their contention that Armstrong's contacts with California, and California residents, are more than sufficient to satisfy the minimum requirements of recent decisions to constitute doing business in this state:

(1) Armstrong obtains its business and conducts its solicitation of California business by a continuous and consistent mail campaign directed to all of the major hospitals in California. Numerous examples of the letters are attached to the various affidavits. They describe the product, extol its virtues and solicit orders, urging the prospective customers to write, wire, or telephone their orders collect. This type of solicitation has been used for at least the past five or six years, and average in frequency one letter per hospital per month.

(2) Armstrong advertises extensively, frequently and continuously in numerous periodicals which are received by most of the hospitals operating in California.

(3) Armstrong has followed the policy of reserving and contracting for space for the purpose of displaying its products at hospital association conventions for the purpose of soliciting orders, contacting purchasing agents of hospitals and building up good will. In connection with the three California conventions attended in 1953, 1954, and 1955, Armstrong spent $5,872.52 on transportation expenses for its officers and employeès who attended the conventions and manned the booths. In addition, the sums of $731.34, $1,226.07 and $1,646.63 were incurred for expenses in connection with said convention displays. The foregoing expenses did not include the salaries of the employees and attendants.

(4) Jay Dorsak, vice-president in charge of engineering, visited St. John's Hospital on June 22, 1955 to inspect their incubators. At that time, he inspected the Armstrong incubators at St. John's, made some adjustments thereon, and discussed their safety and engineering features with Sister Mary David of that hospital. He spent three days at the hospital on that occasion.

(5) In November of 1955, Mr. Dorsak conferred for several hours with a Mr. Cornelius Gray, Chief of Engineers of the California Lutheran Hospital, concerning suggested improvements that could be made on the incubators, and certain parts were sent to the California Lutheran Hospital following that conference.

(6) Approximately 8.4% of Armstrong's entire business is attributable to sales in California. At the time of the accident, out of which this action arises, Armstrong had sold a total of approximately 22,000 incubators in the United States. Plaintiffs calculate from figures supplied in the affidavits that in the twelve years before 1955, Armstrong had sold approximately $400,000 worth of incubators to California customers.

(7) Armstrong's direct mail advertising goes to several hundred customers, and prospective customers, in California, and its magazine advertising material reaches an equal number.

(8) Plaintiffs' several affidavits tend to show numerous other California contacts via the telephone and mails, and tend to show that Armstrong's representatives did in fact solicit sales at the several hospital association conventions, and on the occasions of the visits of Armstrong's officials to California above mentioned.

Applicable Law.

In view of the recent decision of the Supreme Court of the United States in McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223, and the more recent decision of the Supreme Court of California in Henry R. Jahn & Son v. Superior Court, 49 Cal.2d 855, 323 P.2d 437, it is entirely unnecessary for us to undertake here any comprehensive review of the earlier decisions. The latter decision cites all of the more recent California precedents including Jeter v. Austin Trailer Equipment Co., 122 Cal.App.2d 376, 265 P.2d 130, wherein this court undertook a comprehensive digest and analysis of the apposite decisions, state and federal, which had been filed prior to December of 1953.

Our decision in Jeter v. Austin Trailer Equipment Co., supra, reversed the trial court's order quashing service of summons upon a foreign corporation which sold its manufactured products in California solely through a manufacturers' agent. This agent represented several other manufacturers and was compensated "strictly on a commission basis." The decision holding the foreign corporation amenable to local service of process was rested very largely upon the activities of the manufacturers' agent in the solicitation of orders in California.

Following a comprehensive review of the authorities, and after taking notice of "the changing philosophy regarding the concept of 'doing business' which will subject a foreign corporation to local process" [122 Cal.App.2d 376, 265 P.2d 134], the Jeter decision epitomizes the then-current state of the law in the following language (122 Cal.App.2d at page 388, 265 P.2d at page 137):

> "By way of recapitulation of the current state of the law under the evolving concept of the 'doing business' requirement, it is deducible from the cases that the essentials of due process are fully met, at least for the purposes of amenability to local process and jurisdiction, if a foreign corporation maintains substantial contacts with a state through a course of regularly-established and systematic business activity, as distinguished from casual, isolated, or insubstantial contacts or transactions. The court must be astute to weigh the facts of the individual case to determine whether the particular type of activity in, relation to, or nexus with, the forum is of such substance as will make it just and equitable to conclude that a corporation is 'doing business' in the sense required by the purpose at hand."

The trend of California decisions rendered since 1953 has been consistent with the "continuing process of evolution" described by the United States Supreme Court in McGee v. International Life Ins. Co., supra, 355 U.S. 220, 78 S.Ct. 199, 201, 2 L.Ed.2d 223, 226, in these words:

"Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

With specific reference to the phrase "doing business in this State" as used in our Code of Civil Procedure, section 411, subdivision 2, the decision in the Jahn case declares (49 Cal.2d at page 858, 323 P.2d at page 439): "That term is a descriptive one that the courts have equated with such minimum contacts with the state 'that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" Citing International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95. The Jahn decision further defines the statutory phrase "doing business" as "synonymous with the power of the state to subject foreign corporations to local process." The last quoted language is credited to the cited case of Eclipse Fuel Engineering Co. v. Superior Court, 148 Cal.App.2d 736, 738, 307 P.2d 739. Also cited with approval is Kneeland v. Ethicon Suture Laboratories, 118 Cal.App.2d 211, at page 222, 257 P.2d 727, at page 734, which declares that the concept "'doing business' enlarges to the extent that the federal Constitution permits it to enlarge."

Our California Supreme Court followed the decisions of the United States Supreme Court, cited at page 859 of 49 Cal.2d, at page 440 of 323 P.2d, in the Jahn decision, in declaring: "Under the minimum contacts test of the International Shoe case regular sales solicitation alone can constitute doing business rendering the foreign corporation amenable to process in actions engendered by such activities."

Application of the above stated rules and principles to the facts of the instant case leads to the definite conclusion that the ruling of the trial court must be sustained. The evidence here presented unquestionably is sufficient to sustain the implied finding that petitioner was doing business in California within the meaning of the statute. Petitioner's contacts with California residents have been so numerous, so regular, and so continuous over a period of several years that in the aggregate they amount to many more than the necessary "minimum." We think it cannot fairly be argued that the maintenance of this action in California would offend "traditional notions of fair play and substantial justice."

The evidence before us shows that petitioner's solicitation of sales in California has been extensive, regular and continuous over a period of many years. These solicitations have been sufficiently productive of business that petitioner's California sales represent approximately one-twelfth of its total sales throughout the United States. The finding here under review is supported by evidence of other activities in California additional to its continuous solicitation of sales through direct mail advertising and through its program of advertising in periodicals circulated in California. Among others, these additional activities include repeated appearances in California by petitioner's executives and representatives for the purpose of exhibiting, demonstrating, selling and repairing its manufactured product.

It is immediately apparent from a reading of recent decisions, both state and federal, that the question as to which forum would be the more convenient is being given increasing consideration. In McGee v. International Life Ins. Co., supra, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223, the Supreme

Court alluded to the facilities of modern transportation and communication which "have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." It seems pertinent in this case to observe that in a very real sense Los Angeles is now more easily and more comfortably accessible to the residents of Cleveland than it was to the residents of Pamona at the turn of the century.

In the Jahn case our California Supreme Court concluded its opinion with an observation that "[a] denial of jurisdiction would lead only to a duplicity of litigation" because the cause of action involved Jahn's dealings with a California plaintiff and with Jahn's co-defendants, who were California residents. The same consideration weighs at least as heavily in the case at bar. Armstrong's co-defendant, the St. John's Hospital, is a local corporation.

To the extent that the practical considerations implicit in the doctrine of forum conveniens are relevant to our decision, the balance of advantage would seem clearly to be in favor of allowing the merits of the instant case to be tried in California. It seems beyond reasonable dispute that the additional difficulties which plaintiffs would encounter and the additional costs which they would necessarily incur in prosecuting this action in Ohio would be far greater than any additional burdens which petitioner would incur as a result of being required to defend it here. Bearing upon this matter of convenience the following from the affidavit of plaintiff's counsel seems pertinent: "That the accident which forms the basis of this complaint occurred in the City of Santa Monica, County of Los Angeles, State of California. That plaintiff was a nine day old infant at the time the accident occurred. That said infant is a resident of the County of Los Angeles, as well as his parents. That said infant has been permanently disabled for life as a result of the events described in the complaint. That the several doctors who have treated plaintiff and who will be necessary as witnesses to testify concerning injuries are residents of the County of Los Angeles. That the several nurses who attended plaintiff and can testify as to the events leading up to the explosion of Armstrong's incubator reside in the County of Los Angeles. That the incubator which exploded and forms the basis of this litigation is located within the County of Los Angeles. That the investigators from the Fire Department who can testify as to the technical reasons for the explosion reside in the State of California. That affiant estimates between 15 and 20 witnesses can and will testify as to relevant facts in this case, and that all of them are residents of the State of California. That affiant knows of no witnesses in this case who are not residents of the State of California."

It seems reasonable that these very real and practical considerations should be allowed to enter into our process of determining what action best comports with "traditional notions of fair play and substantial justice."

The alternative writ is discharged, and the petition for a peremptory writ is denied.

FOX, P. J., concurs.

ASHBURN, Justice (concurring).

Upon the predicate that the "minimum contacts" doctrine supplies the definition of "doing business" under the law of California, I concur in the judgment. I do so with reluctance because of the belief that judicial pronouncements have, in disregard of the legislative prerogative, overridden the terms of the local statute.

"Statutory authority is a necessary basis for service upon a foreign corporation. Jameson v. Simonds Saw Co., 2 Cal.App. 582, 584, 84 P. 289; Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 440, 446, 72 S.Ct. 413, 96 L.Ed. 485. And where the legislature has provided for jurisdiction over a foreign corporation based upon something more than the minimum of due process (as that concept changes with the attrition of the years) it is not for the courts to set up some new and different standard."

Confidential, Inc., v. Superior Court, 157 Cal.App.2d 75, 320 P.2d 546, 550.

The codes are to be construed as a single statute. Armenta v. Churchill, 42 Cal.2d 448, 455, 267 P.2d 303; In re Porterfield, 28 Cal.2d 91, 100, 168 P.2d 706, 167 A.L.R. 675. This, of course, applies to the relationship between the Code of Civil Procedure and the Corporations Code. Section 411, Code of Civil Procedure, says: "The summons must be served by delivering a copy thereof as follows: * * * 2. If the suit is against a foreign corporation * * * doing business in this State; in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code." The section presupposes a right to service upon a foreign corporation doing business here and incorporates by reference §§ 6500 to 6504, inclusive, of the Corporations Code. The language of § 6504[1] plainly withholds the right to serve a foreign corporation which has departed from the state, except in actions arising out of intrastate business transacted here. That the right to serve foreign corporations while doing business in California is likewise limited appears from further consideration of the Corporations Code.

Sections 6500 to 6504 (incorporated by reference into Code of Civil Procedure, § 411, subd. 2), are found in part 11 of that code. Section 6200 thereof says: "The definitions and general provisions set forth in this chapter govern the construction of this part." Section 6203: " 'Transact intrastate business' means entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce." Section 6300: "This part does not apply to corporations engaged solely in interstate or foreign commerce." Plainly, the right to serve foreign corporations is limited to those engaged in intrastate business (repeated and successive transactions in California), and does not include those engaged solely in interstate or foreign commerce.

In the "process of evolution," mentioned in recent decisions, the courts have expanded the concept of doing business to square with the repeatedly changing content of due process until California has committed itself to the proposition that any set of facts which would sustain service of summons as due process would also spell doing business within the state. Henry R. Jahn & Son v. Superior Court, 49 Cal.2d 855, 323 P.2d 437, 439, says: "The statute authorizes service of process on foreign corporations that are 'doing business in this State.' That term is a descriptive one that the courts have equated with such minimum contacts with the state 'that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, [161 A.L.R. 1057]. Whatever limitation it imposes is equivalent to that of the due process clause. ' "[D]oing business" within the meaning of section 411 of the Code of Civil Procedure is synonymous with the power of the state to subject foreign corporations to local process.' "

Feeling myself bound by the Jahn and similar decisions, I concur in the judgment at bar.

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[1] Corp.Code § 6504: "A foreign corporation which has transacted intrastate business in this State and has thereafter withdrawn from business in this State may be served with process in the manner provided in this chapter in any action brought in this State arising out of such business, whether or not it has ever complied with the requirements of Chapter 3 of this part."

50 Cal.2d 321

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Walter G. BORCHERS, Jr., Defendant and Respondent.

Cr. 6216.

Supreme Court of California,
In Bank.

May 16, 1958.

Defendant was convicted of murder in the second degree. The Superior Court, Los Angeles County, James G. Whyte, J., reduced the verdict from second degree murder to voluntary manslaughter, and the state appealed. The Supreme Court, Schauer, J., held, inter alia, that in prosecution for felonious killing of mistress by defendant, evidence including showing of mistress' admitted infidelity, her statements that she wished she were dead, her attempt to jump from automobile, her repeated urging that defendant shoot her, and illegitimate child by another man, and himself on night of the homicide, and her taunt, "are you chicken" justified the trial court's conclusion that defendant did not possess the state of mind known as "malice aforethought" which is an essential ingredient of murder and hence was warranted in reducing verdict of second degree murder to voluntary manslaughter.

Affirmed.

Opinion, 319 P.2d 52, vacated.

1. Criminal Law ⚷935(1)

In passing on motion for new trial it is not only the power but also the duty of trial court to consider weight of the evidence. West's Ann.Pen.Code, § 1181, subd. 6.

2. Criminal Law ⚷993

The trial court may weigh the evidence in considering the matter of reducing the offense. West's Ann.Pen.Code, § 1181, subd. 6.

3. Criminal Law ⚷561(1)

In criminal trial, the burden is upon prosecution to prove beyond any reasonable doubt every essential element of the crime of which defendant is to be convicted.

4. Homicide ⚷39

Under statute defining voluntary manslaughter as the unlawful killing of a human being without malice upon a sudden quarrel or heat of passion, "passion" need not mean "rage" or "anger", but may be any violent, intense, high-wrought, or enthusiastic emotion. West's Ann.Pen.Code, § 192.

See publication Words and Phrases, for other judicial constructions and definitions of "Passion".

5. Homicide ⚷33

In determining whether a homicide is voluntary manslaughter, fundamental inquiry is whether defendant's reason was, at time of his act, so disturbed or obscured by some passion, not necessarily fear and never the passion for revenge, to such extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from such passion rather than from judgment. West's Ann.Pen.Code, § 192.

6. Criminal Law ⚷964

In prosecution for felonious killing of mistress by defendant, evidence including showing of mistress' admitted infidelity, her statements that she wished she were dead, her attempt to jump from autombile, her repeated urging that defendant shoot her, and illegitimate child by another man, and himself on night of the homicide, and her taunt, "are you chicken" justified trial court's conclusion that defendant did not possess the state of mind known as "malice aforethought" which is an essential ingredient of murder and hence was warranted in reducing verdict of second degree murder to voluntary manslaughter. West's Ann. Pen.Code, §§ 187, 188, 192, 1181, subd. 6, 1238(6).

7. Homicide ⚷329

In prosecution for felonious killing of mistress by defendant, wherein there was evidence that there were spermatozoa in vagina of deceased and that defendant had had a vasectomy so that he could not have been responsible for that, from which evidence the prosecution argued a motive for killing might be inferred, and defendant suggested that that was evidence of provocation which would make the killing manslaughter, Supreme Court would not determine which of the two inferences should have been drawn by trial judge who reduced the verdict of second degree murder to voluntary manslaughter even if Supreme Court's function might include such review, where there was no evidence that defendant had any knowledge that decedent had had intercourse with a person other than himself shortly before the killing. West's Ann.Pen.Code, §§ 187, 188, 192, 1181, subd. 6, 1238(6).

8. Homicide ⚿329

A statement of trial judge that in reducing verdict of second degree murder to voluntary manslaughter he considered the evidence of psychiatrists on mental condition of defendant could not be used to impeach his reappraisal of evidence in the case in chief which fully supported order of reduction notwithstanding that evidence of psychiatrists was not before jury when they found defendant guilty of second degree murder, but was presented only on trial of issue of not guilty by reason of insanity. West's Ann.Pen.Code, §§ 187, 188, 192, 1181, subd. 6, 1238(6).

◆

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan, Fred N. Whichello and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

Ellery E. Cuff, Public Defender, James P. Nunnelley and Richard F. Bird, Deputy Public Defenders, Los Angeles, for respondent.

SCHAUER, Justice.

The People appeal "from an Order of the Superior Court * * * modifying the verdict in the above entitled cause by reducing the punishment imposed." (Pen. Code, § 1238(6).) Defendant does not appeal. A jury found defendant guilty of murder of the second degree and found that he was sane at the time of the commission of the offense. The trial judge denied defendant's motion for a new trial on the issue of sanity and ordered that "Defendant's motion for new trial on the case in chief is ruled upon as follows: In lieu of granting a new trial, the verdict of second degree Murder is reduced to Voluntary Manslaughter." The People argue that the evidence was sufficient to justify the implied finding of malice aforethought, that the evidence did not show that defendant was guilty of voluntary manslaughter, and that the trial court erred in reducing the class of crime found by the jury. We have concluded that no ground for reversal is shown.

Defendant, a Pasadena insurance broker, aged 45, met deceased, referred to throughout the testimony as "Dotty," aged 29, at a zoo on May 13, 1956. With Dotty was Tony, an illegitimate child of four whom Dotty had cared for since 16 days after his birth. Defendant was attracted by the "warmth," "kindness," and "sweetness" with which Dotty spoke to the child. Defendant spoke to the boy and thus became acquainted with Dotty. They had dinner together that night and thereafter, according to defendant's testimony, "went together steadily from then on" until he killed her on October 9, 1956. From May 13 until October 9 "excepting the days that I was away on a business trip to Mexico and one other day, * * * there was not a day that went by but what Tony and Dotty and I saw each other."

In March, 1955, defendant's wife had filed suit for divorce while defendant was in South America. On his return a "temporary experimental reconciliation was effected" but on December 1, 1955, the Borchers finally separated. In February, 1956, defendant, accompanied by Mrs. Borchers, "initiated the action in which I asked for the divorce from her."

On May 22, 1956, nine days after defendant's meeting with Dotty, they became engaged. Defendant testified that "Dotty was a very independent person. She finally admitted to me, although it was under duress, that she was having very serious financial problems." Nevertheless she permitted defendant to make payments on her car, to establish her and Tony in a "comfortable, pleasantly furnished apartment" in Pasadena, and to take her to Las Vegas. In Las Vegas Dotty "froze in her tracks" when she saw a man whom she identified as "Lard Bucket," a well known gambler who was a friend of "Chicken Louie," Dotty's former husband.

The next day, May 28, in Las Vegas Dotty had her hair dyed red. That afternoon defendant said, "I wish we didn't have to wait so long for our marriage." After some discussion Dotty said that "committing bigamy * * * wasn't a good idea." They bought a wedding ring and "had a lot of fun reciting our little common-law marriage ceremony, if you want to call it that, and we said our vows one to the other."

On their return to Pasadena defendant opened a bank account for Dotty. She pawned some jewelry and put the proceeds in the account but defendant later "paid them off." Defendant gave her power of attorney to draw checks on his bank accounts, including his business account. He caused insurance in an amount of about $85,000 to be made payable to "Dotty for her lifetime the interest in that and to Tony if he survived her." He consulted his attorney "to get papers cleared for Tony's legal adoption."

About September 2 defendant engaged a private detective, Mr. Fagg, to investigate the "background and associates" of Marvin Prestridge and Nick Cascio. These men had criminal records and were "hanging around" Dotty and using her automobile. Fagg told defendant "that I was dealing with * * * big-time hoodlums, and I was way over my head, * * * and I ought to get out, and furthermore he said I was * * * being set up for a possible murder for insurance. I laughed at him." Defendant in his testimony repeatedly emphasized his devotion to Dotty and his complete disbelief that she was plotting against him with the "hoodlums."

Although defendant declared his complete love for and implicit trust in Dotty, he sometimes remained outside her apartment and on several occasions observed a man enter the apartment after he had left it.

Defendant believed that Prestridge "used the fear that he held over Dotty to demand sexual relations with her." She admitted such relations with Prestridge. Defendant testified that Dotty told him she was trying to help Prestridge "because she was very fond of his mother, and she said that relationship got out of hand because of his demands, and there was an understanding."

About three weeks before the killing Dotty, with defendant's help, moved to another apartment. Although defendant repeatedly testified that he never had an argument with Dotty, a neighbor testified that she heard Dotty scream at and curse defendant.

Defendant answered affirmatively a question whether Fagg, before October 5, 1956, told defendant in substance, "I am going to have to be brutal with you in order to get you to realize that your life may be in jeopardy. My investigation does not indicate that Dotty is in any way being forced to sleep with Prestridge. Quite the contrary. She does it because she wants to, and, furthermore, Prestridge has a Dallas police record as a pimp, among other things, and Dotty is taking money from you and giving it to Prestridge."

On October 5, 1956, defendant and Dotty drove to San Diego. On the way back she was very morose. She said that she wished she were dead and that "These men will stop at nothing," and she attempted to jump from the car as they were driving.

Defendant testified in detail to the events surrounding the killing. Also in evidence were the testimony of a police officer to an oral statement of defendant made two days after the killing (which defendant testified was accurate), a typewritten statement signed by defendant, and the testimony of Fagg, to whom defendant described the killing.

On the evening of October 9 defendant and Dotty left Tony with a baby sitter and at about 7:00 o'clock went to a restaurant. "It was a particularly happy evening at that point." After drinks and dinner, at about 9:30, they went for a drive. Dotty "became very pensive, not speaking too much, and then when she did decide to talk she was talking about Tony and adoption again." She expressed fear, as she repeatedly had in the past, that she would not be allowed to adopt the child. "She made the suggestion that * * * if the two of us couldn't be happy because of our problem she would commit suicide and wanted me to shoot Tony. I told Dotty without Tony and without her, as far as I was concerned, there was nothing. At this time I couldn't seem to lift her out of her mood." Dotty took the key from the ignition as they were driving, unlocked the glove compartment, and took out defendant's .32 caliber automatic pistol. "[S]he actuated the slide on the automatic and at that time the cartridge was ejected from the chamber and a live one replaced in the chamber by the actuation of the slide and * * * Dotty replaced the ejected cartridge into the clip of the gun."

Defendant testified that Dotty held the gun "not threateningly pointed at him," but he told Fagg that "She did point the gun at him and told him he better stop the car, she was going to shoot him. Then she pointed it at herself." She discussed suicide with defendant and stated that she wanted defendant to shoot her and Tony and himself. Defendant "attempted to work her out of this trend of thought." She held the gun on the seat of the car and defendant put his hand "very carefully" over her hand which held the gun. Dotty withdrew her hand. She again said that defendant should kill her, Tony, and himself. "[S]he put her head on my shoulder and she kissed my cheek and she straightened back up to a sitting position, and when she leaned over to kiss me I had put my arm with the gun in it on the back * * * of the seat. I had thought of throwing it in the back, but I didn't want to throw it back there, and I didn't want to make too much of a point so that she would feel I actually tried to take the gun away from her. I was trying to do it as carefully as I could. But I didn't throw it in the back seat and if I only had." The car was moving during all this time. Defendant held the gun pointed at the back of Dotty's head. She turned to him and said, "Go ahead and shoot, what is the matter, are you chicken." She turned away. Defendant heard the explosion of the gun as he shot Dotty in the back of the head and Dotty fell over in the seat with her head by defendant's right leg.

Defendant saw a car behind him and, frightened because he thought it might be the police, slowed down until it drove past. Dotty was "moaning very softly."

As defendant drove on a near accident with another car occurred. The driver of the other car testified that Dotty's hands "were hung on the horn and the horn was sounding." Both cars came to a stop. Defendant "pulled her hands out and then sped away. He pushed her down in the floorboards when he drove on and sped away."

Defendant then drove to his office but when he arrived there he saw an automobile and a man whom he feared was Cascio coming from it so he drove on. He returned to his office but the same car was there and again he drove on. He believed the other car followed him but eventually he eluded it.

Dotty was still moaning so defendant stopped at a deserted spot and "to put her out of her misery" he struck her on the head with the gun. He held her and tried to talk with her and finally became aware that she was dead. The bullet wound in the back of her head made death inevitable;

the skull fracture from the blow with the gun may have accelerated death.

Defendant put Dotty's body in the trunk of his car. He drove 140 miles to a camp site with which he was familiar, reaching it about daylight. Defendant drove to the camp site with the thought of shooting himself. He fell asleep in the trunk compartment beside her body. When he awoke defendant took the engagement ring from Dotty's finger. He drove to a filling station, bought gasoline, washed his hands, on which there was blood, and ate.

Defendant drove to a post office where he bought four $100 money orders. He told the woman who sold him the money orders that he bought them because he planned to go on a hunting and fishing trip to Mexico. He subsequently told a police officer that he bought the money orders because he planned to commit suicide and did not want cash found on his body. Defendant then ate lunch and drove back to Pasadena. On his way to Pasadena he telephoned Mr. Fagg and made an appointment to meet him in Arcadia at 9:00 in the evening.

Defendant drove to his home, took a shower, and changed his clothes. He gave the engagement ring which he had taken from Dotty's finger to his wife for safekeeping. He ate and then drove to meet Fagg in Arcadia. He and Fagg drove in their respective cars to Fagg's home. They talked for an hour or more, discussing the fact that Fagg had been looking for defendant for several days and that Dotty had been reported as a missing person. Suddenly defendant said, "Well, you don't have to look for Dotty any more, her body is in my car." Then defendant related to Fagg the circumstances of his killing of Dotty.

Section 1181, paragraph 6 of the Penal Code provides that the trial court may grant a new trial "When the verdict is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial * * *"

The trial court in ruling on the question of reducing the class of the crime stated that in its opinion there was "a duty fixed on the trial court to independently weigh and consider the testimony and all of the ramifications of it and determine in his own mind if he is satisfied that the evidence beyond a reasonable doubt shows guilt of second degree murder. Tested in that light and tested further in the light of the evidence of the psychiatrists on the mental condition of this defendant, I am not satisfied that the evidence is sufficient to sustain the finding of malice to make this second degree murder; hence, the Court in lieu of granting a new trial will reduce the degree to that of voluntary manslaughter."

[1, 2] In passing on a motion for new trial it is not only the power but also the duty of the trial court to consider the weight of the evidence. (People v. Robarge, (1953), 41 Cal.2d 628, 633 [4], [5], 262 P.2d 14; People v. Sarazzawski, (1945), 27 Cal.2d 7, 15 [7], 161 P.2d 934.) The power and duty of the trial court in considering the question of the reduction of the class or degree of the crime are the same. (People v. Sheran (1957), 49 Cal.2d 101, 315 P.2d 5.)

[3–6] In a criminal trial the burden is upon the prosecution to prove beyond any reasonable doubt every essential element of the crime of which a defendant is to be convicted. Here, from the evidence viewed as a whole, the trial judge was amply justified in concluding that defendant did not possess the state of mind known as "malice aforethought" which is an essential ingredient of murder. (Pen.Code, § 187.) "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen.Code, § 188.) Voluntary manslaughter is "the unlawful killing of a human being, without malice * * * upon a sudden quarrel or heat of passion." (Pen. Code, § 192.)

From the evidence viewed as a whole the trial judge could well have concluded that defendant was roused to a heat of "passion" by a series of events over a considerable period of time: Dotty's admitted infidelity, her statements that she wished she were dead, her attempt to jump from the car on the trip to San Diego, her repeated urging that defendant shoot her, Tony, and himself on the night of the homicide, and her taunt, "are you chicken." As defendant argues persuasively, "passion" need not mean "rage" or "anger". According to dictionary definition, "passion" may be any "Violent, intense, highwrought, or enthusiastic emotion." (Webster's New International Dictionary, 2d ed.) As stated in People v. Logan (1917), 175 Cal. 45, 49, 164 P. 1121, quoted with approval in People v. Danielly (1949), 33 Cal.2d 362, 377-378, 202 P.2d 18, and People v. Valentine (1946), 28 Cal.2d 121, 139, 169 P.2d 1, "the fundamental of the inquiry [in determining whether a homicide is voluntary manslaughter] is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion—not necessarily fear and never, of course, the passion for revenge—to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." It may fairly be concluded that the evidence on the issue of not guilty supports a finding that defendant killed in wild desperation induced by Dotty's long continued provocatory conduct.

[7] There was evidence that there were spermatozoa in the vagina of deceased and that defendant had had a vasectomy so that he could not have been responsible for this. From this evidence, the People argue, a motive for the killing may be inferred. Defendant suggests that this is evidence of provocation which would make the killing manslaughter. However, even if we assume, arguendo, that our function might include reviewing which of the two inferences the trial judge should have drawn, we need not make such determination, because there is no evidence whatsoever that defendant had any knowledge that Dotty had had intercourse with a person other than himself shortly before the killing. Hence it does not appear that this particular evidence should enter into an appraisal of the class of the homicide.

[8] A problem is presented by the statement of the trial judge that in reducing the class of the offense he considered "the evidence of the psychiatrists on the mental condition of this defendant." This evidence of the psychiatrists was not before the jury when they found defendant guilty of second degree murder; it was presented only on the trial of the issue of not guilty by reason of insanity. Nevertheless, we conclude that this statement of the trial judge should not be used to impeach his reappraisal of the evidence in the case in chief. The latter fully supports the order and the testimony of the psychiatrists is in effect merely cumulative to the result.

The trial judge here is to be commended for his diligent alertness to the power and duty, reposed *only in trial courts,* to reappraise the weight of the evidence on motion for new trial. He very properly showed no hesitance in reducing the class of the homicide in the light of his determination, supported by a reasonable view of the evidence, that there was no sufficient showing of malice aforethought. Such unhesitant exercise of this power by the trial judge, when he is satisfied that the action is indicated by the evidence, not only makes for justice in the individual case but tends also to lighten the burden of reviewing courts and to expedite the finality of judgments.

For the reasons above stated the order appealed from is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

50 Cal.2d 317

ESTATE of Juliana Matilda FLETCHER, also known as Mabel Fletcher, Deceased.

Margaret J. LOFTUS and William W. Loftus, Appellants,

v.

Montez Ione OAKES, Respondent.

Sac. 6767.

Supreme Court of California,
In Bank.
May 16, 1958.

Will contest. The Superior Court, Napa County, Percy King, Jr., J., rendered judgment denying probate of will and the proponents appealed. The Supreme Court, McComb, J., held, inter alia, that substantial evidence sustained trial court's findings of fact that purported will was not prepared by nor caused to be prepared by decedent, that decedent did not declare it to be her last will to subscribing witnesses and did not by conduct or act imply that it was her last will, that decedent did not expressly or by implication request subscribing witnesses to sign the attestation clause, that decedent was mentally incapable of understanding nature of proceedings surrounding execution of purported will, and that decedent did not request a person to sign decedent's name for her.

Affirmed.

Opinion, 318 P.2d 692, vacated.

1. Wills 🔑312

In will contest, neither party having demanded a jury trial, trial court did not err in ending the proceedings after proponents of purported will had introduced their evidence on issue of due execution of the will.

2. Wills 🔑289

A presumption obtains that a will has been duly executed upon proof of signatures of testator or testatrix and witnesses, that is, proof of signatures of testator or testatrix and witnesses makes out prima facie case of due execution.

3. Wills 🔑289

In will contest, the court need not find according to presumption that will has been duly executed upon proof of signatures of testator or testatrix and witnesses, when contrary evidence is clear.

4. Wills 🔑322

The trial court had discretion to determine order of proof and may require proponents of a will to prove due execution before it proceeds with contest.

5. Wills 🔑322

Proponents of will must have opportunity to present all the evidence they may have on issue of due execution before that issue is finally determined against them.

6. Wills 🔑386

The question of due execution of a will is one of fact, and trial court's finding thereon will not be reversed on appeal if there is any substantial evidence to sustain it.

7. Wills 🔑289

In will contest, testimony of attesting witness that the document purporting to be the last will of decedent was in fact not her will nor was it executed with formalities required by law raised a conflict with presumption of due execution which arose from proof of execution of attestation clause and left a question of fact, which was properly determined by trial judge.

8. Wills ⟹55(1), 302(1)

In will contest, substantial evidence sustained trial court's findings of fact that purported will was not prepared nor caused to be prepared by decedent, that decedent did not declare it to be her last will to subscribing witnesses and did not by conduct or act imply that it was her last will, that decedent did not expressly or by implication request subscribing witnesses to sign the attestation clause, that decedent was mentally incapable of understanding nature of proceedings surrounding execution of purported will, and that decedent did not request a person to sign decedent's name for her.

◆

Harold J. Thorsen, St. Helena, for appellants.

Francis H. Frisch, Napa, for respondent.

McCOMB, Justice.

This is an appeal from a judgment denying probate of a purported will.

Juliana Matilda Fletcher died June 13, 1955. Thereafter appellants filed in the superior court a purported will of decedent dated October 6, 1951, together with a petition for probate thereof.

The alleged will was a typewritten document purportedly bearing the signatures of the testatrix and two witnesses, the latter two signatures following a formal attestation clause.

Respondent filed a petition for contest of the will before probate and for grounds of contest alleged that at the time of the execution of the document the testatrix was not of sound and disposing mind; that the offered will was not signed by decedent or executed with the formalities required by law; and that at the time of the execution thereof decedent was acting under the undue influence of appellant William W. Loftus.

At the trial before a judge without a jury, appellants (proponents), through the testimony of William W. Loftus, offered proof of the due execution of the will, that is, that the will was signed by decedent and by two subscribing witnesses.

The signatures of the witnesses were not disputed. One of the witnesses was deceased. The other, Doris Vroubel, called as a witness by appellants, admitted her signature to the attestation clause but testified that the recitals in such clause were not true and that the purported will was not executed with the formalities required by law. She testified that decedent was in a semiconscious slumber or coma at the time; that the purported will was signed by her by appellant William Loftus' placing a pen in decedent's hand and directing the signature by holding her hand in his; and that decedent did not know what was happening and did not in any manner declare the instrument to be her will.

The trial judge found as a fact that (i) the purported will filed by appellants was not prepared by decedent, nor did decedent cause it to be prepared; (ii) decedent did not declare it to be her last will and testament to the subscribing witnesses, nor did she by act or conduct imply in any manner that it was her last will and testament; (iii) decedent did not expressly or by implication request the subscribing witnesses to sign the attestation clause attached to said purported will; (iv) decedent was in a coma and mentally incapable of understanding the nature of the proceedings surrounding the execution of the purported will and was unable to understand, and did not in fact know, that the document presented was a will or any instrument purporting to dispose of her property upon her death; and (v) decedent did not request appellant William W. Loftus to sign her name for her.

[1–5] *Questions:* First: *Neither party having demanded a jury trial, did the trial court err in ending the proceedings after the proponents of the purported will had introduced their evidence on the issue of due execution of the will?*

*No.** There is a presumption that a will has been duly executed upon proof of the signatures of the testator or testatrix and the witnesses. In re Estate of Emden, 87 Cal.App.2d 115, 122 [5], 196 P.2d 627. Phrased otherwise, the rule is that proof of the signatures of the testator or testatrix and the witnesses makes out a *prima facie* case of due execution. In re Estate of Pitcairn, 6 Cal.2d 730, 732 [1], 59 P.2d 90.

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* If either party demands a jury trial, the proper procedure is set forth in Swift v. Superior Court, 39 Cal.2d 358, 364 [9], 247 P.2d 6.

Appellants contend that since they proved those signatures the rule entitles them to a trial on the issues in the contest beyond the issue of due execution. They misconstrue the rule.

The presumption of due execution would have authorized a finding of due execution, if, for example, the court had chosen not to believe the witness Doris Vroubel. But the court is not required to find according to the presumption when contrary evidence is clear.

The trial court has discretion to determine the order of proof and may require the proponents of a will to prove due execution before it proceeds with a contest. In re Estate of Relph, 192 Cal. 451, 459 [10], 221 P. 361; In re Estate of Smith, 176 Cal. 729, 730, 171 P. 289.

It would be wasteful to require a lengthy trial on multitudinous issues when it is evident that the purported will is not entitled to probate.

The proponents must have the opportunity to present all the evidence they may have on the issue of due execution before that issue is finally determined against them, but the record in this case shows they had the fullest opportunity.

[6–8] Second: *Was there substantial evidence to sustain the trial court's findings of fact?*

Yes. The question of the due execution of a will is one of fact, and the trial court's finding thereon will not be reversed on appeal if there is any substantial evidence to sustain it. In re Estate of Leonard, 1 Cal. 2d 8, 10 [1], 32 P.2d 603; In re Estate of Streeton, 183 Cal. 284, 289 [3], 191 P. 16; In re Estate of Cullberg, 169 Cal. 365, 370, 146 P. 888.

It is apparent that the testimony of Doris Vroubel was clear, uncontradicted, and tended to prove that the document purporting to be the last will and testament of decedent was in fact not her will nor was it executed with the formalities required by law. This testimony raised a conflict with the presumption of due execution which arose from proof of the execution of the attestation clause and left a question of fact, which was properly determined by the trial judge.

The findings of fact in the instant case are similar to those in Re Estate of Krause, 18 Cal.2d 623, 117 P.2d 1, wherein this court held that no other conclusion could be reached than "that the will was not executed in accordance with the requirements of law." (See 18 Cal.2d at page 626, 117 P.2d at page 2.) This court also pointed out in that case that In re Estate of Pitcairn, supra, relied on by appellants here, was distinguishable from the facts in the Krause case, and therefore it is not applicable to a set of facts such as those existing in the present case.

In the Pitcairn case, uncertain testimony was discredited, and findings were made in accordance with the presumption of due execution. This court held that the trial court was entitled to rely upon the presumption in drawing its conclusions of law. On the other hand, in Estate of Krause and in the present case, the court believed uncontradicted testimony contrary to the presumption of due execution and made findings of fact accordingly. See Estate of Krause, supra, 18 Cal.2d at page 626 [2], 117 P.2d at page 2.

From the foregoing, it appears that there was no error upon the part of the trial court.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

160 Cal.App.2d 606

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Hubert WILSON, Defendant and Appellant.

Cr. 3443.

District Court of Appeal, First District, Division 2, California.

May 19, 1958.

Defendant who took merchandise from counter of store, was convicted of burglary and petty theft with a prior conviction for petty theft. The Superior Court, County of Alameda, Marvin Sherwin, J., rendered judgment, and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that evidence sustained finding that intoxication of defendant did not preclude him from forming the necessary intent to commit larceny and that defendant entered store with intent to commit larceny.

Affirmed.

1. Criminal Law ⚷53

Under section of penal code providing that while intoxication is not excuse for a crime, jury may consider fact of intoxication in determining purpose, motive or intent, intoxication is not a defense to charge of burglary. West's Ann.Pen.Code, §§ 22, 666, subd. 3.

2. Criminal Law ⚷457

Any witness may express his opinion as to intoxication.

3. Criminal Law ⚷739(1)

Under statute providing that while voluntary intoxication is no excuse for a crime, jury may consider fact of intoxication in determining purpose, motive or intent, question whether intoxication precluded a defendant from forming the necessary intent is for jury. West's Ann.Pen. Code, § 22.

4. Burglary ⚷41(3)

In prosecution of defendant who took merchandise from store counter, for burglary and petty theft, evidence sustained finding that intoxication of defendant did not preclude him from forming necessary intent, and that defendant entered store with intent to commit larceny. West's Ann. Pen.Code, §§ 22, 666, subd. 3.

5. Burglary ⚷9(2)

One who enters a store with intent of committing larceny is guilty of burglary although entry was made through public entrance during business hours. West's Ann. Pen.Code, § 666, subd. 3.

6. Constitutional Law ⚷257
Criminal Law ⚷1030(2)

Record did not support contention of defendant that there was a denial of due process because he was held six days after his arrest without being charged and contention could not be raised for first time on appeal. West's Ann.Pen.Code, § 849.

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Philip L. Evans, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Appellant was charged by information with two felonies, burglary and petty theft with a prior conviction for petty theft. Penal Code, § 666, subd. 3. Appellant admitted the prior conviction and entered a plea of not guilty to both charges. A jury trial resulted in a verdict of guilty as charged, on both counts. The trial court denied appellant's motion for a new trial, dismissed the second count, denied probation, and sentenced the appellant to the State prison. This appeal is taken from the judgment of conviction and the order denying the motion for a new trial.

The following facts appear from the evidence: on April 20, 1957, a sales clerk at the J. J. Newbury Company store at 1921 Broadway, Oakland, saw the appellant slip two pairs of blue jeans into a box which he was carrying. He did not pay for them, but asked the sales clerk where he could buy a coping saw and walked toward the hardware counter. The sales clerk called a shop lifting code number. The store manager came and questioned the appellant in a back room. Appellant admitted taking the articles. Upon realizing that the manager was going to turn him in, he struck the manager with the coping saw and struggled until the police arrived. The appellant took the stand on his own behalf and admitted being in the store on the day in question, but could not remember what happened after he entered the store, as he had been drinking for several days, except that he bought a coping saw.

[1–5] Appellant's chief contention on appeal is that the verdict is contrary to the evidence because he could not harbor the necessary intent to commit burglary due to intoxication. Although appellant testified that he had been drinking, and the store manager and another witness testified that the appellant had a bottle, there was also considerable testimony that the appellant was not "drunk", and that his actions and speech were coherent. Penal Code, section 22, provides that while voluntary intoxication is no excuse for a crime, the jury may consider the fact of intoxication determining purpose, motive or intent. Under this section intoxication is not a defense to burglary. People v. Ramirez, 101 Cal.App. 2d 50, 224 P.2d 878. Any witness may express his opinion as to intoxication. People v. Clark, 106 Cal.App.2d 271, at page 279, 235 P.2d 56, at page 60. The statute clearly leaves to the jury the question of whether intoxication precluded a defendant from forming the necessary intent. People v. Murphy, 1 Cal.2d 37, 32 P.2d 635. Here there is ample evidence to support their conclusion that it did not, and that the appellant entered the store with the intent to commit larceny. People v. Henderson, 138 Cal.App.2d 505, 292 P.2d 267. One who enters a store with the intent of committing larceny is guilty of burglary although the entry was made through the public entrance during business hours. People v. Barry, 94 Cal. 481, 29 P. 1026.

[6] Appellant raises for the first time on appeal, a denial of due process in violation of Penal Code, section 849, in being held six days after his arrest without being charged. The record does not support this contention nor can it be raised for the first time on appeal. People v. Tennyson, 127 Cal.App.2d 243, 273 P.2d 593.

Appellant further contends that there were certain errors in the admission of evidence, that certain witnesses were prejudiced, that the district attorney committed prejudicial misconduct, and that the jury did not apply the presumption of innocence. There is nothing in the record which gives merit to any of the above contentions.

No prejudicial error appearing in the record the judgment must be affirmed.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

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160 Cal.App.2d 454

In re Al ADAMS on Habeas Corpus.

Cr. 3524.

District Court of Appeal, First District, Division 2, California.

May 14, 1958.

Rehearing Denied June 13, 1958.

Hearing Denied July 11, 1958.

Habeas corpus proceeding to secure release of defendant convicted of violations of Vehicle Code. The District Court of Appeal, Kaufman, P. J., held that where defendant did not personally waive a jury trial and could not have properly done so because of his alcoholic condition at time of trial, and public defender appointed to represent defendant waived a jury trial, judgment and commitment were void and defendant was entitled to immediate release.

Order to show cause granted, writ of habeas corpus issued and defendant ordered discharged from custody.

1. Habeas Corpus ⚷29

A violation of a defendant's constitutional right during trial is ground for an attack on judgment by habeas corpus.

2. Jury ⚷29(6)

Constitutional provision that right of trial by jury shall be secured and remain inviolate and may be waived in criminal cases by consent of both parties, expressed in open court by defendant and his counsel, requires an express as distinguished from an implied consent to the waiver by the defendant personally, as well as by his counsel. West's Ann.Const. art. 1, § 7.

3. Habeas Corpus ⚷25(1)

Where defendant did not personally waive a jury trial in prosecution for violations of vehicle code and could not have properly done so because of his alcoholic condition at time of trial, and public defender appointed to represent defendant waived a jury trial, judgment and commitment were void and defendant was entitled to immediate release. West's Ann.Const. art. 1, § 7; West's Ann.Vehicle Code, §§ 483, 502.

◆

Edward T. Mancuso, Public Defender, City & County of San Francisco, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., San Francisco, for respondent.

KAUFMAN, Presiding Justice.

Petitioner Al Adams, presently held in the County Jail of the City and County of San Francisco, seeks a writ of habeas corpus. Petitioner was sentenced for violations of Vehicle Code, sections 502 and 483, and Municipal Police Code, section 152. The public defender was appointed to represent the petitioner. At the trial on November 8, 1957, the public defender, not the petitioner, entered a plea of not guilty, waived a jury trial and submitted the case on the police report. Petitioner alleges that his constitutional right was violated as he did not personally waive a jury trial, nor could he properly have done so because of his alcoholic condition at the time of the trial. The People do not dispute the allegations of the petitioner, but state only that the petitioner is imprisoned pursuant to a valid judgment.

[1] A violation of a defendant's constitutional right during the trial is ground for an attack on the judgment by habeas corpus. In re Wallace, 24 Cal.2d 933, 152 P.2d 1.

[2] Article I, section 7 of the state Constitution, provides in part: "The right of trial by jury shall be secured * * * and remain inviolate; * * * A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel." As we said recently in People v. Pechar, 130 Cal.App.2d 616, at page 617, 279 P.2d 570, where the identical point was raised on appeal, the above constitutional provision "has been construed repeatedly to require an express as distinguished from an implied consent to the waiver by the defendant personally, as well as by his counsel. (Citing cases.) The right to trial by jury in a criminal case is a sacred one and accordingly the method of waiver provided in the constitution must be strictly followed. For this reason 'it is necessary that the defendant personally express in open court that he consents to a waiver of trial by jury'. People v. Washington, supra, 95 Cal.App.2d [454] at page 455, 213 P.2d [70] at page 71." The Pechar case has recently been followed in People v. Benjamin, 1956, 140 Cal.App.2d 703, 295 P.2d 477; People v. Barnum, 1957, 147 Cal.App.2d 803, 809, 305 P.2d 986, on facts somewhat less compelling than those in the instant case.

The record here does not show a waiver of jury trial in the manner required by Article I, section 7 of our state Constitution. It is a little difficult for this court to imagine the violation of a more fundamental constitutional right than that which occurred here. In re James, 38 Cal.2d 302, 240 P.2d 596.

[3] It is therefore our view that the judgment and commitment are void and that the Petitioner is entitled to his immediate release. In re Howe, 135 Cal.App.2d 604, 287 P.2d 510.

The order to show cause is granted; a Writ of Habeas Corpus shall issue and the Petitioner is hereby discharged from custody forthwith. The Sheriff of the City and County of San Francisco is ordered to discharge the petitioner from custody forthwith.

DOOLING and DRAPER, JJ., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

160 Cal.App.2d 665

Maybelle B. STEINER, Plaintiff and Respondent,

v.

Harold H. STEINER, Defendant and Appellant.

Civ. 22530.

District Court of Appeal, Second District, Division 3, California.
May 20, 1958.

Rehearing Denied June 6, 1958.

Hearing Denied July 16, 1958.

Wife's action to set aside deed to husband. From a judgment of the Superior Court of Los Angeles County, John G. Barnes, J., granting the relief sought, the defendant appealed. The District Court of Appeal, Shinn, P. J., held that where husband obtained deed from his wife without payment of consideration by falsely representing that she would continue to own lot notwithstanding execution of deed and that he would not record it, deed would be cancelled at wife's behest.

Affirmed.

1. Appeal and Error 🔑757(3)

Where defendant did not specify, in his brief, as ground for reversal that findings were not supported by evidence, and aside from statement in brief that plaintiff had testified that she had delivered deed to defendant with condition attached, there was no statement of evidence which was relevant to and consistent with facts as found by trial court, evidence would be deemed, for purposes of appeal, to have been sufficient to justify findings in all respects, notwithstanding defendant's argument in brief that evidence established material facts contrary to those found by trial court.

2. Deeds 🔑56(2)

To effect valid delivery of deed, grantor must intend to divest himself of title to property.

3. Deeds 🔑56(2)

To effect valid delivery of a deed, act of delivering must be accompanied by an intention that instrument shall become presently operative and convey a present title.

4. Deeds 🔑208(3, 4)

Evidence, that deed had been duly executed and acknowledged and that it had been in grantee's possession for considerable time before it was recorded, established at least a prima facie case of delivery. West's Ann.Civ.Code, §§ 1055, 1056.

5. Deeds 🔑61

An oral request to grantee that deed not be recorded until after grantor's death does not defeat a delivery otherwise effective. West's Ann.Civ.Code, §§ 1055, 1056.

6. Deeds 🔑70(1), 76

A deed procured by fraud is invalid and is subject to cancellation.

7. Husband and Wife 🔑36

Even though wife had theretofore brought and dismissed divorce action, husband was required after they resumed cohabitation, to exercise highest good faith in dealing with his wife.

8. Deeds 🔑70(6)

Where a person standing in relation of trust and confidence to grantor obtains deed through false representations as to legal effect of instrument, relief will be granted to defrauded party.

9. Deeds ⚷70(8)

Where husband obtained deed from his wife, without payment of consideration, by falsely representing that she would continue to own lot notwithstanding execution of deed and that he would not record it, deed would be cancelled at wife's behest.

10. Appeal and Error ⚷694(1)

Where appellant did not challenge finding and furnished reviewing court with no statement of evidence upon issue resolved by, finding was conclusive.

◆

Marcus C. Clark and Clifford H. Clark, Los Angeles, for appellant.

Everett F. Beesley and Maurice Gordon, Los Angeles, for respondent.

SHINN, Presiding Justice.

Action to set aside a deed. After an extended trial, the court made findings and ordered the deed annulled. Defendant appeals from the judgment and has noticed an appeal from the denial of his motion for new trial.

The facts found by the court were those alleged in the complaint. Plaintiff alleged as follows: The parties were living together as husband and wife. Plaintiff owned an unimproved lot on La Cienega Boulevard in Los Angeles. On September 24, 1953, she executed a grant deed of the lot to defendant as his separate property; defendant gave no consideration for the deed. An office and a residence were subsequently built on the lot and the parties resided on the premises until April 1955, when plaintiff separated from her husband. Defendant has continued to reside thereon and to use the office in his business.

The complaint alleged that plaintiff executed the deed and parted with its possession in reliance upon defendant's representations that "by so executing said deed it would not be necessary to probate her estate in order to make him the owner of said property in the event of plaintiff's death before the death of the defendant; that notwithstanding the execution of said grant deed she would remain the owner of the property; that he would not cause the deed to be recorded prior to her death." It was also alleged that plaintiff reposed the utmost confidence and trust in her husband and had she not so trusted him she would not have executed the deed. Plaintiff alleged that her purpose in deeding the lot "was to make defendant the owner of said property upon and only in the event of her death" and that "it was further her intent and purpose that said deed should be recorded only upon and in the event of her death."

It was further alleged that defendant's representations were false and fraudulent "and were made with the intent and purpose of inducing the plaintiff to execute said grant deed to the defendant and with the intent and purpose of acquiring the record ownership of said property prior to plaintiff's death." Defendant's promise not to record the deed before her death was made without an intention to keep the promise. In furtherance of his plan to defraud plaintiff, defendant caused the deed to be recorded on June 20, 1955 without her knowledge and consent. By reason of the foregoing, plaintiff has been cheated and defrauded out of title to the property and is entitled to have her deed annulled.

All the allegations of facts that would tend to invalidate the deed were found to be true. Consistent with these findings, the court found the deed to be invalid and ordered its cancellation.

[1] Plaintiff's testimony consisted of 190 pages of the transcript; appellant's testimony consisted of over 250 pages; 41 exhibits were introduced in evidence. In his briefs appellant does not specify as a ground for reversal that the findings are not supported by the evidence. He says in his brief: "Maybelle B. Steiner, plaintiff and respondent, testified at the trial of this action that the Deed which she made and executed to Harold H. Steiner, defendant and appellant was delivered to him with a condition attached, namely, that Harold H. Steiner, defendant and appellant, would not record the same until her death."

There is no other statement of the evidence which was relevant to and consistent with the facts as found by the court. Nevertheless throughout appellant's briefs it is argued that the evidence established material facts to the contrary of those found by the court. We shall not discuss these arguments. For the purposes of the appeal, the evidence must be deemed to have been sufficient to justify the findings in all respects. Hickson v. Thielman, 147 Cal.App.2d 11, 304 P.2d 122.

In urging a reversal of the judgment, appellant contends that the deed was delivered to him by Mrs. Steiner with the intention to presently pass title and that the deed conveyed title free of any oral condition imposed by her. He ignores the evidence of his representations which the court found to have been fraudulent. Plaintiff contends, on the other hand, that the deed was procured by appellant's fraud, that she did not intend to divest herself of title to the lot, and that the findings support the judgment annulling the deed. She refers to the evidence upon which she relies. We agree with plaintiff's contention.

[2, 3] To effect a valid delivery of a deed, the grantor must intend to divest himself of title to the property. Donahue v. Sweeney, 171 Cal. 388, 390, 153 P. 708, and cases cited. The act of delivering the deed must be accompanied by an intention that the instrument shall become presently operative and convey a present title. Williams v. Kidd, 170 Cal. 631, 638, 151 P. 1, and cases cited.

[4] The deed in question was duly executed and acknowledged by Mrs. Steiner and it was in her husband's possession from September 24, 1953 until June 20, 1955, when the instrument was recorded. Evidence of these facts, appellant correctly argues, established at least a *prima facie* case of delivery. Civil Code, sec. 1055; Towne v. Towne, 6 Cal.App. 697, 701, 92 P. 1050.

[5] Steiner also relies upon section 1056 of the Civil Code, providing as follows: "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made." Appellant's contention is that title to the lot vested in him immediately upon delivery of the deed, and that his title was not to be defeated by the fact that plaintiff attached a verbal condition to the delivery, namely, that he would not record the instrument before she died. It is, of course, true that an oral request to the grantee that the deed not be recorded until after the grantor's death does not defeat a delivery otherwise effective. McCarthy v. Security Trust, etc., Bank, 188 Cal. 229, 234, 204 P. 818; Blackledge v. McIntosh, 85 Cal.App. 475, 483, 259 P. 770.

However, these were not the controlling circumstances in the case. The court found that plaintiff did not intend to convey the property to her husband and that he obtained the deed through fraudulent representations. The sufficiency of the evidence to support the finding of fraud is not subject to review for the reasons we have stated.

[6] It is settled that a deed secured by fraud is invalid and is subject to cancellation. Cox v. Klatte, 29 Cal.App.2d 150, 160, 84 P.2d 290, and cases cited. And as the Supreme Court said in Cox v. Schnerr, 172 Cal. 371, at page 376, 156 P. 509, at page 512: "If it [the deed] were fraudulently obtained the mere manual tradition of it would not be in legal sense a delivery. Execution and delivery of such an instrument depend upon more than the mechanical acts of signing it and passing it to another person. Apparent consent is not real or free when obtained through fraud, undue influence or mistake. Free consent is an indispensable element in the making of a valid contract."

[7] Under the facts as found by the court, appellant was required to exercise the highest good faith in dealing with his wife. Dolliver v. Dolliver, 94 Cal. 642, 30

P. 4. While the court also found that a divorce action had been pending between the Steiners for more than a year prior to September 24, 1953, there was evidence that plaintiff caused her divorce action to be dismissed in December 1952 and resumed cohabitation with appellant in February 1953. In view of the finding that the parties were living together as man and wife and that Mrs. Steiner reposed her confidence and trust in her husband, it could not reasonably be contended that they were dealing at arm's length. It is a fallacy that because a husband and wife have had differences which have caused one to seek a divorce from the other, the confidential relationship has thereby been destroyed. The least overreaching or misrepresentation, through which appellant obtained property belonging to his wife, would warrant an avoidance of the transaction. (26 Cal.Jur. 2d 139, 140.)

Appellant paid nothing for the grant deed, thereby securing property worth a considerable sum. He obtained the deed through a promise that he would not record it, having no intention to keep his promise, but this was not the only misrepresentation made by Steiner. Plaintiff testified that she did not intend the transaction as a gift. Appellant told her that she would continue to own the lot notwithstanding execution of the deed. The representation was a false one, and it was calculated to deceive plaintiff as to the legal effect of the transaction.

[8, 9] Where a person standing in a relation of trust and confidence to the grantor obtains a deed through false representations as to the legal effect of the instrument, our courts do not hesitate to grant relief to the defrauded party. Nunes v. De Faria, 107 Cal.App.2d 794, 796, 238 P.2d 106; Tyler v. Larson, 106 Cal.App.2d 317, 235 P.2d 39. This is a proper case for application of the rule. Cancellation of the deed was not only proper but upon the facts found could not reasonably have been refused.

[10] Although the conclusions we have reached require affirmance of the judgment we may add that in addition to the issues raised by the complaint and the answer defendant tendered other issues by way of cross-complaint. He alleged that the property was acquired and improved with his separate funds. He also attacked the validity of a homestead placed upon the property by plaintiff. He sought to have the property declared to be his separate property. The court found that plaintiff was not living upon the property when she recorded the declaration of homestead and adjudged it to be invalid. It also found that the property was not purchased or improved with defendant's separate funds. The appeal does not touch upon the adjudication that the declaration of homestead is invalid. Defendant does not challenge the finding that the property was not purchased or improved with his separate funds except by the mere assertion that the property was his separate property. He has furnished us with no statement of the evidence upon that issue. The finding is therefore conclusive.

Plaintiff alleged that when she executed the deed to defendant she was "the equitable and record owner" of the property. The court found that allegation to be true. This was not a finding that plaintiff owned the property as her separate estate, nor does plaintiff contend that it should be construed as such.

The judgment declared void plaintiff's deed to defendant and the declaration of homestead. It did not declare plaintiff to be the owner of the property as her separate estate. The question whether the property is community property was not in issue, and the court properly did not undertake to decide that question.

The order denying the motion for new trial not being appealable, the notice of appeal from that order is void and of no effect. The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

160 Cal.App.2d 584

In the Matter of the ESTATE of Florence Elizabeth HEWITT, Deceased.

Ethel Mary PEAK, Appellant,

v.

Robert M. McGROUTHER, Adm'r with the will annexed of the Estate of Percival H. Myers, Deceased, Substituted for Percival H. Myers, Respondent.

Civ. 17921.

District Court of Appeal, First District, Division 1, California.

May 19, 1958.

Proceedings in the matter of a decedent's estate. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., granted testatrix' nephew's petition for letters of administration with the will annexed and denied a similar petition filed by testatrix' niece, and the niece appealed. The District Court of Appeal, Peters, P. J., concluding that order denying petition for letters of administration with the will annexed was void for lack of supporting findings, decided to reverse void order instead of dismissing appeal.

Appeal dismissed in part and portion of order reversed.

1. Executors and Administrators ⚷21(2)

Even though notices of appeal referred only to minute order, denying appellant's petition for letters of administration with will annexed and granting substituted respondent's successor's petition for such letters, and appeal, in part at least, should have been from formal order entered on following day, admitting will to probate and appointing respondent's successor administrator with the will annexed, appeal was not premature, and would be considered, so far as necessary, as having been taken from formal order later entered. West's Rules on Appeal, rule 2(c); West's Ann.Prob. Code, §§ 460, 461.

2. Executors and Administrators ⚷21(2)

Testatrix' niece could not have appealed from order granting her brother's ex parte application for appointment as special administrator, and she could not attack such order on her appeal from subsequent denial of her petition, and grant of her brother's petition, for letters of administration with will annexed. West's Rules on Appeal, rule 2(c); West's Ann.Prob.Code, §§ 460, 461.

3. Executors and Administrators ⚷21(2)
Wills ⚷344

Minute order, granting testatrix' nephew's petition, and denying his sister's petition, for letters of administration with will annexed, and formal order, admitting will to probate and appointing testatrix' nephew administrator with will annexed, were both void for lack of support by findings of fact, where such findings had not been waived. West's Ann.Prob.Code, § 1230; West's Ann.Rules on Appeal, rule 2 (c).

4. Executors and Administrators ⚷21(2)

That portion of testatrix' niece's appeal which challenged her brother's appointment as administrator with the will annexed was rendered moot by his death; but issue as to niece's own right to letters of administration was not moot.

5. Executors and Administrators ⚷21(2)

Reviewing court, concluding that order denying petition for letters of administration with the will annexed was void for lack of supporting findings, would reverse void order rather than dismiss appeal where no subsequent judgment supported by findings had been entered. West's Ann.Code Civ. Proc. § 955.

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Ethel Mary Peak, in pro. per., for appellant.

O'Gara & O'Gara, San Francisco, for respondent.

PETERS, Presiding Justice.

On January 22, 1957, Florence E. Hewitt died, testate, leaving as her sole heirs her niece and nephew Ethel Peak and Percival Myers, brother and sister. Both filed petitions for letters of administration with the will annexed. After Myers had filed, and before Ethel Peak had filed, the Probate Court on February 13, 1957, on the *ex parte* application of Myers, appointed him special administrator. On February 25, 1957, Ethel Peak filed objections to the appointment of Myers, and on the same day filed her petition for letters. On March 11, 1957, after a hearing, the court entered its minute order reading as follows:

"Petition of Ethel M. Peak for Letters of Administration with Will annexed Denied.

"Petition of Percival H. Myers for Letters of Administration with Will annexed Granted."

The next day, March 12, 1957, the court entered its formal order admitting the will to probate and appointing Myers administrator with the will annexed.

On March 14, 1957, Ethel Peak appealed from the minute order of March 11, 1957. On April 17, 1957, Ethel Peak filed an amended notice of appeal "from the orders made and entered in the above entitled matter granting the petition of P. H. Myers for letters of administration and the order denying the petition of Ethel M. Peak for letters of administration. * * *

"Said orders were made and entered in the Clerk's Register on or about March 11, 1957."

[1] Both notices of appeal refer only to the minute order of March 11, 1957. In part at least, the appeal should have been from the formal order of March 12, 1957. This, however, is of minor importance, and does not render the appeal premature. Under the Rules on Appeal, and the cases interpreting them, the appeal will be considered, so far as necessary, as having been taken from the formal order later entered. Rule 2(c); Holden v. California Emp. Stabilization Comm., 101 Cal.App.2d 427, 225 P.2d 634; Smith v. Smith, 126 Cal.App.2d 194, 272 P.2d 118.

[2] Appellant attempts to attack the order of February 13, 1957, appointing respondent, *ex parte*, as special administrator. This she may not do. She has not appealed from that order. She could not have done so. Section 460 permits the Probate Court to appoint a special administrator when the circumstances of the estate require the immediate appointment of a personal representative, and section 461 provides that such appointment "may be made at any time without notice * * * such order is not appealable." Thus, nothing further need be said about the attack on the order of February 13, 1957.

[3-5] The attacks upon the minute order of March 11, 1957, and the formal order of March 12, 1957, present more difficult problems. Both sides admit that those orders were void because they were not supported by findings of fact and such findings were not waived. Both sides agree that the statute provides, and the cases hold, that such orders must be supported by findings. See § 1230, Prob.Code; In re Estate of Dow, 91 Cal.App.2d 420, 205 P.2d 698. The parties differ, however, as to whether the appeal, being from a void order, should be dismissed or reversed.

There is substantial authority that appeals prematurely taken from orders not appealable because not final should be dismissed. In re Estate of Dow, 91 Cal.App.2d 420, 205 P.2d 698; Supple v. Luckenbach, 12 Cal.2d 319, 84 P.2d 52; In re Estate of Lopus, 12 Cal.2d 651, 86 P.2d 818; In re Estate of Dodds, 52 Cal.App.2d 287, 126 P.2d 150; see, also, In re Estate of King, 121 Cal.App.2d 765, 264 P.2d 586. It should be noted that several of these cases last cited were decided before the 1951 amendment to Rule 2(c), which has now changed the rule of these cases.

There are also several well-reasoned cases holding that since a dismissal is in legal effect an affirmance, the proper procedure is to reverse, even though the order is unsupported by findings. In Petroleum Midway Co. v. Zahn, 62 Cal.App.2d 645, 145 P.2d 371, a judgment, unsupported by findings, was entered and an appeal taken, in a case requiring findings. The court discussed the problem at some length and came to the conclusion that in such cases, although the appeal is premature, the judgment or order appealed from should be reversed, rather than dismissed. The court in the Zahn case first pointed out that as in the instant case no subsequent judgment supported by findings has been entered, and then stated (62 Cal.App.2d at page 652, 145 P.2d at page 375): "'The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from.' Code Civ.Proc., § 955. The only judgment in this case should be reversed, not affirmed by the dismissal of the appeal.

"The principles and practice of the decided cases warrants our reversal of the judgment. The entry of a judgment without findings, where findings are required and not waived, is not an immaterial error in procedure. [Citing several cases.] In each of the cases just cited the complication created by entering a judgment without the filing of prerequisite findings was cured by reversing the judgment on appeal. An appeal should be an appropriate remedy. The judgment appealed from would be a valid judgment, if findings had been waived, and as the judgment roll need not, and does not, reveal whether findings were or were not waived, the judgment, under many circumstances, would be immune from attack. [Citing a case.] It is true that such judgments may be characterized as nullities. [Citing two cases.] However, 'It has been repeatedly held that an appeal may be taken from an order or judgment notwithstanding the fact that it is void.' [Citing several cases.] To conclude that we have no jurisdiction on this appeal to reverse the judgment which was entered in book 1274, page 264, on August 20, 1942, because it has not yet been rendered, in that findings have not been filed, would be to give words precedence over the ideas they are meant to convey, and to give to a form of procedure greater obeisance than to the object sought to be attained." See, also, Engleman v. Green, 125 Cal.App.2d Supp. 882, 270 P.2d 127; In re Estate of Baird, 59 Cal.App.2d 303, 138 P.2d 698; Cecchini v. Ridinger, 136 Cal.App.2d 8, 288 P.2d 146; In re Estate of Pendell, 216 Cal. 384, 14 P.2d 506; see discussion and collection of cases 3 Witkin, California Procedure, p. 2177.

Thus, there is a definite conflict in the cases, some holding that in such cases the appeal should be dismissed, in others that the order or judgment should be reversed. We are impressed by the reasoning in the Zahn case, supra, and the other cases holding that the proper procedure is to reverse.

Respondent argues that in any event the appeal is moot. This contention is based on several events occurring after the orders here appealed from were made. Respondent points out in his brief that after Myers was appointed as administrator and the appeal taken several days later, Myers continued to act as administrator although his power to act had been suspended by the appeal. Ethel Peak, the appellant, then noticed a motion for the revocation of letters of administration of Myers, for an accounting, and for the appointment of First Western Bank as special administrator. At the oral argument of the instant case it was stipulated that on May 22, 1957, the Probate Court made its order appointing the First Western Bank as special administrator, suspending all powers of respondent as general administrator, and ordering respondent Myers to turn over to First Western Bank all assets of the estate in his possession. It was further stipulated that on August 13, 1957, the letters of respondent as administrator with the will annexed were withdrawn. From the record in the instant case it appears that Percival Myers is now dead and that the administrator of his estate has now been substituted as respondent in the instant proceeding.

Thus it now appears that respondent has been removed as administrator and that the First Western Bank has, at appellant's request, been appointed special administrator. Because of the death of Myers there is no possibility of his again being appointed administrator. Thus this portion of the appeal is moot. But that is not the only issue involved on this appeal. Appellant has appealed from that portion of the order of

March 11, 1957, denying her petition for letters of administration. This issue is not moot. She is legally entitled to an order supported by findings finally disposing of this issue. The reporter's transcript of the hearing of March 11, 1957, discloses that the evidence was conflicting on this issue. Appellant is entitled to have this portion of the order reversed because of the failure to make findings.

As already pointed out, the validity of the order of February 13, 1957, is not before us, and no order is required in reference thereto. That part of the order of March 12, 1957, admitting the will to probate is affirmed. The appeal from that portion of the order of March 12, 1957, appointing Myers as general administrator is dismissed as moot. That portion of the order of March 11, 1957, denying appellant's petition for letters is reversed. Appellant to recover her costs on appeal.

BRAY and FRED B. WOOD, JJ., concur.

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160 Cal.App.2d 650

Frank C. SILVA, Petitioner and Appellant,

v.

The JUSTICE'S COURT OF LOMPOC JUDICIAL DISTRICT, COUNTY OF SANTA BARBARA, State of California, and H. T. Reed, the Justice Thereof, Defendants and Respondents.

Civ. 22711.

District Court of Appeal, Second District,
Division 2, California.
May 20, 1958.

Proceedings on petition for writ of prohibition. The Superior Court of Santa Barbara County, Earnest D. Wagner, J., denied the petition, and the petitioner appealed. The District Court of Appeal, Herndon, J., held that Justice Court has power to hear and determine every issue of fact involved in prosecution for failure to provide for minor child, irrespective of jurisdiction of Superior Court to determine issue of paternity of illegitimate child in civil case; and held that Justice Court had had, in prosecution for failure to provide for unborn illegitimate child, jurisdiction to determine issue of paternity, presented by defendant's plea.

Affirmed.

Criminal Law 🔑90(2)

Justice Court had jurisdiction to determine issue of paternity presented by defendant's plea to charge of violating Penal Code section by failing to provide for unborn illegitimate child. West's Ann.Pen. Code, §§ 270, 1425; West's Ann.Const. art. 6, §§ 5, 11.

Douglas G. Hitchcock, Los Angeles, for appellant.

Vern B. Thomas, Dist. Atty., Santa Barbara, James T. Barnes, Deputy Dist. Atty., Los Angeles, for respondent.

HERNDON, Justice.

This is an appeal from an order of the superior court denying a petition for a writ of prohibition. Appellant, petitioner below, was convicted in the justice court of the Lompoc Judicial District of a violation of section 270 of the Penal Code (failure to provide for a minor child) and was sentenced to serve ninety days in the Santa Barbara county jail.

Fifteen months after that sentence was pronounced, appellant filed in the superior court a petition in which he prayed for a writ of prohibition "commanding said [justice] Court to desist from any further proceedings in siad matter, and that the Judge be restrained from incarcerating the petitioner until this matter shall be disposed of."

The petition alleges in substance that on February 15, 1956, appellant was sentenced by the justice court to ninety days in the county jail for failure to provide for an unborn illegitimate child in violation of section 270 of the Penal Code, a misdemeanor; that appellant had never been married to the mother of the child, and that the justice court was without jurisdiction "to consider the issues of parenthood on the merits."

The sole contention of appellant on this appeal is that the justice court was without jurisdiction to determine the issue of paternity presented by his plea to the charge of a violation of Penal Code section 270.

The contention is without merit. In 1949 section 1425 of the Penal Code (Stats.1949, ch. 1518, p. 2701) was amended, and it expressly provides that "justice courts * * * shall have jurisdiction of cases amounting to a misdemeanor under Section 270 of the Penal Code * * *". No question is raised with respect to the constitutionality of this statutory provision which seems to be entirely consistent with the provisions of sections 5 and 11 of Article VI of the California Constitution which authorizes the legislature to provide by general laws for the jurisdiction of municipal and justice courts.

In the case of In re Clarke, 149 Cal.App.2d 802, 808, 309 P.2d 142, 147, this court explicitly rejected the contention that a municipal court lacked jurisdiction to determine the issue of paternity in a prosecution under section 270 of the Penal Code. The power conferred on municipal and justice courts by the Legislature includes "power to hear and determine every issue of fact involved in a prosecution for failure to provide for a minor child irrespective of the jurisdiction of the superior court to determine the issue of paternity of an illegitimate child in a civil case, Civ.Code, §§ 196a and 231." In re Clarke, supra, 149 Cal.App.2d 802, 808, 369 P.2d 142.

Appellant cites People v. Edland, 34 Cal.App.2d 104, 93 P.2d 180 as a case in which a conviction of a defendant under section 270 before a *superior* court was affirmed, and appellant argues that "* * * if the Municipal Court or the Justice Court had jurisdiction [in the present case] * * * it is doubtful that the Superior Court had jurisdiction in the Edland case."

Appellant's reliance on People v. Edland, supra, is completely misplaced. Edland was decided in 1939, more than twelve years before the first municipal court was established in San Bernardino county and ten years before the amendment of section 1425 of the Penal Code expressly conferred jurisdiction in such cases on the justice court.

This disposition of appellant's basic contention renders it unnecessary to discuss the other grounds advanced by respondents as adequate to sustain the order denying the writ.

The order denying the writ is affirmed.

FOX, P. J., and ASHBURN, J., concur.

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160 Cal.App.2d 532

Patrick THORNTON, Plaintiff and Respondent,

v.

Leonard STEVENSON, Donald Keith, Robert K. Griffin, J. E. Roberts, V. P. Hunt, Lillie Pulos, Con Pulos, Theo. G. Krumm et al., Defendants and Appellants.

Civ. 5729.

District Court of Appeal, Fourth District, California.

May 15, 1958.

Action to quiet title to mining claim in which plaintiff sought temporary injunction to restrain defendants from interfering with plaintiff's exclusive possession. The Superior Court of San Bernardino County, Edward P. Fogg, J., entered order granting injunction pendente lite so as to permit both plaintiff and defendants to enter peacefully on claim in order to do necessary work to perfect or maintain claims and to enjoin either party from removing ore, and defendants appealed. The District Court of Appeal, Griffin, J., held that complaint stated a sufficient showing for injunctive relief.

Affirmed.

Mines and Minerals ⚿38(9)

In action to quiet title to mining claim in which defendants filed affidavits conflicting with verified complaint, complaint made a sufficient showing for temporary injunctive relief allowing both plaintiff and defendants to enter peacefully on claim in order to do any work necessary to perfect or maintain claims thereto and restraining either from removing ore. West's Ann. Code Civ.Proc. § 526; West's Ann.Public Resources Code, §§ 2301, 2302, 2304.

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E. John Eriksson and Theo. G. Krumm, San Bernardino, for appellants.

Casey & Kerrigan, San Bernardino, Monta W. Shirley, Los Angeles, and Richard J. Weller, San Bernardino, for respondent.

GRIFFIN, Justice.

It is alleged in a verified complaint in this action to quiet title to the Snowflake Lode Mining Claim, also known as the "Lillian Queen", that plaintiff has been the owner thereof and defendants claim and assert some interest therein; that on January 29, 1957, two of the defendants wrongfully and without the consent of plaintiff entered upon and took possession of said claim and constructed a gate across the only road thereto; that on February 5th, plaintiff went on the claim and performed improvements in the nature of discovery work, but one named defendant, while armed, orally ordered plaintiff from the claim and threatened to kill him if he came back onto it; that upon demand of plaintiff, access was granted by defendants for the purpose of establishing monuments, which he did, and accomplished the location work required by law; that on February 23rd, plaintiff's employees visited the claim and found the monuments they had erected were removed; that since then defendants refused to permit plaintiff to enter upon the claim and it was necessary for plaintiff to perform discovery work and to reestablish monuments thereon before July 26, 1957; that defendants filed false and fraudulent affidavits as to proof of prior assessment work and that defendants have no right, title and interest in the claim. The prayer was for an injunction restraining defendants from interfering with plaintiff's exclusive possession, and to quiet title.

An order to show cause was served upon defendants as to why such temporary injunction should not issue. Defendants, after filing a general demurrer, filed their affidavits indicating that on August 12, 1952, they located the "Lillian Queen" No. 1 Lode claim, erected boundary and center monuments, placed a notice of location thereon, and recorded such notice on August 18, 1952, and performed all necessary location and assessment work to date; that plaintiff wrongfully entered upon such claim and removed defendants' notice of location and replaced his notice in its place; that plaintiff later replaced defendants' notice; that plaintiff's claim is void; that defendants' claim is valid; and that the only reason defendants allowed plaintiff to post his notice without right was because he was accompanied by an officer of the law.

Upon this showing the court originally, on April 23, 1957, granted the injunction conditioned upon the posting of a $500 bond. By subsequent order the court modified the terms of the injunction so as to permit both plaintiff and defendants to enter peaceably upon the claim in order to do any work necessary to perfect or maintain their claims thereto, and to enjoin either party from removing ore therefrom, pendente lite.

Defendants have appealed from this order, as modified. Meanwhile defendants filed an answer to the complaint and by cross-complaint sought to have their title thereto quieted. The case is ready for trial upon the issues thus framed.

Appellants' first claim of error appears to resolve itself down to the contention that the verified complaint did not state sufficient facts to support the issuance of an injunction pendente lite, citing Provident Land Corp. v. Provident Irr. District, 22 Cal.App.2d 105, 79 P.2d 392, the claim being that the injunction should be dissolved because the allegation of ownership of plaintiff was a mere conclusion; that the showing made by defendants clearly shows plaintiff had no prior and existing valid location; that plaintiff failed to allege sufficient facts to show his claim was valid or that he acted in good faith. It is further argued that he failed to show that he had discovered a valuable vein or lode of mineral in place at the point of discovery, the construction of a discovery monument, or the monumenting of the claim so its boundaries could be readily traced, that the discovery, if any, was made upon open, unappropriated government land, or that he was a citizen of the United States, citing Public Resources Code, §§ 2301, 2302 and 2304; Gemmel v. Swain, 28 Mont. 331, 72 P. 662; and McPheeters v. McMahon, 131 Cal.App. 418, 21 P.2d 606.

Plaintiff sufficiently alleged a cause of action to quiet title and made a sufficient showing for temporary injunctive relief. The court was not bound by affidavits of defendants conflicting with plaintiff's verified complaint. Section 526 of the Code of Civil Procedure fully authorizes the issuance of an injunction, pendente lite, upon the showing here made. McRae v. Blakeley, 3 Cal.App. 171, 173, 84 P. 679; Empire Star Mines Co. v. Butler, 62 Cal.App.2d 466, 145 P.2d 49; Hunt v. Steese, 75 Cal. 620, 17 P. 920; Hess v. Winder, 34 Cal. 270; Martin v. Danziger, 21 Cal.App. 563, 565, 132 P. 284.

Order granting temporary injunction affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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160 Cal.App.2d 201

E. F. BURGE, Plaintiff and Respondent,
v.
Norval KRUG, Defendant and Appellant.

E. F. BURGE, Plaintiff and Appellant,
v.
Norval KRUG, Defendant and Respondent.

Civ. 22886.

District Court of Appeal, Second District, Division 1, California.
May 7, 1958.

Action for breach of contract to convey real property. The Superior Court of Los Angeles County, Arthur K. Marshall, J. pro tem., rendered judgment for purchaser, and vendor appealed. The District Court of Appeal, Lillie, J., held that where language preceding description in contract for sale of real property stated that agreement covered property in county as per map recorded in certain book and page of miscellaneous records of said county, but description erroneously described block, writing did not sufficiently describe subject matter to constitute an enforceable contract and failed to meet demands of statute of frauds, and that parol evidence was inadmissible to supply description.

Reversed and remanded for new trial.

1. Pleading ⟹129(2)

Where purchaser's amended complaint, which originally sought declaratory relief as well as damages for vendor's breach of contract to convey real property, in paragraph for declaratory relief, described property and contract attached to complaint contained part of such description, failure of vendor to plead specifically to such allegations constituted an admission that purchaser sought declaration of his rights to property described in complaint but was not an admission that such property was the same as that mentioned in the contract or constituted the basis of litigation in purchaser's action for damages, especially where vendor's answer denied allegations of every subsequent paragraph in complaint in which plaintiff sought to set forth his basis of claim for damages or to connect such piece of land with the alleged contract.

2. Declaratory Judgment ⚷329
Vendor and Purchaser ⚷349

Where purchaser brought action for vendor's breach of contract to convey real property and for declaratory relief, but description in complaint and attached contract contained erroneous block number, additional description in complaint stating that property was located at intersection of two streets could not supply legal deficiencies in proof of purchaser's case in view of fact that he sought to recover upon the contract.

3. Pleading ⚷252(2)

Where complaint for damages for vendor's breach of contract to convey real property and for declaratory relief contained description of property in paragraph for declaratory relief and was amended by interlineation to eliminate claim for declaratory relief allegation in paragraph for declaratory relief was pertinent only to that action and, when amendment occurred, paragraph became a nullity, would be considered as having been physically removed from complaint, and could not be relied upon to supply description of property.

4. Evidence ⚷460(7)

In purchaser's action against vendor for alleged breach of written contract to convey real property, parol evidence was not admissible to supply description of property where description in contract was unintelligible and did not describe any identifiable parcel of real estate. West's Ann. Civ.Code, § 1624.

5. Frauds, Statute of ⚷110(1)
Vendor and Purchaser ⚷22

Where language preceding description in contract for sale of real property stated that agreement covered property in county as per map recorded in certain book and page of miscellaneous records of said county, but description erroneously described block, writing did not sufficiently describe subject matter to constitute an enforceable contract and failed to meet demands of statute of frauds. West's Ann.Civ.Code, § 1624.

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Aaron Sapiro and Charles M. Arak, Los Angeles, for E. F. Burge, plaintiff, respondent and appellant.

Hastings, Blanchard & Hastings, Los Angeles, for Norval Krug, defendant, appellant and respondent.

LILLIE, Justice.

Appeals have been taken by both parties from a $1,200 judgment in favor of plaintiff entered against defendant in an action for a breach of contract to convey real property. The defendant appeals on the ground that the purported agreement for the sale of real property is invalid under the statute of frauds and is unenforceable.

The basis of plaintiff's appeal is inadequacy of damages. Both are taken upon the clerk's transcript only. The facts are not in dispute.

E. F. Burge, plaintiff, entered, into a written contract entitled "Escrow Instructions" with defendant Norval Krug to buy certain real property described therein as "Lot 7, Block 10 of Crescenta Canada Tract." The defendant failed to convey the property under the agreement and plaintiff filed suit against him for declaratory relief and damages.

At the trial plaintiff amended his complaint by interlineation to eliminate his claim for declaratory relief leaving only a simple action for damages for breach of contract. The action was tried on that theory before the court sitting without a jury. The trial judge, among others, made the following findings: "That the legal description of the parcel of real property contained in the written agreement between the parties is unintelligible and does not describe any identifiable parcel of real estate." The court further found that the parties intended to contract with respect to a particular parcel of land not described in the written contract, that defendant breached the contract to convey it and that plaintiff was entitled to damages in the sum of $1,200. In awarding this amount the court found: "That the plaintiff has properly incurred expenses in preparing to enter upon the land described in Paragraph IV of these Findings in a total amount of $1,200.00." Both plaintiff and defendant filed a motion for new trial. They were denied and both parties appeal from the judgment.

The defendant on appeal presents a single question of law: Does the statute of frauds preclude recovery for breach of a written contract to convey real property in which the description is unintelligible and does not describe either the lands which the parties intended to convey or any other identifiable parcel?

The parcel of land in question is described in the contract as "Lot 7, Block 10 of Crescenta Canada Tract." It was more specifically identified in oral testimony rendered at the trial. Although this court does not know of what this testimony consisted, it appears to make little difference for the basic question is whether parol evidence can be resorted to for the purpose of supplying a description of real property inadequately described in the contract of sale. With nothing in the record to the contrary we assume that it was upon this oral evidence that the court found the parties intended to contract with respect to a parcel of land which was not described in the written contract. There is no explanation before this court for the reference to "Block 10" in the contract for it is generally conceded by the parties in their briefs that "10" is an erroneous designation. It is not too clear from the record but it appears that the description should have referred to Block "00" and not "10." With no evidence to the contrary we believe that "Block 10" mentioned in the agreement is in all probability nonexistent for the trial court found not only that the legal description using it is unintelligible but does not describe any identifiable piece of real estate. Patent in the court's findings is the trial judge's determination that, standing alone, the description is so insufficient and inadequate as to preclude an enforcement of the contract and that if recovery is to be had it must be through the use of oral testimony to show that the parties intended to contract with reference to an entirely different parcel of land.

Plaintiff seeks to forestall this court's consideration of the use of the oral testimony to identify the property involved by asserting that defendant is precluded from raising the issue because of his implied admission in the answer that the property described in the contract is the same as that properly and more fully described in the pleadings and that actually further identification of the property by way of oral testimony was not necessary. An accurate analysis of the pleadings disposes of this contention as being without merit.

Plaintiff's amended complaint originally sought declaratory relief as well as damages for breach of contract. He alleged in paragraph II thereof "That real property in connection with which plaintiff asks a declaration of his rights, is described as: Lot 7, Block 10 of the Crescenta Canada Tract, and is also known as 'That 10 acres on the southeast corner of Lowell and Carlotta, La Canada, California.'" Plaintiff seeks to rely on this description to properly identify the property mentioned in the contract. However, no other description is set out in the complaint except that which appears in the document in question and which is attached as an exhibit thereto. This description reads: "Lot 7, Block 10 of Crescenta Canada Tract."

In the first part of the prayer of the complaint plaintiff sought declaratory relief. In the second he prayed for damages equal to the profits that plaintiff would have realized had defendant conveyed "said real property to plaintiff in accordance with the Escrow Agreement."

[1,2] In his answer defendant did not plead specifically to the allegation contained in paragraph II of the complaint, which in effect constitutes an implied admission that plaintiff seeks a declaration of his rights to property described as Lot 7, Block 10 of the Crescenta Canada Tract, also known as the 10 acres of the southeast corner of Lowell and Carlotta, La Canada, California. This is as far as defendant's admission goes. Certainly this is no admission that the described property is the same as that mentioned in the contract or constitutes the basis of litigation in the action for damages. This is particularly clear when the remaining paragraphs of the answer are analyzed. Therein defendant denied each allegation of every subsequent paragraph in the complaint in which plaintiff sought to set forth the basis of his claim for damages or to connect this piece of land with the alleged contract. In addition defendant specifically denied paragraph V of the complaint wherein plaintiff alleged that a written agreement was executed to purchase the "within described property." All other allegations contained in the complaint were denied by defendant. However, in his affirmative defense defendant alleged that he owned an interest in certain real property described at great length in the answer and bearing little similarity to that described in the written document in question and that through a real estate broker he had dealings with the plaintiff which had not resulted in a written contract of sale. The more complete description set out in paragraph II of the complaint, and on which plaintiff would like to rely, is of little help to him, first, because merely pleading a recital of his position cannot supply the legal deficiencies in the proof of plaintiff's case and, second, whatever implied admission resulted from defendant's failure to plead to the allegations of paragraph II referred only to the property about which plaintiff sought a declaration of his rights. The defendant's answer denied the existence of any transaction between the parties relating to the property described in paragraph II. Furthermore, if plaintiff is to recover upon a contract, the contract itself must furnish the basis for the claim.

In the case of Gordon v. Perkins, 108 Cal.App. 336, 291 P. 644 the complaint set forth the property in question as 40 acres of land in Madera County and described as the northeast quarter of the northeast quarter of section 35—Township 11 South, Range 17 East. The written memorandum agreement described the property only as "N.E.¼ of N.E.¼ of Section 35, 11/17." Appellant sought to substitute the more complete description alleged in the complaint for the one set out in the writing. The court said, 108 Cal.App. at page 338, 291 P. at page 644, "While the complaint alleges that an agreement was entered into for the sale of certain real property (describing the same), according to the conditions set forth in a certain memorandum in writing, the liability and rights of the parties to this action must be measured by the instrument in writing."

[3] In any event, before the trial the plaintiff's complaint was amended by interlineation to eliminate the claim for declaratory relief and to substitute therefor a simple action for damages. The allegation in paragraph II on its face was pertinent only to a declaratory relief action. When the amendment occurred and the claim for declaratory relief was abandoned, the paragraph became a nullity and can be considered as having been physically removed from the complaint.

One of the most comprehensive discussions concerning the statute of frauds (Civil Code, section 1624) and the parol evidence rule is found in the case of Ellis v. Klaff, 96 Cal.App.2d 471, 216 P.2d 15. Likening the evidentiary consequences of the statute of frauds with those of the parol evidence rule, the court said in 96 Cal.App.2d at page 476, 216 P.2d at page 19: "Both require exclusion of extrinsic evidence which would vary, contradict, or add to the terms of the written agreement under consideration, Craig v. Zelian, 137 Cal. 105, 69 P. 853, statute of frauds;

Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 96 P. 319, parol evidence rule, but both permit reception of such evidence to identify the subject matter of the contract from the written description, explain the meaning of ambiguous, abstruse, or technical expressions, and assist in interpreting the expressed intentions of the parties in the light of circumstances existing at the time of execution. (10 Cal. Jur., 'Evidence,' sec. 186, pp. 916–919; 12 Cal.Jur., 'Statute of Frauds,' sec. 65, p. 902; Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 152 P.2d 774; Balfour v. Fresno Canal & Irr. Co., 109 Cal. 221, 225, 41 P. 876; Von Rohr v. Neely, 76 Cal.App. 2d 713, 173 P.2d 828."

The court in describing the purpose of the statute of frauds continued: "The Statute of Frauds, on the other hand, is designed to prevent fraud and perjury by requiring certain contracts to be evidenced exclusively in writing. In order to effectuate that purpose, it demands that every material term of an agreement within its provisions be reduced to written form, whether the parties desire to do so or not. To be sufficient, the required writing must be one 'which states *with reasonable certainty,* (a) each party to the contract * * * and (b) the land, goods or other subject-matter to which the contract relates, and (c) *the terms and conditions of all the promises* constituting the contract and by whom and to whom the promises are made.' Restatement, Contracts, sec. 207. Emphasis added. Unless the writing, considered alone, expresses the essential terms with sufficient certainty to constitute an enforceable contract, it fails to meet the demands of the statute. Breckinridge v. Crocker, 78 Cal. 529, 535, 21 P. 179; Sherwood v. Lowell, 34 Cal.App. 365, 375, 167 P. 554; Wineburgh v. Gay, 27 Cal.App. 603, 150 P. 1003; Zellner v. Wassman, 184 Cal. 80, 85–86, 193 P. 84; Fritz v. Mills, 170 Cal. 449, 458, 150 P. 375; Hines v. Copeland, 23 Cal.App. 36, 136 P. 728; 37 C.J.S. Frauds, Statute of § 195, p. 681. See, also, In re Guardianship of Carlon's Estate, 43 Cal. App.2d 204, 209, 110 P.2d 488. Accordingly, where the Statute of Frauds, rather than the parol evidence rule is invoked, it follows that recovery may not be predicated upon parol proof of material terms omitted from the written memorandum, even though the oral understanding is entirely consistent with, and in no way tends to vary or contradict, the written instrument. Friedman v. Bergin, 22 Cal.2d 535, 140 P.2d 1; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Wristen v. Bowles, 82 Cal. 84, 22 P. 1136; Edgar Bros. Co. v. Schmeiser Mfg. Co., 33 Cal. App. 667, 166 P. 366; Baume v. Morse, 13 Cal.App. 456, 110 P. 350; Fields v. Harris, Tex.Civ.App., 294 S.W. 612; Linebarger v. Devine, 47 Nev. 67, 214 P. 532, 217 P. 1101; Williston on Contracts, vol. 2, pp. 1619, 1645; 49 Am.Jur., sec. 322, p. 636. In the words of the Supreme Court, 'The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence.' Craig v. Zelian, supra, 137 Cal. 105, 106, 69 P. 853, 854."

The effect of this rule with respect to the specific matter of descriptions of real property has been early established by the Supreme Court in 1902 in the case of Craig v. Zelian, supra. This case involved an action for damages for a breach of an agreement for conveyance of real property. The plaintiff appealed from an order granting a nonsuit. The agreement described the realty as follows: "a strip of land in front of Golden Rule Store and Stent Market." The appellant therein contended that this was a sufficient description of the real property to require an enforcement of the contract. The court stated, 137 Cal. at page 105, 69 P. at page 853:

"An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated, and supplying a description thereof which they have omitted from the writing. * * * The land was not inclosed or in any mode designated upon the ground. How far it is located from the Golden Rule Store, or the width of the 'strip,' or its length, is not given, and it must be held that there is no description of the land intended to be conveyed. * * * The statute of frauds was originally enacted 'for the prevention of frauds and perjuries,' and an agreement for the sale of land is required to be in writing in order that this purpose may be accomplished. The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence. A description of the land intended to be conveyed is one of the most essential parts of the agreement, and must be contained in the writing."

A situation similar to the one in the instant case is found in Gordon v. Perkins, supra. The memorandum described the real property as "N.E.¼ of N.E.¼ of Section 35, 11/17." There was nothing in the writing which designated any tract of land by naming or setting forth any description constituting a description from which a surveyor might take the description and apply it to the earth's surface. The court pointed out that a surveyor could not go with certainty to any particular forty acres of land and apply the description thereto. The court, in ruling that the description was defective in the memorandum, in that it was not sufficiently definite to comply with section 1624, subdivision 5 of the Civil Code, stated in 108 Cal.App. at page 339, 291 P. at page 645: "'One of the essential elements of a contract for the sale and conveyance of real property, which must be stated in the contract, or a memorandum or note thereof, is a description of the property to be conveyed. The land must be so described that it can be identified with reasonable certainty. The writing must disclose a description which is itself definite and certain, or it must furnish the means or key by which a description may be made certain and identified with its location on the ground. In other words, the contract, note or memorandum is insufficient where parol evidence is necessary to supply the description, or part thereof, to determine and define the subject matter, and to show the intention and agreement of the parties as to the subject matter; and it is sufficient, as regards subject matter, where it furnishes a sufficient foundation for the admission of extrinsic evidence to apply the description and by means of such evidence the particular tract of land which is the subject matter of the agreement may be identified and located to the exclusion of all others.'"

[4] Plaintiff herein seeks to sustain the judgment of the lower court on the basis of Ellis v. Klaff, supra. It is true, as stated by the court in that case, that parol evidence is admissible under some circumstances, such as in a situation in which the land has been adequately described in the contract and it is offered for the purpose of locating on the ground the land described. Obviously this is not the case here because the very finding upon which the plaintiff relies expressly characterizes the description of the real property in the document in question as "unintelligible" and not describing "any identifiable parcel of real estate." We agree also that parol evidence may be admissible if the wording in the contract is ambiguous, abstruse or technical but there is no hidden or dual meaning in the language here. In addition, there is little comfort to the plaintiff in the factual situation found in Ellis **v.** Klaff. The court there was asked to construe a lease of real property which required lessee to build "a building or buildings" thereon. It did not contain any specifications of construction. The court held that though parol evidence may be admissible to cure the ambiguity as to the number of buildings agreed upon it could not, under the statute of frauds, be admissible to supply essentials of a complete agreement which

were lacking in the writing which was too vague to be enforceable.

In applying the rule in Gordon v. Perkins, supra, does the contract itself furnish the means or key by which the description may be made certain and identified with its location on the ground? Plaintiff resorts to the following language in the contract which precedes the description: "covering property in the County of Los Angeles, State of California, as per map recorded in Book 7, Page 68, Miscellaneous Records of said county described as follows" then "Lot 7, Block 10 of Crescenta Canada Tract." Plaintiff urges that the key to a more complete description and identification of the property is found in the reference to the book and page of Miscellaneous Records of the Los Angeles County Recorder. His argument overlooks the fact that because of the error in describing the number of the block as "Block 10" it would avail nothing for one to go to Book 7, Page 68, Miscellaneous Records, because it would disclose no Block 10 on the map. If Block 10 is nonexistent or if the numeral "10" is not a correct designation of the block (and it is conceded that it is not) there would be no way to select any portion of the lands appearing on the map. No explanation of this is possible under the pleadings in this case and it is only by oral testimony, which we hold is not admissible, that the certain description of the property can be supplied.

[5] In the light of the general rule discussed in Ellis v. Klaff, supra, and other authorities specifically relating to the descriptions of real property in written memoranda (Craig v. Zelian, supra; Gordon v. Perkins, supra) we do not believe that the writing in question, considered alone, describes the subject matter of the contract with sufficient certainty to constitute an enforceable contract and that it fails to meet the demands of the statute of frauds. Recovery in this case may not be predicated upon parol evidence relating to the proper description which was omitted from the contract.

Since the judgment must be reversed and a new trial be had, it becomes unnecessary to discuss the issue presented by plaintiff's appeal as to the inadequacy of damages.

The judgment is reversed and the cause remanded for a new trial. Defendant to recover costs on appeal.

WHITE, P. J., and FOURT, J., concur.

Margery Lee WHITE, Plaintiff and Respondent,

v.

COX BROTHERS CONSTRUCTION COMPANY et al., Defendants,

County of Los Angeles, Defendant and Appellant.*

Civ. 22935.

District Court of Appeal, Second District, Division 1, California.

May 12, 1958.

Rehearing Granted June 6, 1958.

Action for injuries sustained when automobile in which plaintiff was riding overturned on a highway under construction. Judgment for plaintiff against the County in the Superior Court of Los Angeles County, Fletcher Bowron, J., and the County appeals. The District Court of Appeal, Fourt, J., held that the case was properly submitted to the jury; that release of the construction company was not a release of the county; and that the instructions were proper.

Judgment affirmed.

1. Automobiles 🔑308(7)

In action for injuries sustained by passenger in automobile when the car struck a chuckhole and overturned, where highway was being reconstructed by con-

* Opinion vacated 329 P.2d 14.

struction company under a contract let by the county, whether the county inspector had notice of the condition at the place of accident and if he did have knowledge whether such knowledge was chargeable to the county, was a question of fact. West's Ann.Gov.Code, § 53051; West's Ann.Vehicle Code, § 465.7.

2. Automobiles ⚿308(10)

In action for injuries sustained by passenger in automobile which struck a chuckhole in a road under construction by construction company under a contract let by the county, whether driver of plaintiff's car was negligent as a matter of a law because of failure to see warning signs and whether such was the proximate cause of damages were questions of fact for the jury.

3. Release ⚿29(1)

In action by passenger in automobile which overturned after striking a chuckhole in a street under construction under a contract between construction company and county, dismissal for consideration of the construction company did not constitute a release of the county where there was no thought of abandoning the action against the county.

4. Automobiles ⚿309(1)

In action for injuries sustained by passenger in automobile which overturned after striking chuckhole in road under construction under a contract between construction company and county where claimed negligence of the driver was before the jury, instructions as to principal and agent were proper under the circumstances. West's Ann.Gov.Code, § 53051.

5. Negligence ⚿6, 136(14)

Each violation of a statutory requirement must be considered in connection with the surrounding circumstances and ordinarily the excuse relied upon by the violator presents a question of fact for the jury.

6. Automobiles ⚿308(10)

In action for injuries sustained by passenger in automobile which overturned due to a chuckhole in a road being constructed, whether violation of the driver of the Vehicle Code contributed to the accident and was excusable or justifiable was a question of fact. West's Ann.Vehicle Code, § 465.7.

7. Appeal and Error ⚿216(2)

In action for injuries, where court instructed as to the life expectancy of plaintiff but omitted the qualifying condition about normal health, defendant was not entitled to complain where it did not request an explanatory instruction.

8. Automobiles ⚿309(1)

In action for injuries against a county when automobile in which plaintiff was riding overturned due to a chuckhole in a road under construction, instruction that it is presumed that the official duty has been regularly performed was properly omitted under the evidence. West's Ann.Code Civ. Proc., § 1963(15).

◆

Harold W. Kennedy, County Counsel, Los Angeles County, Lloyd S. Davis, Deputy County Counsel, Los Angeles, for appellant.

G. Keith Sprague of Chapman & Sprague, San Bernardino, for respondent.

FOURT, Justice.

This is an appeal from a judgment on a verdict of a jury in favor of the plaintiff for damages and injuries suffered in an accident allegedly resulting from a defective street.

On June 24, 1955, Harold Atenese was driving the plaintiff's automobile westerly on Imperial Highway near the intersection of Imperial Highway and Luitweiler Avenue in the unincorporated territory of the County of Los Angeles. The plaintiff was riding in her automobile at the time. Imperial Highway, where the accident occurred, was being reconstructed by a construction company under a contract let by the county of Los Angeles. The work consisted, in part, of the removal of the pavement from the surface of Imperial Highway, commencing about fifty feet east of

Luitweiler Avenue. During the late afternoon of the day of the accident, when it was still daylight, the plaintiff's car was traveling westerly, and the front wheels thereof struck the first drop off between the old pavement and the gravel surface where the pavement had been removed, and then struck a "chuck hole," and the car skidded and overturned. The drop off was at the crest of a hill such that westbound drivers could not see the drop off or the excavated roadway until they were almost upon it.

There was evidence that a water line under Imperial Highway, at the place of the accident, had been leaking for months, and that before the contractors had started excavating and repaving, there was a hole caused by the leaking water which extended from the edge of the asphalt into the paved portion of the roadway. The hole began two feet north of the asphalt and extended from one foot to one and one-half feet into the asphalt and was six to eighteen inches in depth and up to two to two and one-half feet wide. It was wet and stayed there until June 27, 1955. After the paving was removed the hole remained but got larger. The county inspector saw the "damp spot." There was also testimony that the condition was reported to the Los Angeles County Health Department and to "someone in a County Road Department car" long before the construction work started.

The excavated roadway consisted of "washboards" and loose gravel. The roadway was heavily traveled and the traffic tended to loosen the rock and create holes and ruts which required the contractor's smoothing and grading the surface every few days to prevent it from being hazardous. Two days before the accident the contractor's employees went out on strike and no work was being performed at the time of the accident. There was testimony of a long-existing six inch hole three yards west of the drop off. There was also evidence that during the twelve days prior to the accident, cars on the roadway struck something on the road so hard that "it * * * jarred the house" and "occurred pretty near 24 hours a day," and of the hubcaps being forced off of the cars by reason of these impacts.

During the period of time between the commencement of the construction work and the accident there had been placed and maintained two advance warning signs and a barricade to warn drivers of the construction work. The first sign was of a type designated by the State Department of Public Works as a "W35R" wherein the word "slow" is written in reflectorized letters on a yellow background, and was mounted on a post to the side of the highway about 300 feet from the termination of the pavement, and is in the category of the ordinary "warning signs" commonly placed on highways. The planning manual of instructions issued by the Department of Public Works, Division of Highways, states with reference to this particular type of sign, "This sign must be sparringly used to prevent ineffectiveness."

A second sign of a type designated as "P.R.", consisted of the words, "Construction Zone—Drive Carefully," in six inch high black letters on a yellow background about 84 inches by 60 inches, was mounted between two posts about 100 feet from the termination of the pavement. The manual heretofore referred to, states in part with reference to this sign, "Use the P.R. sign in pairs to bracket the individual sections of a project where traffic is affected by construction work. Several pairs may be needed on one construction project * * *," and are to be located "on the right 100 feet to 800 feet in advance of construction activities." This sign is in the category of "Construction Type Signs" and, as the manual indicates, "on major highways, particularly where speeds are high, larger signs may be required," and "[d]ue to unusual conditions encountered on construction projects, the position may be varied to obtain maximum effectiveness."

A third sign, apparently not of the type described or set forth in the "Uniform Sign Chart" of the Department of Public Works, had, most of the time prior to the accident, been located in the center of the highway about fifty feet from the end of the pavement. This sign consisted of the word "Slow" in block letters a foot high, mounted on a barricade and equipped with an orange flasher. On one occasion the sign was placed on the shoulder of the highway, but appellant states in its brief that, "* * * at the time of the accident, this sign was apparently lying in the grass at the side of the road."

The job site was inspected regularly by a county inspector, and although the appellant states in its brief that the inspector "* * * testified that all warning signs were in place on the morning of the day of the accident," we find that the following is the testimony of the inspector:

"Q. Did you see it there on the 23rd? A. I visited the project on the 23rd, Mr. Sprague, to examine the signs, and I do not recall that it had been moved.

* * * * * *

"Q. Do you have a recollection of visiting there and seeing the signs on the 24th, or would it help your recollection if you were allowed to read your deposition on that subject? A. I have a record here of the time of day of my visit on the 24th at 10:15, and the purpose of my visit to Imperial and Luitweiler on June 24th was to examine the condition of the roadway, the signs, barricades, lights in place.

"Q. Is it your recollection that you saw the signs there, based upon the notation in your record? A. Well, as I say, I visited the project for that purpose. I have no record in here that anything was amiss.

"Q. Is the absence of any such record upon which you base your statement that the signs, and particularly the flasher light sign was in the center of Imperial Highway on the 24th of June? A. I think I would have noted anything amiss if I had noticed it."

Before the trial the plaintiff received $3,500 from the co-defendants (among them the construction company), and gave them a covenant not to sue and filed a dismissal as to said defendants.

The trial resulted in a verdict in favor of the plaintiff in the sum of $15,000, from which the $3,500 above referred to was deducted. This appeal followed.

Appellant contends that there was no evidence to support a finding that there was notice to the Board of Supervisors, or other person employed by the county authorized to remedy the dangerous or defective condition; that the driver of the car was guilty of negligence as a matter of law, and his negligence was impugned to the plaintiff; that the dismissal as to the co-defendants of appellant constituted a release as to the appellant; that the jury was erroneously instructed, and that the court erred in refusing to give certain instructions.

[1] It is conceded that the Public Liability Act, section 53051 of the Government Code, is the sole basis for imposing liability in this case.

In our opinion it was a question of fact whether the county inspector had notice of the condition at the place of the accident, and if he did have knowledge, such knowledge is chargeable to the county. See, Murphy v. County of Lake, 106 Cal.App. 2d 61, 234 P.2d 712; Balkwill v. City of Stockton, 50 Cal.App.2d 661, 123 P.2d 596; Newman v. County of San Mateo, 121 Cal. App.2d 825, 264 P.2d 594; Allen v. City of Los Angeles, 43 Cal.App.2d 65, 110 P.2d 75; Ackers v. City of Los Angeles, 40 Cal.App.2d 50, 104 P.2d 399; Bridges v. County of Los Angeles, 131 Cal.App.2d 151, 280 P.2d 76.

While we are cognizant of the ruling in Electrical Products Corp. v. County of Tulare, 116 Cal.App.2d 147, 253 P.2d 111, we do not consider it to be determinative of the present controversy, in which a different factual situation is before the court.

Appellant insists that the legislature has placed the responsibility for establishing uniform types of warning signs in the State Department of Public Works, and cites section 465.7, Vehicle Code, which in part reads:

"The State Department of Public Works shall determine and publicize the specifications for uniform types of warning signs, lights and devices to be placed upon a highway by any person, firm or corporation engaged in performing work which interferes or endangers the safe movement of traffic upon such highway."

Further, appellant states that the State having occupied the field, so to speak, the county would not be authorized to vary the requirements. Section 465(b) of the Vehicle Code provides, in part, as follows: "Local authorities * * * may place and maintain or cause to be placed and maintained, such appropriate signs, signals or other traffic control devices as * * * may be necessary properly to * * * warn or guide traffic."

It apparently is admitted in this case that the number three sign which was "lying in the grass at the side of the road," was not the type specified by the State Department of Public Works.

[2] Appellant next asserts that the driver of the plaintiff's car was negligent as a matter of law. The basis of the assertion is that the driver failed to obey the signs erected and therefore he did not exercise ordinary care. The traffic was heavy over the particular road; it was a fifty-five mile per hour zone, and prior to seeing the third sign the driver was traveling at about 50 to 55 miles per hour. He decreased his speed to 50 to 45 miles per hour. Whether his failure to see the signs, if he did not see them, was negligence under the circumstances and whether such was the proximate cause of the damages, were issues of fact for the jury to determine. Rath v. Bankston, 101 Cal.App. 274, 281, 281 P. 1081; Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768; Owen v. City of Los Angeles, 82 Cal.App.2d 933, 187 P.2d 860.

[3] We think that there is no merit to the claim of the appellant that the dismissal for a consideration of certain co-defendants constitutes a release of the appellant. See, Kincheloe v. Retail Credit Co., Inc., 4 Cal.2d 21, 46 P.2d 971; Holtz v. United Plumb. & Heating Co., 49 Cal.2d 501, 319 P.2d 617; Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99; Gerald v. San Francisco Unified School District, 121 Cal.App.2d 761, 264 P.2d 90.

It is uncontradicted that the plaintiff gave certain of the defendants a covenant not to sue, for which she received $3,500, and directed the dismissal of the action with prejudice as to those particular defendants. There was no thought of abandoning the action against the county. The parties who engaged in and made such an agreement were entitled to do so, but any dismissal as to the defendants paying the $3,500, operating as a bar to proceeding against the county was completely contrary to the intent of the parties.

[4] A complete reading of all of the instructions given by the court considered with the evidence convinces us that the jury was properly instructed. Appellant insists that the basis of liability must exist because of section 53051 of the Government Code, and therefore the giving of instructions respecting general negligence was clearly erroneous. Suffice it to say that the claimed negligence of the driver was before the jury and instructions on the subject were necessary to properly evaluate the conduct of the driver. The instructions as to principal and agent were proper under the circumstances. And as the respondent has set forth in her brief:

"The instruction regarding the inability of the County to abdicate its duty to exercise proper supervision over the work of third persons improving its streets was necessary to advise the jury that, where the requirements of the Public Liability Act were otherwise met, the County could not escape liability for a dangerous or defective condition simply because someone else created it or, in violation of its contract with the County, allowed it to remain or failed to warn thereof. Waldorf v. [City of] Alhambra, 6 Cal.App.2d 522 [45 P.2d 207]. Mulder v. City of Los Angeles, 110 Cal.App. 663 [294 P. 485].

"Since full instructions were given on the requirements for plaintiff to prove a case under the Public Liability Act, and thus no prejudicial error could result, any error which existed would not constitute ground for reversal. Silva v. Fresno County, 63 Cal.App.2d 253 [146 P.2d 520]."

[5, 6] As to the assertion that a violation of the penal provisions of the Vehicle Code is negligence per se, the correct rule is stated in Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, at page 590, 177 P.2d 279, at page 284:

"In the application of this rule each violation of a statutory requirement must be considered in connection with the surrounding circumstances. Ordinarily, the excuse relied upon by the violator presents a question of fact for the jury's determination. As stated in Scalf v. Eicher, supra, 11 Cal.App.2d [44] at page 54, 53 P.2d [368] at page 373: 'Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where "the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury."' (Citing cases.)"

[7] The court also instructed as to the life expectancy of the plaintiff, but omitted the qualifying conditions about normal health. As said in Newman v. Campbell, 23 Cal.App.2d 639, at page 641, 73 P.2d 1265, at page 1266:

"If the appellant desired an instruction explaining in more detail the weight to be given the elements fixing her life expectancy * * * such an instruction should have been offered. This was not done, and in the circumstances appellant has no ground for complaint."

[8] Appellant's last contention is that the jury should have been instructed that it is presumed that official duty has been regularly performed. Code Civ.Proc. § 1963(15). Under the circumstances of this case we are of the opinion that it was not error to omit such an instruction in the light of the evidence before the jury.

We have considered the remaining assertions and contentions of appellant not herein particularly pointed out, but we deem it unnecessary to comment further thereupon.

We find no prejudicial error in the record.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

160 Cal.App.2d 321

Bill TOSTEVIN, Plaintiff and Appellant,

v.

Jack DOUGLAS; and Jack Douglas Enterprises, Inc., a corporation, Defendants and Respondents.

Civ. 22958.

District Court of Appeal, Second District,
Division 1, California.
May 12, 1958.

Action for declaratory relief and accounting. The Superior Court of Los Angeles County, Leon T. David, J., granted a motion to strike the third amended complaint and dismissed the action, and plaintiff appealed. The District Court of Appeal, Lillie, J., held that an action which actually sought recovery for services rendered under oral contract to pay salary, though denominated an action for accounting and declaratory relief, was barred by two-year rather than four-year statute of limitations.

Affirmed.

1. Pleading ⊂=252(2)

Facts once alleged under oath cannot be withdrawn from consideration by merely filing an amended pleading eliminating them without explanation.

2. Frauds, Statute of ⊂=44(3)

An oral agreement for services to be rendered in connection with a television series "to be produced," without definite time for performance, and with payment to continue so long as program was broadcast throughout world, was not to be performed within a year and hence was within statute of frauds. West's Ann.Civ.Code, § 1624, subd. 1; West's Ann.Code Civ. Proc. § 1973, subd. 1.

3. Frauds, Statute of ⊂=46

A contract is invalid under statute of frauds when it is evident from subject matter that parties contemplated a longer period than one year as time for performance. West's Ann.Civ.Code, § 1624, subd. 1; West's Ann.Code Civ.Proc. § 1973, subd. 1.

4. Limitation of Actions ⊂=16

The nature of right sued upon and not form of action nor relief demanded determines applicability of statute of limitations.

5. Pleading ⊂=36(7)

Where original complaint and first amended complaint were verified, and plaintiff did not explain in subsequent amended complaints his reason for advancing date of alleged breach of oral agreement as originally alleged, under which cause of action would be barred by limitations, plaintiff was bound by prior allegations. West's Ann.Code Civ.Proc. § 339, subd. 1.

6. Limitation of Actions ⊂=21(3)

An action which actually sought recovery for services rendered under oral contract to pay salary, though denominated an action for accounting and declaratory relief, was barred by two-year rather than four-year statute of limitations. West's Ann.Code Civ.Proc. §§ 339, subd. 1, 343.

7. Account ⊂=1

There is no occasion for accounting where plaintiff seeks to recover what he alleges in complaint to be a sum certain to his knowledge.

8. Limitation of Actions ⊂=170

Until some conventional right of action has accrued, statute of limitations does not operate independently to cut off rights to bring action for declaratory relief; and after "coercive" right of action has accrued the alternative right to bring action for declaratory remedy continues concurrently, but after "coercive" remedy is barred by limitations, declaratory relief action may not be utilized to circumvent statute of limitations. West's Ann.Code Civ. Proc. §§ 339, subd. 1, 343.

9. Pleading ⊂=356(1)

Where changes made in second and third amended complaints were result of efforts to conform to a theory of recovery rather than to facts really existing, in attempt to circumvent statute of frauds and statute of limitations, such pleadings should be stricken from the files.

◆

Arthur M. Applebaum, Los Angeles, for appellant.

I. B. Kornblum, Los Angeles, David H. Kornblum, Beverly Hills, for respondents.

LILLIE, Justice.

This is an apeal from a judgment of dismissal following an order granting a motion to strike plaintiff's third amended complaint.

Plaintiff filed an action for declaratory relief and accounting on January 21, 1957. Thereafter he filed three verified amended complaints. In substance, they alleged that under an oral agreement entered into in May of 1954, defendants employed plaintiff to solicit and procure personnel and material for a series of travelog television shows at a fixed salary of $50 per week and that defendants repudiated the agreement and refused to be bound by it. Demurrers to the original, first and second amended complaints were sustained with leave to amend. Demurrer to the second amended complaint was sustained with directions that "to the extent that allegations vary from those in previous verified complaint, such variation must be explained." A third amended complaint was filed and the trial court granted defendants' motion to strike, "no substantial amendment having been made and no explanation having been made of changes from former complaint." The plaintiff having made no further amendment, the trial court entered its judgment of dismissal, from which this appeal is taken.

Appellant urges reversal of the judgment on the ground that the trial court abused its discretion in granting the motion to strike the third amended complaint and in ordering a dismissal of the action.

A review of the record discloses numerous changes in essential averments in the amended pleadings, none of which were ever explained or accounted for by the pleader. These unexplained changes constitute omissions, variations and contradictions in material allegations relating to the services required to be performed by plaintiff under the oral agreement, the termination date thereof and the time of defendants' repudiation.

Referring first to the services plaintiff was required to perform, the original complaint alleged that all services under the agreement were to be paid for by defendants—in the first amended complaint, all were to be performed voluntarily without compensation—and in the second and third amended complaints, only his services in securing personnel and material were to be paid for. More specifically, in his original complaint, plaintiff was to "solicit, procure and obtain personnel and material" for a series of travelog shows and "to conduct, supervise, prepare and produce the publicity and advertising of such travelog shows," for which "such services" he was to receive $50 per week. In the first amended complaint, plaintiff alleged that under the oral agreement his services of "conducting, supervision, preparation and production of publicity and advertising of and for said travelog shows, was agreed by said parties to be entirely voluntary upon the part of the plaintiff," for which he was not to be paid; and in the next paragraph further alleged that his sole duties under the agreement "were to contact such personnel and locate such material and refer such personnel" to defendants, "except, that plaintiff was to perform such duties upon a voluntary basis, without compensation." A fair reading of this complaint leaves plaintiff without compensation for any services to be performed under the agreement. The second and third amended complaints eliminated any reference to publicity and advertising; completely ignored the allegation in the first amended complaint that plaintiff's services of contacting personnel and locating material were to be voluntary and without compensation; and alleged that plaintiff was to be paid for them at a salary of $50 per week.

In a similarly ambiguous and contradictory state we find plaintiff's allegations relating to the time of defendants' repudiation of the agreement. In both the original and first amended complaints, plaintiff alleged that since May, 1954, immediately after the agreement was entered into, defendants refused to recognize plaintiff as the solicitor of personnel and material and as the producer of advertising and publicity under the agreement; and since May, 1954, refused to deal further with him. Plaintiff in his second and third amended complaints presented an entirely new version of when the repudiation took place, completely omitting any reference to prior allegations that defendants repudiated the agreement since May, 1954, and alleged for the first time that from May, 1954, to October, 1955, plaintiff performed certain services under the agreement and "That *thereafter* plaintiff demanded his compensation pursuant to said agreement, but the defendants refused to meet such demands." (Emphasis added.)

These variations and omissions are most serious because of the application of the statute of limitations. Plaintiff in his original complaint and first amended complaint swears that defendants repudiated the agreement since May, 1954, immediately after it was entered into; and in his second and third amended complaints, without any explanation therefor, he advanced the date of repudiation to October, 1955, a year and five months later. It is immediately obvious that, if plaintiff is to be bound by the allegations of fact in his prior verified complaints, if he had a cause of action for breach of the oral agreement, it was barred by the two-year statute of limitations when the original complaint was filed on January 21, 1957. Code Civ.Proc. § 339, subd. 1.

Equally serious are plaintiff's changes in various allegations relating to the termination date of the agreement. In his original complaint he alleged he was to receive compensation for his services in the sum of $50 per week, commencing June 1, 1954, and "continuing for an indefinite period" as long as the personnel and material procured by plaintiff are used on television throughout the world; and that defendants have been producing shows since May, 1954. No reference was made in this complaint to the term of employment under the agreement. Plaintiff's first amended complaint alleged that his "said employment was to continue for an indefinite period of time" to be determined by the length of time the series is shown on television and that his compensation of $50 per week was to continue for the same "indefinite period." Plaintiff in his second amended complaint eliminated the phrase "for an indefinite period of time" in connection with his employment and compensation and added a new account of how and when the agreement could be terminated. He alleged that his employment was to continue as long as the series was acceptable to and exhibited on television stations, either on a sustaining basis or as a commercial show paid for by a commercial sponsor; and for the first time plaintiff alleged that his services shall "continue until terminated by mutual agreement." His compensation for such services was to continue as long as the shows were exhibited on television. He also alleged that since May, 1954, defendants have been producing the series. The third amended complaint used the exact wording of the second except plaintiff added the following: "In other words, the plaintiff and the defendants agreed that as long as said series of travelog shows were marketable in that one or more commercial sponsors would show them for a consideration to be paid to the defendants, the plaintiff was to continue searching for, and continue to solicit, procure and obtain personnel and material for such series of travelog shows and the exhibition thereof as aforesaid." In the next paragraph with reference to compensation, plaintiff followed the wording of the second amended complaint, but added this language: "In other words, the plaintiff and the defendants agreed that as long as said series of travelog shows were marketable in that one or more commercial sponsors would show them for a consideration to be paid to the defendants, the plaintiff was to receive weekly compensation as herein set forth."

[1] Throughout these various pleadings, numerous material facts alleged under oath have been withdrawn from consideration, entire allegations have been omitted, and variations and changes in essential allegations resulting in contradictions and ambiguity have been effected; all without any explanation or justification. It is well settled that facts once alleged under oath cannot be withdrawn from consideration by merely filing an amended pleading eliminating them without explanation. Tognazzi v. Wilhelm, 6 Cal.2d 123, 56 P.2d 1227. The court, in Pike v. Archibald, 118 Cal.App.2d 114, at page 118, 257 P.2d 480, at page 483, commented: "As stated in respondent's brief, 'appellant should not be allowed to breathe life into a complaint by omitting facts, previously alleged in a verified pleading, which made it fatally defective.'" Similar language is found in Lee v. Hensley, 103 Cal.App.2d 697, 230 P.2d 159; Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Williamson v. Joyce, 137 Cal. 151, 69 P. 980; Neet v. Holmes, 25 Cal.2d 447, 154 P.2d 854; Neal v. Bank of America, 93 Cal.App.2d 678, 209 P.2d 825.

In permitting a third amendment, the court required that the complaint contain a substantial amendment. The result was the addition of that portion beginning "In other words," which was only a reiteration and repetition of the facts set out in the allegations in the second amended complaint previously questioned. No attempt was made in the third amended complaint to state new facts or to explain any variations. It was no more clear and free from defects, ambiguities and uncertainties than the prior complaints to which demurrers had been sustained, and no substantial amendment having been effected by the plaintiff, the court granted the motion to strike.

[2, 3] A consideration of the second and third amended complaints in the light of the statute of frauds, the statute of limitations and authorities relating to rules of pleading applicable to declaratory relief and accounting actions, leads us to the conclusion that plaintiff has failed to state a cause of action. At the outset, the alleged oral agreement by its terms was not to be performed within a year from the making thereof and is invalid and barred by the statute of frauds. Sec. 1624, subdivision 1, Civil Code; Sec. 1973, subdivision 1, Code of Civil Procedure. The Supreme Court, in the case of Swift v. Swift, 46 Cal. 266, at page 268, early laid down the rule that a contract is invalid under the statute of frauds "When it is evident from the subject matter of the contract that the parties had in contemplation a longer period than one year as the time for its performance." Long v. Cramer Meat & Packing Co., 155 Cal. 402, 101 P. 297; Edgar Bros. Co. v. Schmeiser Mfg. Co., 33 Cal.App. 667, 166 P. 366.

In the case at bar the oral agreement made in May, 1954, was for services in connection with a television series "to be produced" and no definite time for performance was alleged. Plaintiff, however, alleged that since May, 1954, defendants have been and are now producing the series in question. Since it is clear from the pleadings that payment was to continue so long as the program was broadcast throughout the world, the parties must have contemplated that the continued performance of the contract was to last more than one year from the date of making, as indeed it did. Appellants rely upon part performance to take the oral agreement out of the statute of frauds. According to the allegations in the original and first amended complaints, if plaintiff partly performed it was after defendants repudiated the contract in May, 1954, immediately after the agreement was entered into.

[4, 5] Although entitled, "Complaint for Declaratory Judgment and for an Accounting," the action is really one to recover an amount due for breach of the terms of an oral agreement. The nature of the right sued upon and not the form of the action, nor the relief demanded, determines the applicability of the statute of limitations. Maguire v. Hibernia S. & L. Soc., 23 Cal. 2d 719, 146 P.2d 673, 151 A.L.R. 1062. The court, in Bendien v. Solov, 89 Cal.App. 2d 904, at page 907, 202 P.2d 372, at page 374, discussed a similar situation: "There is no merit in plaintiffs' contention that the two-year statute of limitations is inapplicable to the present case because their suit was for an accounting. Entitling the action 'Complaint for an Accounting' does not change the character of the action. The character of the action is to be determined not from the relief demanded but from the allegations of the complaint." We hold under the authority of Pike v. Archibald, 118 Cal.App.2d 114, 257 P.2d 480; Slavin v. City of Glendale, 97 Cal.App.2d 407, 217 P.2d 984, and other cases hereinbefore cited, that having failed to explain in his second and third amended complaints the reason for advancing the date of defendants' repudiation, or breach, of the oral agreement from May, 1954, as alleged in his prior verified original complaint and first amended complaint, to October, 1955, he is bound by his prior allegations. According to them, his cause of action accrued in May, 1954, two years and eight months before the original complaint was filed. Clearly, plaintiff's cause of action was barred by

Sec. 339, subdivision 1, of the Code of Civil Procedure.

[6] Appellant seeks refuge in the four-year statute of limitations applicable to actions for accounting and for declaratory relief. Code Civ.Proc. § 343. No real cause of action for accounting appears in any of the pleadings. Plaintiff alleged that under the oral agreement, defendants were to pay him a fixed salary of $50 per week, commencing June 1, 1954, to continue as long as the series is exhibited anywhere in the world. Plaintiff prayed for an accounting for all monies to which he is entitled under the agreement; for a judgment in the sum of $7,900 for compensation due under the contract from June 1, 1954, to the date the complaint was filed; and for a further judgment in the sum of $50 per week thereafter for as long as defendants receive compensation for the showing of the series.

[7] Appellant relies heavily on the cases of Brea v. McGlashan, 3 Cal.App.2d 454, 39 P.2d 877, and Kritzer v. Lancaster, 96 Cal.App.2d 1, 214 P.2d 407. However, the facts in these cases differ materially from those at bar. In Brea v. McGlashan, supra, the pleader alleged that her compensation was to be in the form of a percentage of sums received upon contracts for radio advertising she procured. In praying for an accounting, she alleged that she did not know what monies had been received by defendant. Very clearly an accounting would be the only method of arriving at the amount due her. In Kritzer v. Lancaster, supra, the pleader alleged breach of an agreement to properly invest his money and sued for his loss based upon secret profits made by defendant with plaintiff's money. Plaintiff's loss there could not be ascertained without requiring defendant to make an accounting of money spent and profits made by him. In addition, a fiduciary relation was alleged. In the instant case, plaintiff was to receive a fixed salary of $50 per week for his services. As pleaded, this *amount per week* cannot vary in any way—with the number of people he refers to defendants, the amount of material used, the number of times it is shown, the length of time the series runs, or anything else. Plaintiff himself concedes this in fixing a sum definite, ($7,900) and praying for judgment in that amount. We fail to see for what reason plaintiff needs an accounting—certainly not to ascertain the amount due, which is a simple matter of mathematics and which he himself alleges in a sum certain. There is no occasion for an accounting where plaintiff seeks to recover what he alleges in his complaint to be a sum certain to his knowledge. Kinley v. Thelen, 158 Cal. 175, 110 P. 513.

The question as to how long plaintiff is to receive the $50 per week in the future does not in any way affect the amount plaintiff alleges is now due under the contract. Moreover, we fail to see how the court will be able to determine in advance how long a particular television series will run. The future of any television show, no matter how popular at the moment, is an unknown quantity in any calculation as attested to by many of our prominent ex-television personalities.

[8] As to declaratory relief, we think that no good cause of action therefor remains. Until some conventional right of action has accrued, the statute of limitations does not operate independently to cut off the right to bring one for declaratory relief, and after a "coercive" right of action has accrued the alternative right to bring an action for the declaratory remedy continues concurrently with the "coercive" right of action. *But* after the "coercive" remedy is barred by the statute of limitations, a declaratory relief action may not be utilized to circumvent the purpose of the statute. Martin v. Henderson, 40 Cal.2d 583, 255 P.2d 416; Toomey v. Toomey, 13 Cal.2d 317, 89 P.2d 634. The court made this clear in the case of Maguire v. Hibernia, supra, 23 Cal.2d at page 734, 146 P.2d at page 681: "We are of the opinion that the period of limitations applicable to ordinary actions at law and suits in equity should be applied in like manner to actions for de-

claratory relief. Thus, if declaratory relief is sought with reference to an obligation which has been breached and the right to commence an action for 'coercive' relief upon the cause of action arising therefrom is barred by the statute, the right to declaratory relief is likewise barred." The action for "coercive" relief in the instant case accrued in May of 1954 and is barred by the two-year statute of limitations. Hence, we believe that the cause of action for declaratory relief is likewise barred. It is apparent also that without an available remedy to enforce the obligation sued upon, there would be no real reason to have the rights of the parties thereon declared. In line with the general policy of the law to keep our courts free from needless litigation, the action in any event should be stricken from the files.

[9] In an attempt to state a good cause of action, plaintiff has drafted four different complaints to which either demurrers were sustained or motions to strike granted. In examining all of the pleadings, we find numerous inconsistencies, contradictions, ambiguities, conflicts and uncertainties which plaintiff has never explained or clarified. The second and third amended complaints utterly failed to, and indeed they could not under the sworn facts, remedy the defects in the previous pleadings. No substantial amendments were made even though plaintiff was given ample opportunity by the trial court to clarify ambiguities, amend insufficiencies, eliminate surplusages and explain mistaken statements. Plaintiff simply changed his story with regard to the terms and conditions of the oral agreement and the time of repudiation. We can only conclude that the various changes made by plaintiff in his second and third amended complaints were the result of efforts to conform to a theory of recovery rather than to the facts as they really exist, and that an obvious attempt was made to circumvent the operation of the statute of frauds and the statute of limitations. The court has the right to strike pleadings of this kind from the files. In Neal v. Bank of America, supra, 93 Cal.App.2d at pages 682, 683, 209 P.2d at page 827, the court, in affirming a judgment of dismissal, stated: "* * * the courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes. * * * In Santa Barbara County v. Janssens, 44 Cal.App. 318, 186 P. 372, it was held that an order striking an amended cross-complaint from the files was within the jurisdiction of the trial court, and presumably correct in the absence of error disclosed by the record. The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration. * * * It cannot be doubted that the court had jurisdiction to strike plaintiff's amended complaint on the ground that it was frivolous and a sham and the order clearly was not an abuse of discretion."

It was unquestionably proper for the trial court herein to sustain the demurrer to the second amended complaint with leave to amend. There is manifest in this record no abuse of the trial judge's discretion in granting the motion to strike the third amended complaint and the judgment of dismissal.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

**Carl F. W. BORGWARD, G.M.B.H.,
Petitioner,
v.
The SUPERIOR COURT of the State of
California IN AND FOR the COUNTY
of LOS ANGELES, Respondent.
A. W. Woolverton and E. G. Woolverton,
Real Parties in Interest.***

Civ. 23046.

District Court of Appeal, Second District,
Division 3, California.

May 9, 1958.

Hearing Granted July 2, 1958.

Mandamus proceeding to compel court to enter order quashing service of summons upon petitioner, which was a German manufacturer of automobiles. The District Court of Appeal, Vallée, J., held that where manufacturer of automobiles never maintained office, corporate agent, salesman, or representative in California, nor maintained a bank account or telephone listing in the state, and paid no salary or other compensation to any person within the state, and maintained no inventory in state or had any interest in any property, either real or personal, within state, and manufacturer had not entered into any contracts within state with sole exception of alleged contract, declaration of existence of which was sole remedy sought against manufacturer, and if such contract existed, it was a unilateral contract giving rise to no rights in manufacturer, contacts of manufacturer with state were not such as to make service of process on it constitute due process of law.

Peremptory writ of mandate issued.

1. Constitutional Law ⚿309(1)

Where German manufacturer of automobiles never maintained office, corporate agent, salesman, or representative in California, nor maintained a bank account or telephone listing in state, and paid no salary or other compensation to any person within state, and maintained no inventory in state or had any interest in any property, either real or personal, within the state, and manufacturer had not entered into any contracts within state with sole exception of alleged contract, declaration of existence of which was sole remedy sought against manufacturer, and if such contract existed, it was a unilateral contract giving rise to no rights in manufacturer, contacts of manufacturer with state were not such as to make service of process on it constitute due process of law. West's Ann.Code Civ.Proc. § 416.3.

2. Constitutional Law ⚿309(1)

If contacts of corporation with state are of a quality and nature which make it fair to corporation and reasonable and just according to traditional concepts of fair play and substantial justice to subject it to jurisdiction of courts of state, then service of process upon it constitutes due process.

◆

Overton, Lyman & Prince, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

Macbeth & Ford, Los Angeles, for real parties in interest.

VALLÉE, Justice.

[1] Petitioner, one of the defendants in an action for declaratory relief and damages brought by the real parties in interest herein, A. W. Woolverton and E. G. Woolverton, referred to as "Woolvertons," against Earle C. Anthony, Inc., referred to as "Anthony," seeks a writ of mandate pursuant to the provisions of section 416.3, Code of Civil Procedure, to compel the respondent court to enter its order quashing the service of summons upon petitioner.

Petitioner asserts service of process upon it did not constitute due process of law. We have concluded petitioner's contention must be sustained.

These facts are undisputed:

Petitioner is a corporation organized under the laws in Germany and having its place of business in Germany; it has not

* Opinion vacated 330 P.2d 789.

qualified to do business within California. It is engaged in the manufacture and sale of automobiles and automobile parts, all of which are produced in Germany. It has never maintained an office, corporate agent, salesman or representative in California, nor has it maintained a bank account or telephone listing in this state. It has not paid any salary or other compensation to any person within the state. It has not maintained an inventory in California nor has it any interest in property, either real or personal, within this state. It has not sold any of its products in California but has, in addition to its sales in Germany to its importers, on at least one occasion sold automobile parts to persons in California, which parts were ordered by mail and shipped from Germany.

Petitioner has a contract with Anthony. This contract was executed by Borgward in Germany on January 29, 1957; it was mailed to Anthony in California, who made certain modifications to the contract as executed by Borgward, executed it as modified and returned it to Germany where it was accepted by Borgward, as modified. Under this contract Anthony is given the exclusive right to purchase in Germany for export to the eleven western states of the United States, automobiles and automobile parts manufactured by petitioner. Anthony purchases and pays in Germany, prior to shipment, for all products purchased, and title passes to Anthony prior to shipment. Anthony selects its own distributors and dealers and sets the price at which it sells petitioner's products to distributors, all without consultation with, approval of, or authorization from petitioner.

Anthony is and for many years has been a corporation organized and existing under the laws of California and has been engaged in the business, among other things, of selling automobiles at wholesale and retail; and during the term of its contract with petitioner has sold, and under that contract is entitled to sell, automobiles and automobile parts manufactured by others which are in competition with petitioner's products.

Prior to January, 1957, one Thomson held exclusive rights to import petitioner's products into California.

The only employee or agent of petitioner who has been within the state of California in connection with any business of petitioner is one Knemeyer. Knemeyer is employed by petitioner to travel throughout the world to study market conditions and report to petitioner thereon, and has no authority to act in any manner for petitioner except when specific authority is given.

Knemeyer has been in California on but three occasions: In January 1956 when he remained for 14 days, in January 1957 when he remained for nine days, and in October 1957 for 14 days during which time he was served with process in the subject action. During his visit in January 1956 he negotiated a contract with Thomson and approved on behalf of petitioner a letter form of agreement under which Thomson secured the exclusive right to import petitioner's products in certain territory. In January 1957, while in California, he signed a letter terminating Thomson as importer. He also negotiated with Anthony for a contract between petitioner and Anthony and upon specific telephonic directions from his superiors in Germany, prepared and signed a letter purporting to appoint Anthony exclusive importer for all of petitioner's products for the western United States, subject to a contract being entered into between petitioner and Anthony. He signed this letter in the name of the corporation by himself as delegate general.

While the evidence is in direct conflict, there is evidence that after terminating Thomson's contract and while negotiating with Anthony Knemeyer gave certain assurances to the Woolvertons to the effect that should Anthony become exclusive importer for petitioner's products the Woolvertons would be appointed as distributors by Anthony; that they would retain the same dealers under Anthony as they had under Thomson; that petitioner would control Anthony and that Anthony would be fair to the distributors and not favor its own dealers; and that he, Knemeyer, had full authority from petitioner to settle the difficulties then existing between the importer and the distributors. All these assurances, if made, were given before Anthony was appointed exclusive importer and long before any contract existed between Anthony and petitioner. It is these assurances that form the basis for the alleged cause of action against petitioner in the action commenced by Woolvertons against Anthony and petitioner, and which Woolvertons seek to compel petitioner to litigate in this state.

There is no evidence that petitioner has, at any time, had any right to control or dictate to Anthony in regard to its contracts with or its relationship with distributors or dealers, nor any competent evidence that Knemeyer had any authority to act for petitioner so as to bind it as to any of the assurances allegedly made by Knemeyer.

In May of 1957, the Woolvertons entered into a contract with Anthony, under which they were given by Anthony the distributorship in certain territory for petitioner's products of which Anthony was importer. This agreement was for the period ending December 31, 1957. In August 1957, Anthony notified Woolvertons that it would not renew the agreement on its expiration date of December 31, 1957. Woolvertons, by mail, advised petitioner at Bremen of Anthony's action and petitioner forwarded a copy of this letter to Knemeyer who was then en route to the United States and Canada, asking him to investigate. Shortly after Knemeyer's arrival in California, he was served with the process in the subject action.

[2] Were the contacts of the petitioner with this state such as to make service of process on it constitute due process of law? There is no longer any quantitative yardstick that may be applied in determining whether the contacts of a foreign corporation with this state are such as to constitute doing business in this state and thus make it subject to the jurisdiction of the courts of this state. Each case must be decided on its own facts; and if, under those facts, the contacts of the corporation with the state are of a quality and nature "which make it fair to the corporation" and reasonable and just "according to our traditional conception of fair play and substantial justice" to subject it to the jurisdiction of the courts of this state, then the service of process upon it constitutes due process. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 160, 90 L.Ed. 95; Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485; Henry R. Jahn & Son, Inc., v. Superior Court, 49 Cal.2d 855, 323 P.2d 437.

The complaint in the subject action is in four counts. The first seeks declaratory relief as to Woolvertons' rights to a continuation of the contract of distributorship with Anthony. It does not allege a cause of action against petitioner. The only allegation as to petitioner is that it sent Knemeyer to Los Angeles *to mediate between Woolvertons and Anthony and that as such mediator he assured Woolvertons that Anthony would not terminate Woolvertons' distributorship as long as they performed their duties diligently and efficiently.*

The second count seeks an injunction against the termination by Anthony of its contract with Woolvertons; and while it alleges that it is the intention of petitioner to terminate that contract, it states no facts showing any right of petitioner or any power in petitioner to terminate a contract between Anthony and Wolvertons.

The third count seeks reformation of the contract between Anthony and the Woolvertons.

The fourth count seeks a judgment declaring that an oral contract exists between Woolvertons and petitioner whereby petitioner agreed that if plaintiff would enter into a distributorship agreement *with Anthony* that said agreement would not be terminated so long as Woolvertons performed the obligations of that contract on their part to be performed.

The fifth count alleges a conspiracy between Anthony and certain defendants sued under fictitious names, to interfere with the alleged oral contract between the Woolvertons and petitioner, and seeks damages on account of alleged acts done by Anthony and the unnamed persons pursuant thereto.

It is evident that Woolvertons, by their complaint, have failed to state any cause of action against petitioner, except one to have it declared that a contract arose out of certain alleged acts of its representative, which contract, if it exists, would be wholly unrelated to any business transacted by petitioner in this state but would relate solely to the performance of a contract between Woolvertons and a domestic corporation, against which corporation, if it breached its contract, Woolvertons have a full and adequate remedy.[1]

In the present case, petitioner has neither bought nor sold goods in this state, owned any property in this state, employed any persons in this state, nor had any agency in this state. It has not entered into any contracts to be performed within the state with the sole exception of the alleged contract with Woolvertons, the declaration of the existence of which is the sole remedy sought by Woolvertons against petitioner; and this contract, if one exists, is a unilateral contract which gives rise to no rights in petitioner; and the benefits of the contract to petitioner would be wholly incidental to the business conducted by it in Germany. Petitioner has not engaged in any activity whereby it reaped the benefit of the laws of this state or placed itself in a position to call upon our courts to enforce any rights arising out of any transaction in this state.

The fact that a large volume of petitioner's products are sold in California does not, in any wise, tend to establish the doing of business by petitioner in California for it is undisputed that when these products enter California they are not the property of petitioner and are not offered for sale or sold by it here. If petitioner were to be held subject to process here because its products were sold here by residents of this state, then any foreign corporation whose products, although sold abroad, are imported into this state, by the buyer, would likewise be subject to the process of our courts. It is inconceivable that the state should be held committed to such an unwise, unfair and unreasonable policy.

In our opinion, it would not be fair to petitioner, under the facts here, to make it subject to the jurisdiction of our courts; nor would it be in accordance with the traditional concepts of fair play or substantial justice so to do. Service of process on petitioner by serving Knemeyer did not, therefore, constitute due process.

Let a peremptory writ of mandate issue as prayed.

SHINN, P. J., concurs.

NOURSE, Justice pro tem. (concurring).

While I concur with the holding of the majority of this court that service of process on petitioner did not constitute due process of law, I am of the opinion that, even though its contacts were sufficient to render it amenable to the service of process under the rules laid down by the Supreme Court of the United States and by the Supreme Court of this state in the cases cited by the majority, still petitioner was not, under the statutes of this state, subject to the service of process.

What foreign corporations shall be subject to the service of process as well as how they shall be served, is a matter of legislative discretion. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 S. Ct. 413, 96 L.Ed. 485. "[W]here the legislature has provided for jurisdiction of a foreign corporation based upon something more than the minimum of due process (as that concept changes with the attrition of the years) it is not for the courts to set up some new and different standard." Confidential, Inc., v. Superior Court, 157 Cal. App.2d 75, 320 P.2d 546, 550.

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[1] It was admitted at oral argument that Anthony is financially able to respond to any judgment Woolvertons might obtain against it.

Section 411(2) of the Code of Civil Procedure provides that a foreign corporation "doing business" in this state may be served with summons in the manner provided by sections 6500–6504 of the Corporations Code. This section is purely procedural in character. It does not purport to define what constitutes "doing business" in this state. On the other hand, the legislative policy of the state as to what foreign corporations shall be subject to the jurisdiction of the courts of this state, and the manner in which that jurisdiction may be obtained, is set forth in part 11, title 1, division 1 of the Corporations Code. (This part includes sections 6200–6804 of the Corp.Code and will be hereinafter referred to as part 11.)

By section 6203 of the Corporations Code "doing business" is defined as: "'Transact[ing] intrastate business' means entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce."[1] By section 6300 of the Corporations Code, foreign corporations engaged solely in interstate or foreign commerce are excluded from the application of the provisions of part 11. It is thus apparent that the only foreign corporations which are subject to the provisions of part 11, including those provisions providing for the service of process (Corp.Code §§ 6500–6504), are those who have engaged in repeated and successive transaction of their business in this state.

Under the provisions of part 11, a corporation which has not engaged in business in this state, within the meaning of section 6203 of the Corporations Code, is not required to qualify to do business in this state or to appoint an agent upon whom service of process may be made, and it is only to foreign corporations required to so qualify or appoint an agent, that the provisions of sections 6500–6504 of the Corporations Code are applicable.

The codes are to be construed as a single statute (Armenta v. Churchill, 42 Cal.2d 448, 455, 267 P.2d 303; In re Porterfield, 28 Cal.2d 91, 100, 168 P.2d 706, 167 A.L.R. 675), and are to be construed so as to harmonize one with the other giving effect to all provisions if that be possible. People v. Trieber, 28 Cal.2d 657, 661, 171 P.2d 1; Southern Pac. Co. v. Railroad Comm., 13 Cal.2d 89, 100, 87 P.2d 1055; People v. Pryal, 25 Cal.App. 779, 781–782, 147 P. 114, 115.

If section 411(2) of the Code of Civil Procedure be construed as making subject to the process of the courts of this state, any foreign corporation having any contact with this state which would make service upon it amount to due process, even though those contacts were not such as to make the provisions of part 11 applicable to it, then the provisions of part 11 limiting its application to foreign corporations whose contacts with the state have amounted to "repeated and successive transactions" of its business in the state become meaningless and ineffective. On the other hand, if the definition of "doing business" as set forth in part 11 is applied to "doing business" as used in section 411(2), both statutes are made effective.

Undoubtedly the Legislature may, by appropriate statute, make a foreign corporation subject to the jurisdiction of our courts without that corporation having engaged in repeated and successive transactions of its business in this state; and under such statute a single contact with this state may be sufficient, depending upon the nature and character of that contact, to make substitute service of process upon it constitute due process. See Ins. Code, §§ 1610–1615; McGee v. International

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[1] "[T]o transact business" is synonymous with "to do business." General Conference of Free Baptists v. Berkey, 156 Cal. 466, 469, 105 P. 411, 412. It is significant that "carrying on business" is used as synonymous with "transacting business" in section 6804 of the Corporations Code.

Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223. The Legislature, however, has not sought to make foreign corporations, such as petitioner, engaged solely and purely in commercial business, so subject to process.

I am conscious of the fact that the Supreme Court of this state and the District Courts of Appeal[1] have applied the minimum contact theory of due process as set forth by the Supreme Court of the United States in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 and Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485. But, in none of the cases which have been cited to us has the effect of part 11 of title 1 of division 1 of the Corporations Code been discussed or mentioned.

The record before us is devoid of any evidence that would bring petitioner within the class of corporations subject to process under the provisions of sections 6500–6504 of the Corporations Code. It has not bought or sold goods in this state and while its contract with Thomson made in 1956, was made in this state, the contract did not constitute intrastate business but was solely in furtherance of the business conducted by it in Germany and a part of the petitioners' foreign commerce. Its termination of Thomson as the person having exclusive right to purchase in Germany and import into the western United States, petitioner's products, did not constitute intrastate business but was also merely a part of its business in Germany and inextricably a part of foreign commerce. Its act in seeking through Knemeyer to mediate between Thomson and the distributors and dealers appointed by him to sell the products which he had purchased from petitioner in Germany, did not constitute intrastate business, if it constituted an act of business at all. Its appointment of Anthony as the person having the exclusive right to import its products was but an incident to its business in Germany and cannot be considered apart from the contract it later entered into with Anthony, which having been finally consummated in Germany (by the acceptance there of the contract as modified by Anthony) was a German contract under which petitioner did not attempt to engage in any business in California but only to sell its products to Anthony in Germany with the exclusive right in Anthony to import those products as its own property into California.

The fact that Knemeyer acted as a mediator in an attempt to avoid dissension between Anthony should it become petitioner's importer and Woolvertons should they become a distributor under Anthony, did not constitute the transaction of any business by it in this state; nor does the fact that Woolvertons now claim that, in acting as a mediator, Knemeyer made statements which obligated petitioner to be responsible for any breach of contract by Anthony, change the situation. If their claims are well founded Knemeyer's act at most constituted but an isolated act incidental to petitioner's foreign commerce. In short, petitioner did not engage in "repeated and successive transactions" of business in this state and therefore is not subject to process under the provisions of section 6500 of the Corporations Code.

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[1] West Publishing Co. v. Superior Court, 20 Cal.2d 720, 128 P.2d 777; Thew Shovel Co. v. Superior Court, 35 Cal. App.2d 183, 95 P.2d 149; Boote's Hatcheries & Packing Co. v. Superior Court, 91 Cal.App.2d 526, 205 P.2d 31; Sales Affiliates, Inc., v. Superior Court, 96 Cal.App.2d 134, 214 P.2d 541; Koninklijke Luchtvaart Maatschappy v. Superior Court, 107 Cal.App.2d 495, 237 P. 2d 297; Fielding v. Superior Court, 111 Cal.App.2d 490, 244 P.2d 968; Iowa Mfg. Co. v. Superior Court, 112 Cal. App.2d 503, 246 P.2d 681; Kneeland v. Ethicon Suture Laboratories, 118 Cal. App.2d 211, 257 P.2d 727; Jeter v. Austin Trailer Equipment Co., 122 Cal. App.2d 376, 265 P.2d 130; Duraladd Products Corp. v. Superior Court, 134 Cal.App.2d 226, 285 P.2d 699; Eclipse Fuel Engineering Co. v. Superior Court, 148 Cal.App.2d 736, 307 P.2d 739; Gray v. Montgomery Ward, Inc., 155 Cal.App. 2d 55, 317 P.2d 114; Henry R. Jahn & Son, Inc., v. Superior Court, 49 Cal.2d 855, 323 P.2d 437.

To sum up, it is my opinion that the only foreign corporations which are subject to service of process under section 411(2), Code of Civil Procedure, are such corporations as have transacted business in this state within the meaning of section 6203 of the Corporations Code.

160 Cal.App.2d 528

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ralph Leonard PILGRIM, Defendant and Appellant.

Cr. 2801.

District Court of Appeal, Third District California.

May 15, 1958.

Rehearing Denied June 11, 1958.

Hearing Denied July 9, 1958.

Prosecution for committing lewd acts upon the body of a child under age of 14 years, and for a prior conviction for grand theft. The Superior Court, Solano County, Harlow V. Greenwood, J., entered judgment of conviction and denied defendant's motion for new trial and he appealed. The District Court of Appeal, Peek, Acting P. J., held that where defendant did not request to be allowed to conduct his own defense without the aid of an attorney who had been appointed for him, except in an advisory capacity, until after jury had been selected, and such request was granted, defendant was not denied his right to conduct his own defense.

Judgment and order affirmed.

1. Criminal Law 🔑641(1)

Where, in criminal prosecution, defendant did not request to be allowed to conduct his own defense without the aid of an attorney who had been appointed for him, except in an advisory capacity, until after jury had been selected, and such request was granted, defendant was not denied his right to conduct his own defense.

2. Witnesses 🔑349

In prosecution for committing lewd acts on a child under 14 years of age, defendant would not be deemed to have been unduly restricted in cross-examination, where apparent purpose of such questions was to show association by prosecuting witness with other persons, and possibility of her engaging in like immoral acts with them, since misconduct with others would in no way tend to prove defendant did not so act. West's Ann.Pen.Code, § 288.

3. Criminal Law 🔑673(5)

In prosecution for committing lewd acts on a child under 14 years of age, trial court properly instructed jury that evidence admitted without objection, relative to similar acts which prosecuting witness testified had been committed upon her person by defendant on a prior occasion was to be considered by the jury only in determining disposition of defendant towards the child and his intent at the time of the alleged offenses charged. West's Ann.Pen. Code, § 288.

4. Criminal Law 🔑1171(1)

In criminal prosecution, prosecuting attorney's reference to fact that defendant telephoned his wife from jail, even if such reference was improper, would not be deemed prejudicial, in view of fact that defendant admitted he was apprehended on date in question for being drunk in an automobile and that he was with a woman other than his wife and that he had telephoned his wife.

Richard H. Hoffelt, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., and Philip B. Lynch, Dist. Atty., Fairfield, for respondent.

PEEK, Acting Presiding Justice.

By an information defendant was charged with a violation of section 288 of the Penal Code and with a prior conviction for grand theft. The defendant entered a plea of not guilty to the principal charge and admitted the prior conviction. Following a verdict of guilty as charged, defendant moved for the appointment of psychiatrists to examine him as to his mental condition and for permission to make application for probation. His motion for a new trial was denied, and this appeal followed. Pursuant to defendant's request, Mr. Hoffelt was appointed by this court to assist him on his appeal.

[1] Defendant's first contention is that the court erred in refusing to allow him to conduct his own defense. The record shows that prior to trial the defendant appeared before the court on his request to subpoena witnesses. At this time he again stated, as he had at the time of his arraignment in the superior court, that he did not desire the services of counsel. The court noted the difficulties to be expected in a jury trial and appointed Mr. McInnis to assist him, and the services of counsel were accepted by defendant. When the cause came on for trial Mr. McInnis proceeded with the examination of the jury on voir dire, following which the defendant requested a conference in chambers at which time he again asked that he be allowed to conduct his own defense but that Mr. McInnis remain in an advisory capacity. Defendant's request was granted and the trial proceeded.

The cases cited and relied upon by defendant in support of his contention that he was not permitted to conduct his own defense are wholly inapplicable. The record, as previously noted, shows that defendant first accepted the appointment of Mr. McInnis. It was not until after the jury had been selected that he requested to be allowed to conduct his own defense with Mr. McInnis remaining in an advisory capacity, which request was granted. Under such circumstances he will not now be heard to contend that he was denied his right to conduct his own defense.

[2] It is next contended that defendant was unduly limited in his cross-examination of the prosecuting witness. On direct examination the witness had testified to certain acts committed on her person by the defendant. The apparent purpose of the questions asked on cross-examination was to show association by her with other persons and the possibility of her engaging in like immoral acts with them. While such testimony might well have shown such acts by others, it in no way would have refuted her testimony concerning the acts of the defendant. Stated otherwise, the fact that some other person might have done exactly what defendant did, would in no way have tended to prove that defendant did not so act.

[3] Additionally defendant contends that the court erred in instructing the jury relative to similar acts which the prosecuting witness testified had been committed upon her person by the defendant on a prior occasion. It is his argument that, absent a more particular showing as to the date of the commission of the prior acts, such evidence must be considered as being too remote. Furthermore he contends that such was uncorroborated. Hence any instructions thereon were improper. The record shows that the evidence was admitted without objection, and therefore it must be concluded that defendant waived any objection thereto. Since the evidence was before the jury, the judge properly instructed it thereon and properly limited the jury's consideration thereof to the disposition of the defendant towards the child and his intent at the time of the alleged offense charged. People v. LaMantain, 89 Cal.App.2d 699, 201 P.2d 598. Additionally it should be noted that the prior acts to which she testified, as well as the acts involved in the instant case, were all corroborated by the defendant himself.

[4] Defendant next contends that the prosecuting attorney, in his opening statement, committed prejudicial error by refer-

ring to the fact that defendant had telephoned his wife from the Vallejo jail. Even assuming that such reference in the opening statement was improper, it cannot be said that it was prejudicial. He admitted that he had been apprehended on the date in question for being drunk in a car; that he was then with a woman other than his wife; and that he had telephoned to his wife.

The final contention of defendant appears to be that from an examination of the entire record he was denied a fair and impartial trial, and hence was denied due process of law. In view of our conclusions upon the contentions made by defendant, there appears to be no basis whatever for such contention.

The judgment and order are affirmed.

SCHOTTKY, J., and WARE, J. pro tem., concur.

160 Cal.App.2d 460

John GUTTINGER, Louis B. Joses, Frank Oneto and Colombo Oneto, Plaintiffs and Appellants,

v.

CALAVERAS CEMENT COMPANY, a corporation, Defendant and Respondent.

Civ. 9278.

District Court of Appeal, Third District, California.

May 14, 1958.

Hearing Denied July 9, 1958.

Action to recover for damage allegedly caused by defendant's operation of its cement plant. The Superior Court, Calaveras County, J. T. B. Warne, J., determined that plaintiffs were limited to a proceeding to modify injunction previously obtained or to the institution of contempt proceedings, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that plaintiffs were entitled to sue for damage caused by defendant's violation of decree enjoining it from permitting to be discharged from its cement plant any more than thirteen percent of flue dust and raw mix which could be emitted from kilns, and held that plaintiffs could also sue for damage caused by changed conditions, such as increase in plant capacity, and that for damage so caused they would not be compelled to resort to equity.

Reversed.

1. Limitation of Actions 🔑55(6)

If nuisance may be discontinued at any time it is considered "continuing" in character; and every repetition of a continuing nuisance is a separate wrong for which person injured may bring successive actions for damages until nuisance is abated, even though action based on original wrong may be barred. West's Ann.Code Civ.Proc. § 338.

See publication Words and Phrases, for other judicial constructions and definitions of "Continuing".

2. Nuisance 🔑42

If defendant is not privileged to continue nuisance and is able to abate it, he cannot complain if plaintiff elects to bring successive actions for damages until abatement takes place.

3. Nuisance 🔑41, 42

Plaintiffs were entitled to sue for damage caused by defendant's violation of decree enjoining it from permitting to be discharged from its cement plant any more than 13 per cent of flue dust and raw mix which could be emitted from kilns; and plaintiffs could also sue for damage caused by changed conditions, such as increase in plant capacity, and for damage so caused they would not be compelled to resort to equity.

4. Judgment 🔑564(1)

Injunctive decree, predicated upon finding that if not less than 87 per cent of flue dust and raw mix from defendant's cement plant were recovered remaining 13 per cent could not be injurious to, nor interfere with, comfortable enjoyment of life or property of plaintiffs, constituted, until modified, a final adjudication that, with conditions as they were then, a discharge from plant into air of 13 per cent or less of flue dust and raw mix would not cause injury to plaintiffs and could not be a nuisance for which damages could be awarded; and to that extent such decree was a final adjudication and issues so decided could not be relitigated.

5. Estoppel 🔑91(1)
Nuisance 🔑18

Injunctive procedure was merely an additional remedy available to plaintiffs complaining of maintenance of nuisance by defendant on adjoining land, and they were not estopped, merely by reason of having previously procured injunctive relief, from bringing action at law to recover for damage allegedly caused by defendant's operation of its cement plant.

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Jones, Lane, Weaver & Daley, Stockton, for appellants.

Wallace, Garrison, Norton & Ray, San Francisco, and Huberty & Huberty, San Andreas, for respondent.

PEEK, Justice.

Plaintiffs sought to recover damages alleged to have been caused by the operation of defendant's cement plant which caused dust and chemicals to be deposited upon their lands. The defendant's answer admitted the operation of the plant, denied the material allegations of the complaint, and alleged as affirmative defenses that (1) the action was barred by the three-year statute of limitations, Code Civ.Proc. § 338; (2) the present action should be abated because the prior action was still pending; (3) the prior action is res judicata as to the issues raised in the present proceeding; and (4) the plaintiffs, having elected to pursue an equitable remedy in the prior case, they are now estopped from bringing the present action at law.

Pursuant to a motion of defendant the cause proceeded to trial on the affirmative defenses raised by the answer, and by stipulation of counsel the cause was submitted upon the record in the former case. Guttinger v. Calaveras Cement Co., 105 Cal. App.2d 382, 233 P.2d 914. The trial court concluded that defendant's special defenses numbers two, three and four constituted a bar to maintaining the present action but found in favor of plaintiffs on the first, in other words that plaintiffs were limited to a proceeding to modify the injunction or to institute contempt proceedings. Plaintiffs now appeal from that judgment. The sole question before this court is whether plaintiffs have the right to pursue an action at law for damages accruing to them from defendant's alleged continuing maintenance of an abatable nuisance.

The record shows that in the prior proceeding which was instituted in March of 1948, the present plaintiffs or their predecessors in interest brought an action against defendant to enjoin a nuisance and to recover damages alleged to have occurred during the three years immediately preceding the filing of the complaint and caused by defendant's operation of its cement plant. The findings of the court in that proceeding which are pertinent to the issues now before us were that the stack dust and raw mix in powdered form in quantities which theretofore had been and presently were being discharged from defendant's cement plant into the surrounding atmosphere constituted a nuisance which should be enjoined and abated; and that with a recovery of not less than 87% of said flue dust and raw mix the remaining 13% could not be injurious to, nor interfere with, the comfortable enjoyment of life or property of plaintiffs.

Pursuant to the findings the court gave injunctive relief as to all of the plaintiffs and awarded damages to some. The order, which read in part as follows, restrained the defendant "* * * from permitting to be discharged from its stack * * * stack dust and/or raw mix in powdered form, in excess of thirteen per cent (13%)

of all flue dust and/or raw mix in powdered form which would, or could, be emitted or discharged from said kilns, or any thereof * * *" and ordered that defendant keep each precipitator unit in good operating condition in order to provide "* * * within reasonable limits, maximum operating efficiency, and with a dust recovery efficiency of not less than eighty-seven per cent (87%) at all times * * *."

[1] It is apparent from the conclusion of the trial court in the first proceeding that the nuisance was not permanent and that the same could be abated. As noted in Phillips v. City of Pasadena, 27 Cal.2d 104, 107–108, 162 P.2d 625, 626: "* * * if the nuisance may be discontinued at any time it is considered continuing in character. [Citations.] Every repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred. [Citations.]"

[2–4] Properly, therefore, plaintiffs were granted injunctive relief and damages for the past injuries suffered to their property. Thus it follows, "If the defendant is not privileged to continue the nuisance and is able to abate it, he cannot complain if the plaintiff elects to bring successive actions as damages accrue until abatement takes place." Spaulding v. Cameron, 38 Cal.2d 265, 268, 239 P.2d 625, 628. Hence plaintiffs were entitled to sue for damages caused by defendant's violation of the decree (H. J. Heinz Co. v. Superior Court, 42 Cal.2d 164, 266 P.2d 5; Rhodes v. San Mateo Investment Co., 130 Cal.App.2d 116, 118, 278 P.2d 447; Yates v. Kuhl, 130 Cal. App.2d 536, 279 P.2d 563), for damages caused by changed conditions, such as an increase in plant capacity, and for the damages so caused they are not compelled to resort to equity. But the equitable decree, while it does not bar the present action, is nevertheless, until modified, a final adjudication that with conditions as they were then, a discharge from the plant into the air of 13% or less of "flue dust and/or raw mix in powdered form" does not cause injury to plaintiffs and is not as to them a nuisance for which damages may be awarded. To the extent specified, that decree is a final adjudication and they may not relitigate the issues so decided. Therefore plaintiffs are precluded from asserting any claim that, without change in the controlling facts on which the decree rested, and without violation of that decree by the defendant, they may yet make proof of injury and recover damages therefor. We do not understand that plaintiffs contend otherwise for in their closing brief they say:

> "Hence, so long as conditions remained the same as they were in 1949 when the trial court made its finding of fact, and so long as the Respondent did not violate the terms of the Court's order, it may be assumed that no damage would result. But Appellants have alleged substantial damage to their lands after the Court's finding of fact and from the same source as that from which their original damage occurred. Consequently, either Respondent has violated the 1949 injunction, or the circumstances which existed at the time that the injunction was issued have changed."

[5] Defendant's further defense, that the plaintiffs, having secured injunctive relief in the prior proceeding, they are now estopped from bringing the present action in law, is likewise without merit. As we held in Yates v. Kuhl, supra, the injunctive procedure was merely an additional remedy available to plaintiffs. The granting of such relief in the original proceeding did not preclude plaintiffs from pursuing their present action for damages. Had they done so the court would have had no authority in a contempt proceeding to award compensatory damages resulting from the viola-

tion of the injunction. H. J. Heinz Co. v. Superior Court, supra.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

160 Cal.App.2d 355

Rexford GREENE and Helen Greene, Plaintiffs and Respondents,

v.

August M. COLBURN and Ruth V. Colburn, Defendants and Appellants.

Civ. 22622.

District Court of Appeal, Second District, Division 3, California.

May 12, 1958.

Action for reconveyance of land against defendants, who had made loan to plaintiffs for down payment on purchase of realty and who had received deed from owner. The Superior Court of Los Angeles County, Eugene P. Fay, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Vallée, J., held that where it was agreed between defendants and plaintiffs that when balance was paid to owner, defendants would execute deed to plaintiffs and plaintiffs would execute deed of trust in favor of defendants to secure amount of down payment, but owner gave deed to defendants who stated they took deed so as to secure investment and so as not to have to foreclose in event of default, defendants were equitable mortgagees, and upon payment of balance due, plaintiffs were entitled to have property conveyed to them free of mortgage.

Affirmed.

1. Mortgages ⇨37(2)

A deed which is absolute on its face may be shown by parol evidence to have been intended as a mortgage to secure payment of a debt or for the performance of an obligation. West's Ann.Civ.Code, § 2924.

2. Mortgages ⇨32(2)

Intention of parties must govern as to whether transaction is a mortgage, and it matters not what particular form that transaction might take. West's Ann.Civ. Code, § 2924.

3. Mortgages ⇨32(2, 6), 39

Whether a deed, absolute in form, is to be considered a mortgage is question of intention to be inferred from all facts and circumstances, taken in connection with conduct of parties after its execution, and whether evidence offered to change ostensible character of instrument is clear and convincing and whether instrument was intended to secure payment of subsisting debt are matters for trial court. West's Ann.Civ.Code, § 2924.

4. Appeal and Error ⇨1011(1)

Determination of trial court on conflicting evidence is not open to review.

5. Mortgages ⇨30

Where lenders lent borrowers down payment for purchase of property from owner, and it was agreed between lenders and borrowers that when balance was paid to owner, lenders would execute deed to borrowers and borrowers would execute deed of trust in favor of lenders to secure amount of down payment, but owner gave deed to property to lenders, who stated deed was taken to secure investment and so as not to have to foreclose in event of default, lenders were equitable mortgagees, and upon payment of balance due, borrowers were entitled to have property conveyed to them free of mortgage. West's Ann.Civ.Code, § 2924.

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Gray, Glass, Allen & Ransom, Gardena, for appellants.

Floyd H. King, Long Beach, for respondents.

VALLÉE, Justice.

Appeal by defendants from a judgment decreeing plaintiffs are the owners in fee simple of certain realty subject to a mortgage for $1,800 in favor of defendants and that defendants reconvey the realty to plaintiffs free of the mortgage on receipt of $1,800 within five days after entry of judgment.

Charles Quandt was the owner of the realty. In the first part of May 1947 plaintiff Rexford Greene told defendant August Colburn he was interested in buying the realty. On May 23, 1947 Greene agreed to buy from Quandt for $3,500 with a down payment of $1,500, the balance at $35 a month including interest. Colburn loaned Greene $1,500 to make the down payment and Greene agreed to pay Colburn $7.50 a month as interest on the $1,500 loan. It was agreed between Greene and Colburn that when the balance of $2,000 was paid Colburn would execute a deed to the property to Greene and the latter would execute a deed of trust in favor of Colburn to secure the $1,500 and pay the same at the rate of $35 a month including interest.

Quandt showed Greene a deed to the property and Greene signed what he thought was a deed of trust in favor of Quandt for the $2,000. Greene thought the deed Quandt showed him was delivered to Colburn as additional security. However, Quandt conveyed the property to Colburn and Colburn executed a deed of trust for the $2,000. Greene did not know the property was conveyed to Colburn. He first learned this in March 1955 during an unlawful detainer proceeding brought by Colburn against Greene. Colburn testified he took the Quandt deed so as to be secure in his investment and not to have to foreclose in the event of default. Mrs. Colburn testified they took the deed from Quandt as security.

Greene took possession of the property from Quandt about May 23, 1947 and remained in possession continuously until the trial of this action. During that time he improved the property. He paid the taxes until 1950. After that time he was financially unable to and Colburn paid the taxes. In March 1951 Colburn and Greene agreed that Colburn would pay the taxes and Greene "could pay him at the tail end of the agreement" with interest. They also agreed that when the $2,000 was paid by Colburn, Greene would make the monthly payments of $42.50 to Colburn so as to set up a reserve for taxes. The $2,000 was fully paid by about February 1953. Greene was unable to make the February 1955 payment.

In March 1955 Colburn told Greene he (Colburn) was the owner of the property. In April 1955 Colburn brought a proceeding in unlawful detainer against Greene. Greene prevailed. About November 1955 Greene offered to pay Colburn in full. Colburn demanded $2,000, which was more than he was entitled to. This action followed.

It was stipulated at the trial that the amount unpaid by Greene with interest was $1,800.

The court found: about May 23, 1947 the Greenes, as mortgagors, and the Colburns, as mortgagees, entered into an agreement whereby defendants agreed to loan the Greenes the purchase price of the realty and in consideration therefor they agreed to repay the purchase price of $3,500 in monthly installments of $42.50 inclusive of interest; it was agreed that the $3,500 would consist of two separate loans: one for $2,000 repayable at $35 a month or more inclusive of interest commencing July 1, 1947, the other for $1,500 repayable at $35 a month or more inclusive of interest commencing after the loan of $2,000 was paid in full; pursuant to the agreement defendants loaned plaintiffs the $3,500; Quandt executed the deed to Colburn to hold on behalf of the Greenes to secure the repayment of the $3,500; it was agreed between the Greenes and the Colburns that the latter would execute their grant deed to the property to the Greenes when they tendered or paid the $3,500. Judgment for plaintiffs followed, from which defendants appeal.

[1] It is urged the evidence is insufficient to justify the finding that there was an equitable mortgage. The point is untenable. Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage. Civ.Code, § 2924. A deed which is absolute on its face may be shown by parol evidence to have been intended as a mortgage to secure payment of a debt or for the performance of an obligation. Gronenschild v. Ritzenthaler, 81 Cal.App.2d 138, 144, 183 P.2d 720; Jensen v. Friedman, 79 Cal. App.2d 494, 498, 179 P.2d 855.

[2–4] The test of a mortgage is whether the relation of debtor and creditor continues so that there is a subsisting debt after the conveyance; and where a deed, absolute on its face, is given to secure a debt, it will be held to be a mortgage. The intention of the parties must govern, and it matters not what particular form the transaction may take. Chapman v. Hicks, 41 Cal.App. 158, 162, 182 P. 336. Whether a deed, absolute in form, is to be considered as a mortgage is a question of intention to be inferred from all the facts and circumstances of the transaction in which the deed was executed, taken in connection with the conduct of the parties after its execution. Morris v. Rickmeyer, 28 Cal.App.2d 253, 257, 82 P.2d 472. Although, as here, the transaction involves three parties rather than two, wherein the one who takes title to the property holds it as trustee for the party to whom he loaned the purchase money, and also holds a lien as mortgagee for repayment of the loan, the usual rules applying to a deed absolute-mortgage case apply. Wilcox v. Salomone, 118 Cal.App. 2d 704, 710, 258 P.2d 845. Whether the evidence offered to change the ostensible character of the instrument is clear and convincing and whether it was intended to secure the payment of a subsisting debt are matters for the trial court. Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583; Couts v. Winston, 153 Cal. 686, 688–689, 96 P 357. The determination of the trial court on conflicting evidence is not open to review. Sherman Sandell, 106 Cal. 373, 375, 39 P. 797; Wadleigh v. Phelps, 149 Cal. 627, 637, 87 P. 93; Wilcox v. Salomone, 118 Cal.App.2d 704, 710, 258 P.2d 845.

[5] The evidence supports the findings. Colburn testified he took the Quandt deed as security for his investment. Mrs. Colburn testified the deed was taken as security. It is a fair inference from the evidence that the money paid by Colburn to Quandt was a loan to the Greenes. That the parties intended the deed from Quandt to the Colburns to be a mortgage to secure payment of the money loaned the Greenes by the Colburns fairly appears from the evidence. The relationship of debtor and creditor continued so that there was a subsisting debt after the conveyance. There was ample evidence to support the conclusions of the trial court.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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160 Cal.App.2d 256

Arthur TESCHE and Katherine Tesche, Plaintiffs and Respondents,

v.

BEST CONCRETE PRODUCTS, Inc., et al., Defendants,

Best Concrete Products, Inc., Bernard Blondin, Sr., Defendants and Appellants.

Civ. 17628.

District Court of Appeal, First District, Division 1, California.

May 9, 1958.

Rehearing Denied June 6, 1958.

Hearing Denied July 2, 1958.

Action by parents against concrete products company for death of minor who died in cement mixing machine. The Superior Court, County of Alameda, Chris B. Fox, J., entered judgment for parents and concrete products company appealed. The District Court of Appeal, Fred B. Wood, J., held that where employee of concrete products company permitted his son and the minor in premises near concrete mixer and employee's son operated mixer without close supervision and company's foreman knew of employee's son's presence in plant on previous occasions, company was liable for death of minor when employee's son turned switch on mixer and minor was cut in half, even though neither employee's son nor the minor were employees.

Affirmed.

1. Negligence ⚷119(7)

There was no fatal variance between complaint that concrete products company negligently permitted two minors to work around and assist in cleaning of dangerous machinery, inviting them to be on and about the premises and proof of negligence on part of an employee, father of one of minors, in permitting his son to clean and operate dangerous machinery and negligence of son in turning on power without taking precautions to see that no one was in such close proximity to machine's blades in absence of allegation that concrete products company was taken by surprise by any of evidence which they asserted was at variance with allegations of complaint.

2. Negligence ⚷24

Where employee of concrete products company permitted his son and another boy in premises near concrete mixer and son operated mixer without close supervision and company's foreman knew of son's presence in plant on previous occasions, company was liable for death of other boy when employee's son turned switch on concrete mixer and other boy was cut in half, even though neither employee's son nor other boy were employees.

3. Negligence ⚷20

Where concrete products company employee permitted his son and another to be in premises near a concrete mixer and company's foreman knew of boy's presence and employee's son pushed switch which started concrete mixer in operation and cut other boy in half, even if employee's son were not negligent, in view of his youth, that fact would not exculpate employee or company from responsibility for other boy's death.

4. Negligence ⚷135(1)

Plaintiff in a negligence action does not have to affirmatively and positively disprove contributory negligence.

5. Negligence ⚷122(6)

Where two minor boys were invited on premises of concrete products company and were in vicinity of a concrete mixer and one of boys was cut in half when other boy started concrete mixer, fact that parents of deceased boy failed to prove, in action for his death, that he did not voluntarily get in mixer with knowledge of impending danger did not relieve company for responsibility for death of boy.

6. Death ⚷58(1)

In negligence cases, there is a presumption that deceased has exercised ordinary care for his own concerns, and this presumption is not dispelled as a matter of law unless disproved by uncontradicted evidence, wholly irreconcilable with presumption, produced by party invoking presumption, under circumstances which afford no indication that such evidence is product of mistake or inadvertence.

7. Negligence ⚷122(6)

Where two minor boys were invited on premises of concrete products company and one of boys was killed when concrete mixer was placed in operation, testimony that deceased boy was interested in machinery, was familiar with dangers of moving machinery, and that he was last seen near mixer, did not dispel presumption that boy exercised ordinary care for his own concern.

8. Appeal and Error ⚷1064(1)
Negligence ⚷139(1)

In action by parents of deceased boy against a concrete products company for death of boy killed by a cement mixer while on visit to plant, trial court did not commit prejudicial error in instructing jury on provision of Labor Code prohibiting the employment of minors under 16 years of age or permitting or suffering him to work in certain places or under certain conditions such as operating or assisting in operating a mixing machine and instruction was proper even though minors were not employees. West's Ann. Labor Code, §§ 1290–1292(c), 1293(f), 1294(i).

9. Appeal and Error ⚷1064(1)

In action by parents of deceased minor boy against concrete products company for death of boy cut in half by concrete mixer, while he was an invitee at concrete products company, trial court did not prejudicially err in reading to jury text of General Industrial Safety Orders to effect that during repair work, a machine shall be locked or steps taken to insure machine shall be disconnected from its source of power on theory safety orders were designed for protection of employees only and locking requirements of safety order were intended for minor boy's benefit and protection quite as much as if he were an employee of company. West's Ann.Labor Code, §§ 1290–1294.

10. Trial ⚷241

General Industrial Safety Order providing that during repair work a machine shall be locked or steps taken to insure that machine shall be disconnected from its source of power, was properly read in instruction in negligence case involving a minor, an invitee to concrete products company, who was killed when blade of mixing machine cut him in half during a cleaning operation of machine inasmuch as word "repair" encompassed cleaning operations which included removal of cement which had adhered to blades of concrete mixer and which would have impaired efficient operation of mixer unless and until removed. West's Ann.Labor Code, §§ 1290–1294.

See publication Words and Phrases, for other judicial constructions and definitions of "Repair".

Woodrow W. Kitchel, Oakland, D. W. Brobst, Oakland, of counsel for appellants.

Quaresma & Rhodes, Fremont, for respondents.

FRED B. WOOD, Justice.

Plaintiffs were awarded $10,855 for the loss of their 15-year old son Robert who suffered death in a cement mixing machine at the plant of defendant Best Concrete Products, Inc.

The company and Bernard Blondin, Sr., its employee in charge of the machine at the time of the accident, have appealed. They claim (1) a fatal variance between pleading and proof, (2) insufficiency of the evidence, and (3) giving the jury erroneous instructions.

Our examination of the record convinces us that these claims are not well founded and that the judgment should be affirmed. A summary of significant facts in evidence will serve as an answer to most of these claims.

The Facts In Evidence

Defendant Best Concrete Products, Inc., owned a plant for the manufacture of concrete building blocks. The plant contained a cement mixer seven feet long and about three feet deep. Inside it had two flat blades approximately six inches wide, and half an inch thick set in a spiral. The mixer was electrically operated, and to set it in motion it was necessary to set a pull lever switch on the main panel, a push button switch on a pole and engage the clutch. Neither switch was locked.

Defendant Bernard Blondin, Sr., worked in the evenings at Best Concrete Products cleaning up the machinery and loose cement. His 13-year old son, Bernard, Jr., and plaintiffs' decedent, 15-year old

Robert, accompanied him on occasion. Bernard, Jr., had been going with his father to the plant for about a year, and Robert had gone eight or nine times over a period of a month or six weeks before his death. Larry Chenoweth, the yard foreman at the plant, was present on some occasions when the boys were there. The owner, Harold Best, was there on one occasion when Robert was at the plant and also had seen the Blondin boy there. Best had cautioned Blondin, Sr., in reference to his son, not to let the boy get too close to the machinery, nor to let him operate the machinery or be near it when it was in operation.

On the day of the accident, Mr. Best was not at the plant but Larry Chenoweth was. Blondin arrived at about 6 o'clock with the two boys. After changing clothes Blondin kicked the clutch lever toward the position that disengages the connection between the electric motor and the mixer. While doing it, he thought of something he wished to discuss with Mr. Chenoweth, and continued around the mixer and talked to Chenoweth. Blondin then went about his work, and the boys cleaned loose concrete from underneath and around the mold.

The Blondin boy finished first and asked his father if he could start cleaning the mixer. He had done this before. The mixer was cleaned by knocking off, with a hammer, the material that had built up on the blades and ends of the mixer. The material knocked off was then dumped through the bottom. Care must be exercised in the way the hammer is used because otherwise a blade might break. The Blondin boy had been instructed in the use of the hammer, but Robert had not.

Mr. Blondin testified that he knew his boy was in the mixer because he could hear him hammering, and he saw Robert standing near the mixer watching. Robert was facing the mixer. Mr. Blondin heard the mixer motor starting and saw Robert out of the corner of his eye going into the mixer. He did not know whether he was stepping in or falling in. He could not tell how he was facing. He ran to the side of the mixer, saw his son pushing the stop switch. He jumped into the mixer and rode the blades with his feet to stop them. Robert was in the mixer, cut in half. The blades start at almost full speed.

Bernard Blondin, Jr., testified that he got inside the mixer to clean the blades with the hammer. Robert was then standing near the mixer, facing him, watching him. Robert asked whether he could come inside and help Bernard, but Bernard told him he could not because Mr. Blondin had not cautioned him on how to do it and he might crack the blades. Bernard did not remember saying anything else to Robert, then climbed out, put the sledge hammer behind the iron gate, and then went to the switch and turned the machine on and off. He stated that this was done so the loose cement would fall to the bottom. After he had flipped the switch on and off, he heard Robert yelling his name. He did not see Robert falling into the mixer or climbing on it. The hammer was later found in the mixer.

Mr. Best testified that none of the switches nor the clutch had locks. The safety engineer of the California Division of Industrial Safety testified to the same thing; also, that it was possible to turn the blades without turning the machinery on by disengaging the clutch and using a lever.

Discussion

[1] (1) *There was no fatal variance between pleading and proof.* The gist of the complaint was that defendant negligently permitted these two minors to work around and assist in the cleaning of dangerous machinery, inviting them to be on and about the premises; that these minors were too young and inexperienced to foresee the danger incident thereto; and that the injury and death of Robert resulted therefrom. We think these allegations reasonably embrace the concept of negligence upon the part of Blondin, Sr., in permitting his son to clean and operate the mixer

and negligence of the son in turning the power on without taking precautions to see that no one was in such close proximity to the blades as likely to be injured. Nor have the defendants indicated that they were taken by surprise by any of the evidence which they now assert was at variance with the allegations of the complaint.

[2, 3] (2) *Defendants' attack upon the sufficiency of the evidence* is based upon the erroneous theory that the company could not be liable unless the boys were its employees, which they were not. They were invitees brought there by Blondin, Sr., the company's employee charged with the cleaning of the mixer, with the knowledge of another employee, foreman in charge of the plant or of this portion of it. Also, Kenneth Best, a stockholder and son of the president of the company, employed in a sales capacity, had seen both boys there on one occasion; Blondin, Jr., on many occasions. Here is a sufficient basis for holding the company liable for the results which flowed from the negligence of Blondin, Sr., in permitting his son to operate this machinery, at least without close supervision, and the negligence of Blondin, Jr., in conducting that operation. Indeed, even if Blondin, Jr., were deemed not negligent, in view of his youth, that, of itself, would not exculpate his father and the company.

[4, 5] Defendants claim also that there is a gap in the chain of causation because it does not appear precisely how Robert got into the mixer and onto the blades. They seem to argue that there is thus a failure to prove that Robert did not voluntarily get into the mixer with knowledge of impending danger. That, in effect, is an argument that a plaintiff must affirmatively and positively disprove contributory negligence, which is not the law.

[6, 7] Moreover, there is the presumption that the deceased in such a case as this exercised ordinary care for his own concerns, a presumption that is not dispelled as a matter of law unless disproved by uncontradicted evidence, wholly irreconcilable with the presumption, produced by the party invoking the presumption, under circumstances which afford no indication that such evidence is the product of mistake or inadvertence. Gigliotti v. Nunes, 45 Cal.2d 85, 92–93, 286 P.2d 809; Ribble v. Cook, 111 Cal.App.2d 903, 907, 245 P.2d 593. We find no such evidence in this case. Testimony that Robert was interested in machinery, was familiar with the dangers of moving machinery, and that he was last seen near the mixer, did not dispel the presumption as a matter of law.

[8] (3) *Did the court commit prejudicial error when instructing the jury? No.*

The court read to the jury the text of sections 1290, 1291, 1292(c), 1293(f) and 1294(i) of the Labor Code, prohibiting the employment of a minor under the age of 16 years or permitting or suffering him to work in certain places or under certain conditions such as "operating or assisting in operating" a mixing machine or "in any occupation dangerous to the life or limb * * * of such minor."

Defendants contend that the provisions of these code sections apply only to "employees" and were, therefore, here inapplicable because Robert was not an employee of either. They also claim that these sections are inapplicable upon the ground asserted by them that Robert did not operate the cement mixing machine nor was he engaged in cleaning it. We think this is too narrow a view of the scope and purpose of these code sections; also, it ignores the fact that defendant Blondin's son, a mere 13-year old who was at the time of this accident engaged in cleaning the cement mixing machine, did operate it.

It was, we believe, within the province of the jury to decide whether permitting or suffering Blondin, Jr., to do these things was negligence. The trial court told the jury that if a party to this action violated any of these code sections or such portions thereof as are pertinent to this case, a presumption arises that such party was negligent. The court informed the jury that this presumption is not conclusive; it may be overcome by other evidence showing that under all the circumstances surrounding the event the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence; unless the jury finds that this presumption is overcome by other evidence, the jury is bound to find in accordance with the presumption; however, in this action a violation of law is of no consequence unless it was a proximate cause of or contributed in some degree as a proximate cause to any injury found by the jury to have been suffered by the plaintiff.

[9] The court also read to the jury the text of subdivisions (b), (c) and (d) of section 3276 of the General Industrial Safety Orders of the State Department of Industrial Relations and in respect thereto gave the jury instructions similar to those given in connection with sections 1290 to 1294 of the Labor Code.

Section 3276 provides that during repair work, a machine shall be locked or steps taken to insure that the machine shall be disconnected from its source of power. Here, the controls admittedly were not locked, were not capable of being locked. If they had been locked, Blondin, Jr., could not have attempted the dangerous part of the cleaning operation, or would have been forced to turn the blades by hand. (Turning them by hand was deemed preferable by a Safety Engineer who testified.) Moreover, there were three separate operations that had to be carried out to put the machine in operation. The main switch had to be pulled; the button on the pole had to be pushed; and the clutch, which was right next to the machine, had to be engaged. Apparently the main switch was on and the clutch engaged during the entire operation, because Blondin, Jr., testified that he merely climbed out of the mixer, went to the pole and flipped the switch. If the clutch had not been engaged, he probably would have seen Robert in the mixer, or dangerously close to it, before he put the machine in motion.

Defendants also argue that the safety orders were only designed for the protection of employees; hence, that Robert was not a person of the class to whom defendants owed a duty to comply with these orders. The answer to this contention is furnished by Porter v. Montgomery Ward and Co., 48 Cal.2d 846, 313 P.2d 854, holding admissible in evidence an industrial safety order which required a center handrail on a stairway 88 inches or more in width, even though plaintiff was not an employee. She was a customer, a business invitee. The only qualification which the court in the Porter case made was in these words: "Some safety orders, such as those regulating machinery, might be regarded as peculiarly designed to protect employees when applied to places of employment *which the public is prohibited from entering.* * * *" (48 Cal.2d at page 849, 313 P.2d at page 856, emphasis added.) Here, the boys were not prohibited from entering. They were invited to enter. Blondin, Jr., though under sixteen, was permitted to operate the machine, contrary to the mandate of the statute. The conclusion is impelled that the locking requirements of the safety order were intended for his benefit and protection quite as much as if he were an employee of the company, and for the protection of invitees who might be in the vicinity of the machine whether operated by an employee or by such a person as Blondin, Jr.

[10] Finally, defendants contend the safety order is not applicable here because by its terms the control features which it requires in connection with power driven machines is for use during "repair" work, and that cleaning is not repairing. That is too narrow a view. "Repair" is defined as meaning to "restore to a sound or good state after decay, injury, etc."[1] That encompasses cleaning operations of the type here carried on including the removal of

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[1] Webster's New Collegiate Dictionary, 1956.

cement that has adhered to the blades and will impair their efficient operation unless and until removed.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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160 Cal.App.2d 246

Theresa WHEELER, Plaintiff and Appellant,

v.

SUPERIOR MORTGAGE CO., a corporation, Guaranty Corporation of America, a corporation, Herman Brown, Intrastate Escrow Company, a corporation, Harry John Gluskin, Robert M. Calhoun, Harry J. Calhoun, Ruth Winthers, S. N. Sander, Title Insurance and Trust Company, a corporation, et al., Defendants,

Superior Mortgage Co., Guaranty Corporation of America, Robert M. Calhoun, Harry J. Calhoun, H. John Gluskin and Ruth Winthers, Respondents.

Civ. 22409.

District Court of Appeal, Second District, Division 3, California.

May 8, 1958.

Action to recover treble the amount paid as interest on an alleged usurious loan and to enjoin foreclosure sale based on another alleged usurious loan. Judgment granting a motion for nonsuit in the Superior Court, Los Angeles County, Gerald C. Kepple, J., and the plaintiff appeals. The District Court of Appeal, Parker Wood, J., held that there was a question of fact as to whether the loan transactions were usurious.

Judgment reversed.

1. Appeal and Error 🔑927(7)

On appeal from a judgment on a directed verdict for the respondents, the evidence will be stated and considered in the light most favorable to the appellant.

2. Corporations 🔑1

In action to recover treble amount paid as interest on an alleged usurious loan, whether corporate defendants were in fact separate entities, or whether there was such a unity of ownership of both corporations that individuality of the corporations did not exist, and there was merely a fiction of separate existence was a question of fact, in determining whether there was a proper basis for a charge of commissions by one of the corporations for its alleged services as a broker in allegedly obtaining a loan for plaintiff from the other corporation.

3. Usury 🔑142(1)

In action to recover treble the amount paid as interest on an alleged usurious loan, whether the charges for commissions were bona fide charges for services as a broker in obtaining loan from a third person, or whether they were made under guise of commission charges, and thereby rendered the loan usurious was a question of fact. West's Ann.Civ.Code, §§ 1916–2, 1916–3; West's Ann.Const. art. 20, § 22.

4. Usury 🔑16

In determining whether a transaction is usurious, the court will disregard its form and look to the substance, and will condemn it, if all of the requisites of usury are found to be present, despite any disguise it may wear. West's Ann.Civ.Code, §§ 1916–2, 1916–3; West's Ann.Const. art. 20, § 22.

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Herbert Colden, Los Angeles, for appellant.

Milton N. White, Los Angeles, for respondents.

PARKER WOOD, Justice.

Action to recover treble the amount paid as interest on an alleged usurious loan, and to enjoin a foreclosure sale based on another alleged usurious loan. A motion for a nonsuit was granted. Plaintiff appeals from the judgment.

Appellant contends that the motion for a nonsuit was insufficient in that it did not specify the grounds on which the motion was made, and that the evidence was sufficient to support a judgment in favor of appellant.

In the first cause of action, plaintiff alleged that prior to December 7, 1953, the defendants, other than Title Insurance and Trust Company, entered into a conspiracy to commit fraud and usury; about December 7, 1953, in furtherance of such conspiracy, defendants Superior Mortgage Company and Gluskin falsely represented that Superior and Gluskin would obtain a loan of $1,400 from Guaranty Corporation of America, that Superior would charge a commission of $400 for its services, and Superior would receive such commission from the proceeds of the loan; in reliance upon such representations, plaintiff borrowed $1,400 from Guaranty and she executed, and delivered to Guaranty, a note for $1,400 and a trust deed to secure the note; Guaranty assigned the note to defendant Brown; at the time the loan was made, Superior, Guaranty, and Brown demanded, and plaintiff paid to them, for the use of said $1,400, the sum of $400 in addition to interest of 10 per cent per annum as provided in the note; at the time the loan was made, Superior demanded and received the further sum of $100 as a charge for expenses; about March 29, 1954, plaintiff paid $1,372.45 to Brown in payment of the note.

In the second cause of action, plaintiff incorporated by reference the allegations as to conspiracy which were set forth in the first cause of action. Plaintiff alleged further therein that about March 29, 1954, in furtherance of such conspiracy, defendants Superior and Gluskin falsely represented that Superior would obtain a loan of $13,500 from Guaranty, that Superior would charge $1,000 for its services and would receive such commission from the proceeds of the loan; in reliance on the representations, plaintiff borrowed $13,500 from Guaranty and she executed and delivered to Guaranty a note for $13,500 and a trust deed to secure the note; Guaranty assigned the note to defendant Sander; at the time the loan was made, Superior, Guaranty, and Sander demanded, and plaintiff paid to them, for the use of said $13,500, the sum of $1,000 in addition to interest of 10 per cent per annum as provided in the note; plaintiff paid nothing on the $13,500 note, other than the $1,000; about September 3, 1954, Sander declared that plaintiff had defaulted on the $13,500 note, and he demanded that Title Insurance and Trust Company, as trustee, sell plaintiff's property to satisfy Sander's claim; plaintiff offers to pay to the trustee of the $13,500 trust deed the sum of $12,500 as satisfaction of the obligation; plaintiff tendered $12,500 to defendant Sander as satisfaction of the obligation.

The prayer was that it be adjudged that both loans were usurious and bore no interest; the $1,400 loan was a $1,000 loan; the $13,500 loan was a $12,500 loan; plaintiff recover from defendants Superior, Guaranty, Gluskin, the Calhouns, and Winthers treble the amount of $522.45, which is "the amount of interest collected on the purported $1,400 loan"; Sander and Title Insurance and Trust Company be enjoined from selling plaintiff's property under the trust deed; and the $13,500 note and trust deed be declared void.

[1] Defendants Superior, Guaranty, Gluskin, the Calhouns, and Winthers filed an answer in which they denied the allegations of the complaint, which are set forth above. Sander filed a separate answer. Prior to trial Sander assigned the $13,500 note and the trust deed (securing the note) to Guaranty, and plaintiff dismissed the action as to him. The record on appeal does not show that Brown or Intrastate Escrow Company was served or that they appeared in the action. The evidence will be stated and considered in the light most favorable to plaintiff. See Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 837–838, 161 P.2d 673, 164 A.L.R. 1.

In December, 1953, plaintiff went to 9010 Wilshire Boulevard and consulted with H. John Gluskin, president of Superior Mortgage Co., in regard to refinancing the second trust deed on her home. At that time, plaintiff's home was encumbered with first and second trust deeds, in the approximate amounts of $7,500 and $2,800. Plaintiff told Gluskin that she wanted to borrow $1,000 more. Gluskin told plaintiff that he would refinance the second trust deed. Subsequently Gluskin told plaintiff that it would be less expensive for her to get a third trust deed for $1,000 at 10 per cent than it would be for her to refinance the second trust deed. Plaintiff testified that she "agreed to that." Plaintiff signed a document, in Gluskin's office, whereby she engaged Superior to procure a loan to be secured by a third trust deed on her property. The document was "blank" when plaintiff signed it. Thereafter the blanks in the document were filled in by Gluskin, and then it bore the date December 11, 1953, and it provided that the loan to be procured would be for $1,400, with interest at 10 per cent per annum, payable $40 a month including interest, and that the balance of the loan would be paid within one year. The document, as so filled in, also provided that plaintiff would pay $400 to Superior, and that from said amount all escrow, title, appraisal, and recording fees should be paid. That document also provided that a premium for a life insurance policy on plaintiff's life had been included in the charges. Plaintiff also signed a third trust deed "in blank" in connection with the loan. Thereafter the blanks in the trust deed were filled in, and then the trust deed bore the date December 11, 1953, and recited that the amount of the note, secured by the trust deed, was $1,400. Insured Escrow Company was named as trustee in the trust deed, and Guaranty was named as beneficiary. (The record does not contain a copy of the note secured by the trust deed. It appears from the trust deed that the note was payable to Guaranty.) Plaintiff testified that she received the proceeds from the loan in "dribs and drabs" from Gluskin, and she thought that the amount she received from the loan was $900. (Gluskin testified that plaintiff was the "beneficiary of $1,000 net to her," which might have been reduced by disbursements plaintiff was required to make to clear her title.) On December 18, 1953, Guaranty assigned the note, with recourse, to Herman Brown; and the trust deed was also assigned to him. Plaintiff testified that "way later", (after December 11, 1953) she received a payment book from Guaranty. The book showed that the amount of the note (which had been signed by plaintiff) was $1,400, that Brown was the holder of the note, and that payments on the note were to be made to Guaranty as collection agent for Brown. Brown is a resident of New York. Gluskin was Brown's agent and attorney at the time the loan was made to plaintiff. Brown had deposited $50,000 in a local bank to be invested in trust deeds. Daniel Fenton (son of Louis Fenton, who was secretary of Superior and president of Guaranty) was attorney in fact for Brown in trust deed transactions and he was authorized to withdraw funds from Brown's account in the local bank. Plaintiff testified that she received about $900 from the $1,400 loan. Gluskin testified that she received $1,000 therefrom. The difference between the principal amount of the note ($1,400) and the amount received by her was paid (according to Gluskin) as follows: "about $75 or $80" for escrow, title, and recording fees; $25 for appraisal; $48 (12 per cent of $400) to Guaranty; and the balance of such difference (about $300) to Superior. Gluskin testified that about $19.20 was paid by Guaranty for an insurance policy which provided that in the event of plaintiff's death the insurance company would pay the balance due on the loan.

About two months after December 11, 1953, at Gluskin's request, plaintiff consulted again with Gluskin. He advised plaintiff to consolidate all of her loans into one loan, and he told plaintiff that he would have to find some one with enough money to make such a loan. Plaintiff signed a document, in Gluskin's office, whereby she engaged Superior to procure a loan to be secured by a first trust deed on her home. The form of document was the same as the form of the document which plaintiff signed in connection with the first loan, and it was "blank" when plaintiff signed it. Thereafter the blanks in the document were filled in, and then it bore the date March 29, 1954, and provided that the loan would be for $13,500, with interest at 10 per cent, payable $150 a month, and the balance would be paid within two years. The document, as so filled in, also provided that plaintiff would pay $1,000 to Superior. On March 29, 1954, an escrow, in which plaintiff was named as borrower and Guaranty as lender, was opened in the office of Intrastate Escrow Company, located at 9012 Wilshire Boulevard (next door to the address of Superior). Defendant Winthers, a former employee of Superior, was the president and only stockholder of the escrow company. Plaintiff signed blank forms of escrow instructions and a note and trust deed in the office of the escrow company. Thereafter the blanks in those documents were filled in, and then the terms of the note and trust deed were the same as the terms appearing in the "filled in" document which plaintiff had signed (in blank) when she applied for the loan. After the blanks in the escrow instructions had been filled in, the instructions provided that the escrow holder was authorized to deliver the note at such time as $13,500 had been deposited to plaintiff's account. The payee named in the note was Guaranty. The trustee named in the trust deed was Title Insurance and Trust Company, and the benenciary was Guaranty. Plaintiff also signed a blank form of amendment of the escrow instructions. Thereafter the blank form of amendment was filled in so that it was dated March 29, 1954 (the same date which was on the instructions), and it authorized the escrow holder to pay to Superior, from funds accruing to plaintiff, $1,000 "for expenses and commission in connection with this loan" and to pay the amounts of the unpaid balances on the first, second, and third trust deed notes.

Prior to the close of the escrow, Superior advanced $250 to plaintiff.

On April 7, 1954, plaintiff signed another blank form of amendment of the escrow instructions. When the form was filled in, it authorized the escrow holder to repay to Superior the $250 which had been advanced to her.

On April 13, 1954, Guaranty assigned its interest "in and to the subject matter of the * * * escrow, With Recourse," to S. N. Sander. On the same date Sander approved the escrow instructions and agreed to be bound thereby, and he deposited $1,000 in the escrow. Guaranty assigned the note, with recourse, to Sander; and the trust deed was also assigned to him. On April 14, 1954, Louis Fenton, as president of Guaranty (which was named as lender in the instructions), signed the original escrow instructions and the amendment which was dated March 29. Also on April 14 Daniel Fenton (attorney in fact for Brown) placed the $1,400 note and trust deed in the escrow, and demanded payment, in behalf of Brown, as follows: $1,372.45 principal; interest from February 1, 1954; and a prepayment bonus of five per cent.

On April 28, 1954, Gluskin, on behalf of Superior, signed an amendment to the escrow instructions whereby the escrow company was authorized to deduct $61.19 from the "commission due" Superior, and to credit that amount to plaintiff in order that she might "receive net loan proceeds out of this escrow of $250.00 in addition to funds previously paid her outside of escrow." On May 4 the $13,500 trust deed was recorded. The escrow company disbursed the funds in the escrow as follows: Taxes and insurance, $158.12; payment of first and second trust deed notes, $10,408.13; Herman Brown, $1,474.22 (principal, $1,372.45, interest, $79.26, 90-day bonus, $68.76); escrow fees, $37.50; Superior, $922.01 (commission); Superior, $250 (refund of advance to plaintiff); plaintiff, $250. (Total of those amounts is $13,500.) Superior paid, outside of escrow, $77.10 for a title policy, and also paid $120 to Guaranty.

On the dates of the transactions with plaintiff, Superior and Guaranty were California corporations. The directors of Superior were Gluskin, Harry J. Calhoun and Robert M. Calhoun. The directors of Guaranty were Gluskin, Harry J. Calhoun and Louis Fenton. Gluskin was president of Superior. Harry J. Calhoun was treasurer of both corporations. Louis Fenton was secretary of Superior and he was president of Guaranty. Daniel Fenton, son of Louis Fenton, was secretary of Guaranty. Superior and Guaranty occupied offices at 9010 Wilshire Boulevard, and they had the same telephone numbers. Superior was a real estate broker and was engaged in the business of negotiating loans secured by trust deeds on real property. Guaranty was engaged in the business of collecting payments on loans Superior negotiated. Guaranty carried insurance, payable to it, on the lives of borrowers. The proceeds of the insurance policies were to be used to pay the loans in the event of the death or disability of the borrowers. No stock had been issued by Superior or by Guaranty.

Appellant contends that the motion for a nonsuit was insufficient in that it did not specify the grounds on which the motion was made. At the conclusion of plaintiff's case, defendants' attorney stated: "I should like to move for a non-suit simply because I believe that taking the allegations of the complaint and taking the evidence presented, it would seem to me that a prima facie case substantiating inference, presumption or evidence, the allegations contained in such complaint has not been made out." The motion did not specify the grounds upon which the motion was made. The determination of this appeal need not be based on the fact that defendants did not specify the grounds upon which the motion for a nonsuit was made.

Appellant contends that the evidence was sufficient to support a judgment in her favor.

Article XX, section 22, of the Constitution of California (regarding rate of interest) prohibits the charging of "any fee, bonus, commission, discount or other compensation" whereby the lender will receive more than 10 per cent per annum for any loan of money. Section 2 of the Usury Law (Stats.1919, p. lxxxiii, Deering's Gen. Laws, Act 3757, West's Ann.Civ.Code, § 1916–1 et seq.) provides that any contract to pay interest of more than 12 per cent per annum on the loan of money shall be void as to any agreement to pay interest. Section 3 of the Usury Law provides that any person, who pays interest of more than 12 per cent per annum on a loan of money, may recover from the person or corporation who receives the same, or from his or its representative, treble the amount of interest paid in excess of 12 per cent per annum.

Plaintiff sought a loan of $1,000 from the Superior Mortgage Company. In applying for the loan she signed blank forms of a note and trust deed. Later when the blanks were filled in, it appeared that the amount of the loan was $1,400, with interest at 10 per cent per annum. The note was payable to Guaranty Corporation of America. As a result of that transaction, according to plaintiff's testimony, she received about $900. According to Gluskin's testimony, she received $1,000. Defendants assert that a commission of $400 was charged by Superior Mortgage Company for its services in obtaining the loan, and that expenses in connection with the loan were paid from the commission. The net amount allegedly received as commission was about $300.

After that loan had been made, she had three trust deed encumbrances on her home property. Gluskin, the president of Superior Mortgage Company, suggested that she consolidate the three loans into one loan. In proceeding to obtain such a consolidation, she signed blank forms of a note and trust deed. Later, when the blanks were filled in, it appeared that the amount of the loan was $13,500, with interest at 10 per cent per annum. The note was payable to Guaranty Corporation of America. As a result of that transaction, the three encumbrances and the taxes on her home were paid, and she received

$500 cash. Defendants assert that a commission of $1,000 was charged by Superior for its services in obtaining the loan, and that expenses in connection with the loan were paid from the commission. The net amount allegedly received as commission was $844.91. From that amount, $120 was paid to Guaranty.

[2, 3] At the times of said loan transactions, the Superior Mortgage Company, the alleged broker, and Guaranty Corporation of America, the payee of the notes, maintained offices at the same address and they had the same telephone numbers. It could be inferred from the evidence that they occupied the same offices. The directorates of the two corporations were interlocking. The principal officers of Superior were principal officers or were directors of Guaranty, and the principal officers of Guaranty were principal officers or were directors of Superior. Gluskin, one of the Fentons, and one of the Calhouns were officers or directors of Superior. Gluskin, both of the Fentons, and one of the Calhouns were officers or directors of Guaranty. No permit to issue stock was obtained by either corporation. Under the evidence a question was presented as to whether the corporations were in fact separate entities or whether there was such a unity of ownership of both corporations that individuality of the corporations did not exist and there was merely a fiction of separate existence. If, in fact, there was not separate existence of the corporations there would be no proper basis for a charge of commission by one of the corporations for its alleged services as a broker in allegedly obtaining a loan for plaintiff from the other corporation. A charge for commission under such circumstances would be, in effect, charging a commission when no service as a broker was rendered. A question of fact was presented herein as to whether the charges for commissions were bona fide charges for services as a broker in obtaining a loan from a third person. If the charges for commission were not bona fide commission charges, but were made under the guise of commission charges, it is apparent that when such charges for commission are added to interest at the rate of 10 per cent per annum, as provided in the notes, the total amount of interest for the loans exceeds 12 per cent per annum and is usurious.

[4] In Haines v. Commercial Mortgage Co., 200 Cal. 609, at page 616, 254 P. 956, at page 958, 255 P. 805, 53 A.L.R. 725, it was said: "[I]n determining whether or not the transaction is usurious the court 'will disregard its form and look to the substance, and will condemn it if all of the requisites of usury are found to be present, despite any disguise it may wear.'" It was also said in that case at page 617 of 200 P.2d, at page 958 of 254 P.: "'As a general rule, any benefit or advantage exacted by the lender from the borrower, whatever be its name or form, which, added to the interest taken or reserved, would yield to the lender a greater profit upon his loan than is allowed by law is deemed usury.'"

Respondents assert in effect that the $1,400 loan was made by Brown; that the $13,500 loan was made by Sander; and that Guaranty was the "conduit" through which the loans were made. It is clear that both notes were payable to Guaranty, and Guaranty was named as beneficiary under both trust deeds. One note and a trust deed were assigned by Guaranty to Brown; and the other note and trust deed were assigned to Sander.

In the present case there was a question of fact as to whether the loan transactions were usurious. The motion for a nonsuit should not have been granted.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

160 Cal.App.2d 456

COUNTY OF YUBA, Plaintiff and Respondent,

v.

John H. MATTOON and Marjorie Mattoon, Defendants and Appellants.

Civ. 9225.

District Court of Appeal, Third District, California.

May 14, 1958.

Action to recover the minimum rent under a lease and damages for failure of defendants to conduct necessary rodent and pest control. From a judgment of the Superior Court, Yuba County, Warren Steel, J., in favor of plaintiff, defendants appealed. The District Court of Appeal, Peek, J., held, inter alia, that where evidence showed that acreage lessees were permitted to plant to rice amounted to 58 per cent of the total acreage under lease, lessees became obligated to prorate their allotment among their various lessors, and hence could not defeat action for minimum rental on ground of impossibility of performance by reason of governmental order limiting amount of rice to be grown when lessees elected to allow plaintiff's land to remain idle and to devote their entire allotment to land leased from others.

Affirmed.

1. Landlord and Tenant ⚿322

Where evidence showed that acreage lessees were permitted to plant to rice amounted to about 58 per cent of the total acreage under lease, lessees became obligated to prorate their allotment among their various lessors, and hence could not defeat action for minimum rental on ground of impossibility of performance by reason of governmental order limiting amount of rice to be grown when lessees elected to allow plaintiff's land to remain idle and to devote lessees' entire allotment to land leased from others.

2. Contracts ⚿309(1)

Where a promisor makes two or more bargains and facts then exist or subsequently occur that on grounds of impossibility prevent imposition of a duty to perform all the promises in their entirety, or that discharge a duty to do so that has arisen, but partial performance capable of ratable apportionment to several bargains is possible, promisor is under duty to make such apportionment and is otherwise discharged.

3. Appeal and Error ⚿1033(8)

Where under pleadings in evidence jury gave defendants more relief than, under any theory, they were entitled to, defendants were not aggrieved and hence judgment would be affirmed.

4. Counties ⚿110

Where county's lease of acreage for purpose of growing rice thereon provided for rental of 20% of gross crop proceeds or in any event a minimum sum, and no rice was planted and county elected to sue for minimum only, evidence concerning difficulties lessees met in financing their farming operations was properly excluded as immaterial to issues.

5. Appeal and Error ⚿110

An order denying defendants' motion for new trial was not appealable, and hence purported appeal therefrom would be dismissed.

◆

Manwell & Manwell, Marysville, for appellants.

Heenan & Arnoldy, Marysville, for respondent.

PEEK, Justice.

Defendants appeal from a judgment in favor of plaintiff in the sum of $1,400 for rent and $150 for damages.

It appears that plaintiff leased approximately 300 acres of land to defendants for the purpose of growing rice thereon during the season of 1955. The lease provided for a rental of 20 per cent of the gross crop proceeds, or in any event a minimum of $2,500. No rice was planted and plaintiff elected to sue for the minimum rent only. Plaintiff also sought damages in the sum of $150 for the alleged failure of defendants to conduct necessary rodent and pest control.

Defendants pleaded impossibility of performance by reason of a government order limiting the amount of rice which they would be permitted to grow in that year. Prior to said order defendants had also obligated themselves to plant rice on land leased from others, or a total of approximately 500 acres. Defendants' allotment permitted them to farm 287 acres of the total acreage under lease. They elected to allow plaintiff's land to remain idle and to devote their entire allotment to the land leased from others.

[1] Defendants' attempt to show complete impossibility of performance went no further than to establish partial impossibility; that is, the evidence disclosed that the acreage they were permitted to plant to rice amounted to about 58 per cent of the total acreage under lease. Under such circumstances defendants became obligated to prorate their allotment among their various lessors. Akins v. Riverbank Canning Co., 80 Cal.App.2d 868, 872–873, 183 P.2d 86.

[2] The applicable rule is set forth in Restatement of the Law of Contracts, section 464, subsection 1, as follows: "Where a promisor makes two or more bargains and facts then exist or subsequently occur that on grounds of impossibility prevent the imposition of a duty to perform all the promises in their entirety, or that discharge a duty to do so that has arisen, but partial performance capable of ratable apportionment to the several bargains is possible, the promisor is under a duty to make such apportionment and is otherwise discharged * * *" See also Williston on Contracts, Rev.Ed., Vol. 6, page 1962.

The present case was tried to a jury and the court instructed it upon the theory of impossibility of performance, saying among other things: "You are instructed that the order of the Department of Agriculture of the United States, given to the Defendant on or about January 25, 1955 and introduced as evidence herein, curtailing his rice farming operations for the year 1955 is a fortuitous event as defined in these instructions, and is a matter you may consider with other facts and circumstances in determining whether the Defendant is to be excused from the performance of the lease by him in the year 1955." Other instructions along the same line were given and there is no complaint that the jury was not properly instructed. The court also told the jury that if a government regulation did not entirely prohibit defendant from farming the leased premises but only limited or restricted his operation thereon, thereby making it less profitable and more difficult to perform the lease, the same was not terminated and defendant was not excused from further performance.

[3] Plaintiff proved a prima facie case for recovery of the minimum rental. It might have sued (but was not required to) for a greater sum based upon the damages it suffered through the failure of its lessee to farm the land and to account to it for its share of the crop proceeds. That it was willing to content itself, however, with the minimum rental was a matter for it to determine and defendants cannot complain. Defendants did not prove a release from the lease as they attempted to do, and the jury properly held them to some liability. While it is impossible to determine from the record here just how the jury arrived at its verdict of $1,400, it does appear that this sum represents approximately 58 per cent of the minimum rental, and therefore that the jury may have applied the ratable performance rule to the minimum rental. It is not necessary for us to decide whether the partial relief shown could apply to the minimum rental. Under the pleadings and the evidence, the jury gave defendants more relief than, under any theory, they were entitled to. The defendants have not been

aggrieved, and therefore the judgment must be affirmed.

[4] Defendants contend further that they were erroneously prevented by the court from introducing evidence concerning difficulties they met in financing their farming operations. Such matters were immaterial to the issues and the court properly excluded the offered proof. Williston on Contracts, Rev.Ed., page 5412.

[5] The order denying defendants' motion for a new trial not being appealable, their purported appeal therefrom is dismissed. The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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160 Cal.App.2d 617

Oscar E. REEG and Francis Reeg, Plaintiffs and Respondents,

v.

H. E. WEST et al., Defendants,

Nick Neilsen, Defendant and Appellant.

Civ. 9258.

District Court of Appeal, Third District, California.

May 19, 1958.

Action to establish invalidity of assignment of account receivable by plaintiffs' judgment debtors and to satisfy judgment out of money in hands of defendant belonging to judgment debtors. The Superior Court, El Dorado County, Robert E. Roberts, J., entered judgment for plaintiffs, and judgment debtors' assignee appealed. The District Court of Appeal, Peek, J., held that any knowledge obtained by attorney for judgment creditors by reason of his previous representation of company indebted on account to judgment debtors concerning assignment of account could not be imputed to judgment creditors and did not charge them with actual notice of assignment within meaning of West's Ann.Civ.Code, § 3018, making assignment of account invalid as against any creditor of assignor without actual notice.

Judgment affirmed.

1. Attorney and Client 🔑104

Any knowledge obtained by attorney for judgment creditors by reason of his previous representation of company indebted to judgment debtors on account concerning assignment of account by judgment debtors could not be imputed to judgment creditors, and hence did not charge them with "actual notice" of assignment within Civil Code provision making assignment of account invalid as against any creditor of assignor without actual notice. West's Ann.Civ.Code, §§ 3017–3029, 3018.

See publication Words and Phrases, for other judicial constructions and definitions of "Actual Notice".

2. Judgment 🔑253(1)

Prayer of complaint that named defendant account for all money, etc., in its hands belonging to plaintiffs' judgment debtors and be directed to pay specified sum and any other sums due at time of examination to plaintiffs and that plaintiffs' judgment be satisfied out of such monies, etc., was sufficiently broad to warrant judgment ordering defendant to pay to plaintiffs amount in excess of that specified in complaint. West's Ann.Code Civ.Proc. § 720.

◆

Max H. Hoseit, Sacramento, for appellant.

Russell F. Milham, Placerville, for respondents.

PEEK, Justice.

Defendant appeals from a judgment arising out of an action instituted by plaintiffs under the provisions of section 720 of the Code of Civil Procedure.

The facts are not in dispute. On December 20, 1954, plaintiffs recovered a money judgment in the sum of $4,250 and costs against Howard and Sam Neilsen, a partnership doing business as Neilsens Mill. On July 6, 1956, the partners assigned all of the money due them from the Placerville Lumber Company to Nick Neilsen, their father. This assignment was not recorded until August 9, 1956, and subsequent to plaintiffs' present action which was filed on July 27, 1956. Plaintiffs' action was based on the alleged invalidity of the assignment as to them by reason of defendant's failure to comply with sections 3017 through 3029 of the Civil Code. On July 30, 1956, a restraining order was issued restraining the lumber company from disbursing any of the funds in its hands subject to the assignment. The trial court found in favor of plaintiffs and entered its judgment declaring the assignment invalid as to them and ordering the lumber company to pay to plaintiffs the sum of $4,112.33 in full satisfaction of plaintiffs' prior judgment out of the sum of $4,848 then owing on said account and in the hands of the lumber company.

Defendant now contends (1) that the assignment was valid as against plaintiffs, and (2) that in any event the amount of recovery should be limited to the sum of $2,714.99, the sum set forth in plaintiffs' complaint.

Section 3018 of the Civil Code provides in part that "* * * an assignment of an account shall be invalid as against any creditor of the assignor without actual notice unless notice of or of intention to make the assignment as provided for in this chapter is filed at the time of or before the execution of the assignment or within five days thereafter."

[1] Here the record shows that plaintiffs were judgment creditors of Howard and Sam Neilsen for more than one and one-half years prior to the assignment to Nick Neilsen. Defendant, however, contends that because plaintiffs' counsel had on previous occasions represented the lumber company, and through that representation obtained information concerning the assignment which plaintiffs' counsel admits, such knowledge was therefore the knowledge of plaintiffs in the present proceeding. Under the facts disclosed herein it would appear that whether or not plaintiffs' counsel knew of the assignment would be of no value to defendant since what knowledge if any counsel obtained was by reason of his prior sporadic representation of one of the defendants herein, the Placerville Lumber Company. Certainly any information so obtained and under such circumstances could not be imputed to plaintiffs. (5 Am.Jur., sec. 76, p. 304.)

The basis of defendant's second contention is that plaintiffs' recovery must be limited to that amount actually prayed for, and hence the judgment must be modified accordingly. It appears that the sum specified was the sum owing by the lumber company to Howard and Sam at the time of the issuance of the restraining order. In the interim this sum increased to over $6,000. By reason of the restraining order and a stipulation of the parties, the balance was to be kept at not less than $4,500. The prayer to plaintiffs' complaint requested:

> "2. * * * That Placerville Lumber Company account, under the direction of the Court, for all properties, funds, monies or credits in its hands belonging to the said Howard Neilsen and Sam Neilsen, or either of them, and be directed to pay the said sum of Two Thousand Seven Hundred Fourteen and 99/100 Dollars ($2,714.99), and any other sums due at the time of such examination, to plaintiffs.
>
> "3. That the judgment of plaintiffs in Action No. 7471 be satisfied out of said monies, funds or credits."

[2] We cannot say that the prayer was not sufficiently broad to warrant the judgment as entered by the court.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

160 Cal.App.2d 446

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Hamilton McNEAL, Jr., Defendant and Appellant.

No. 3386.

District Court of Appeal, First District, Division 2, California.

May 14, 1958.

Hearing Denied July 9, 1958.

Defendant was convicted in the Superior Court, Santa Clara County, William F. James, J., for first degree murder, and he appealed. The District Court of Appeal, Dooling, J., held that mere fact that victim had discovered defendant's presence before killing did not prevent crime from being one committed by lying in wait, and held that murder committed by lying in wait is murder in the first degree, and that finding that crime was so committed obviates necessity for finding of deliberation and premeditation.

Affirmed.

1. Homicide 🔑22(2)

Murder committed by lying in wait is murder in the first degree, and finding that crime was so committed obviates necessity for finding of deliberation and premeditation. West's Ann.Pen.Code, § 189.

2. Courts 🔑91(1)

Intermediate court is bound to follow decisions of highest state court.

3. Homicide 🔑308(3)

In homicide prosecution, evidence justified giving of lying-in-wait instructions. West's Ann.Pen.Code, § 189.

4. Homicide 🔑9

It is defendant's intention to ambush victim which is controlling, and fact that victim discovered his presence before killing does not mean that crime was not committed by lying in wait. West's Ann. Pen.Code, § 189.

5. Homicide 🔑308(1)

In homicide prosecution, instructions, fairly read, sufficiently advised jury that intent to murder was an essential part of lying in wait; and, notwithstanding use therein of "while" instead of "by means of," such instructions adequately told jurors that act causing death must have been outgrowth of lying in wait.

6. Criminal Law 🔑818

Correct re-reading of instruction at jurors' request cured any error in trial judge's inadvertent use of word "first" instead of "second" in instruction on second degree murder.

7. Criminal Law 🔑755

In homicide prosecution, informal instructions given by trial judge for purpose of illustrating reasoning process by which jurors should arrive at conclusion were not subject to claimed infirmity of taking from jury question of possible innocence, even though court might better have framed answers to its questions in less positive fashion.

8. Criminal Law 🔑663

In homicide prosecution, it was within trial court's discretion to require that any addition to exhibit, diagraming site of homicide, be made by pencil; and it was not an abuse of that discretion to refuse to permit placing of yellow piece of paper on diagram to designate position of victim's automobile.

9. Criminal Law 🔑384, 1170(1)

In homicide prosecution, it was not error to reject, for remoteness and for lack of connection with shooting, evidence, discovered five months after homicide and consisting of nicked piece of granite found near scene of killing, which might have tended to show that bullet inflicting fatal wound had ricocheted; and, in any event, any error in excluding such evidence could not have been prejudicial in view of other evidence on ricochet issue.

10. Criminal Law 🔑1045

Where defendant had been aware that trial court had not given a definite ruling with regard to offer in evidence of hospital record of homicide victim, but had not again raised matter or asked for a definite ruling, defendant could not complain on appeal of such incident.

John J. Taheny, San Francisco, Joseph A. Bonacina, San Jose, for appellant.

McCutchen, Thomas, Matthew, Griffiths & Greene, Brent M. Abel and Arthur R. Albrecht, San Francisco, amicus curiae in support of appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury of first degree murder which fixed his punishment at life imprisonment. Appellant had formerly lived with Mrs. Vance as her paramour. On July 4, 1956, at about 12:30 a. m. appellant brought a record player to Mrs. Vance's home. Present in Mrs. Vance's home at the time was the decedent Peterson who had also been a recipient of Mrs. Vance's sexual favors. Appellant after setting down the record player left immediately and backed out of the driveway so rapidly that his car was "reeling and rolling."

Approximately 20 minutes later appellant telephoned to Mrs. Vance and told her that she might as well have a good time because this would be her last. Later Mrs. Vance and Peterson left the house. Mrs. Vance entered Peterson's automobile from the passenger side at which time the dome light of the car was illuminated. After she entered the car Mrs. Vance heard a sound like a rock hitting the car. She got out and found Peterson lying on the ground beside the car. Peterson died at 8:19 a. m. from a bullet wound.

Sometime between 1 and 2:30 a. m. that morning appellant entered the Edris Cafe. He asked the cook to call the police saying that he had just shot at his girl but had missed her. He asked the cook to take his gun before "I'm tempted to go back down and really finish her off."

Appellant went with the arresting officer to the area of the shooting, indicated to him the spot where he had parked his car and told him that he had seen people come out of the house, saw the car lights go on and shot at the car. Later at police headquarters appellant said that he saw the couple leave the house when the dome light went on, saw a figure outlined in the light and shot at the figure. In a later statement appellant said that the rifle belonged to his father, that he must have gone home to get it after delivering the record player, that the rifle was never loaded so he must have loaded it and that he wanted to throw a good scare into somebody. Appellant also stated that seeing Peterson with Mrs. Vance made him feel angry and sick to his stomach and he wanted to get away from there.

A statement taken from Peterson in the hospital was introduced. In the statement after saying: "I'm going to die," Peterson said that appellant had shot him, that he saw appellant in the dark behind the garage and that just before he shot appellant told him that he was going to kill him on account of Jessie (Mrs. Vance).

At the trial appellant testified that he remembered getting into his car after delivering the record player. He remembered nothing thereafter until there was a flash of light and the rifle shot.

Appellant had purchased a pint of vodka about 6 p. m. on July 3, but the amount consumed by him was not established. That evening he and a Mr. Williams had drunk a half pint of whisky. When appellant left Williams at about midnight he did not appear to be drunk nor did he appear to be drunk when he entered the Edris Cafe after the shooting. A blood test of appellant taken at 4:15 a. m. showed .16 percent alcohol in his blood.

Appellant offered expert testimony to the effect that because of the combined effect of his emotional disturbance, the concentration of alcohol in his blood and his neurotic temperament, he did not have the capacity for deliberation or premeditation nor for forming an intent to lie in wait and kill. The prosecution produced expert testimony that with .16 percent alcohol in the blood all persons would be under the influence of alcohol but only 50 percent would be classified as intoxicated and that such a person would be able to deliberate and premeditate the killing of a human being. A psychiatrist produced by appellant admitted that he might have had the intent to kill. There was evidence that alcohol is fully absorbed into the blood about one hour after consumption and that it leaves the blood at the rate of .02 percent hourly. From this it is argued for appellant that there must have been over .18 percent alcohol in his blood at the time of the killing.

The court instructed the jury on first degree murder both on the theory of deliberation and premeditation and of lying in wait. It is contended that there is no sufficient evidence to support either theory. It is argued that there is no evidence that with .18 percent or more alcohol in his blood appellant could have the mental capacity for the premeditation and deliberation which is necessary for murder in the first degree. The jury however had testimony that shortly before as well as immediately following the shooting appellant did not appear to be intoxicated, the testimony that with .16 percent alcohol in his blood appellant would be capable of deliberation and premeditation and the admission of his own expert that he might have had the intent to kill. The jury could consider the testimony that he did not appear to be intoxicated, with the expert evidence and the evidence that appellant had threatened Mrs. Vance over the telephone, had driven to his home, gotten and loaded the gun, returned to Mrs. Vance's home and waited until Peterson and Mrs. Vance appeared and then fired the fatal shot and from all of the evidence reasonably have concluded that appellant not only could but did deliberately plan and execute the killing. They could with equal reason conclude from all of the evidence that appellant could and did form the intention of lying in wait for the purpose of committing murder.

The court gave the following instructions on the subject of lying in wait:

"Murder which is perpetrated by lying in wait is declared by our law to be murder of the first degree, and if you should find that the defendant committed that crime, that is, murder, and you will have no choice but to designate the offense as murder in the first degree, if you find that he committed the act while lying in wait.

"The words 'lying in wait' do not refer to the position of the body of the person who commits a murder. There may be a 'lying in wait' within the meaning of the law where such person is sitting down, standing or to a degree moving about. The gist of 'lying in wait' is that the person places himself in a position where he is waiting and watching and concealed from the person he intends to murder. There is nothing in the law that requires that the 'lying in wait' exist for or consume any particular period of time before the firing of a shot or other act which causes death. It is necessary however that the act causing death be preceded by the outgrowth of the 'lying in wait.'

"You are instructed that if you find the defendant guilty of murder, and that the defendant committed that crime while lying in wait then as a matter of law you must fix the degree as murder in the first degree. If you find the defendant guilty of murder, and if said murder was not committed while lying in wait you may nevertheless fix the degree as murder in the first degree if it was a willful, deliberate and premeditated murder. If you find the defendant guilty of murder, and if said murder was not committed while lying in wait, nor was it willful, deliberate and premeditated then you should fix the degree as murder in the second degree."

[1,2] Appellant's counsel argues that it it error to instruct that where murder is committed by lying in wait it is murder in the first degree, without requiring a finding of deliberation and premeditation. The

cases in California are clear, however, that where murder is committed by lying in wait it is "murder of the first degree by force of the statute" (People v. Sutic, 41 Cal.2d 483, 492, 261 P.2d 241, 245) or "because of the substantive statutory definition of the crime" (People v. Thomas, 41 Cal.2d 470, 474, 261 P.2d 1, 3). "If the killing was committed by lying in wait, it was murder of the first degree by force of the statute Pen.Code, sec. 189; * * *, and the question of premeditation was not further involved." People v. Byrd, 42 Cal.2d 200, 208, 266 P.2d 505, 509; and see People v. Merkouris, 46 Cal.2d 540, 560, 297 P.2d 999; People v. Tuthill, 31 Cal.2d 92, 187 P.2d 16. In the face of these clear holdings by the Supreme Court an argument for a different construction of the code cannot be successfully made to an intermediate court which is bound to follow those decisions.

[3, 4] In the amicus curiae brief it is argued that the evidence was not sufficient to justify the giving of lying in wait instructions. The evidence shows that after threatening Mrs. Vance, driving to his home, obtaining the gun and loading it appellant drove his car onto a side road near the Vance home, got out of the car, walked through some shrubbery and stood behind the garage where he could observe persons leaving the house while he stood in darkness. The jury could reasonably find from these facts that appellant deliberately concealed himself and waited for the purpose of committing murder. The case is not at all like People v. Merkouris, supra, 46 Cal.2d 540, 297 P.2d 999, wherein the court found insufficient evidence of any stealth or concealment. Here the manner of approach, not by any path or roadway, but through shrubbery and to a position of obscurity in the darkness will reasonably support a finding of stealth, concealment and furtiveness for the purpose of the murder. The fact that just before the shooting the victim discovered appellant's presence does not prevent the crime from being committed by lying in wait. It is the appellant's intention to ambush the victim which is controlling and the fact that the victim discovers his presence before the killing does not change or affect that intention. People v. Tuthill, supra, 31 Cal.2d 92, 100–101, 187 P.2d 16.

[5] The amicus curiae brief further attacks the instructions on this subject claiming that they lacked the essential feature that the lying in wait must be for the purpose and with the intention of committing murder. We are satisfied that this argument puts too narrow a construction on the instructions as a whole. The jury was told: "The gist of 'lying in wait' is that the person places himself in a position where he is waiting and watching and concealed from *the person he intends to murder.*" (Emphasis ours.) The emphasized language makes clear that the *intent to murder* the person is an essential part of the lying in wait. The jury could not reasonably have understood it otherwise. Complaint is also made of the use of "while" instead of "by means of" lying in wait. The instructions fairly read could not mislead the jury in this respect. Furthermore the jury was expressly instructed: "It is necessary * * * that the act causing death be * * * the outgrowth of the 'lying in wait.'"

[6] The court in reading an instruction on second degree murder inadvertently, by what was apparently a slip of the tongue, substituted the word "first" for "second" in one sentence. This error might have been serious except for what later occurred. After the jury had been deliberating for several hours the jurors returned to the courtroom and, through their foreman, asked the court for a restatement of the difference between first and second degree murder. As a part of the instructions reread to the jury in response to this request the court reread correctly the very instruction in which the erroneous substitution of "first" for "second" had previously occurred, so that on the second reading the instruction used the proper designation of "second" degree murder. We must assume that the jury followed the correct instruction as thus reread to them at their request and could not have been misled by the earlier erroneous reading.

As a part of the instructions given in response to this request for a restatement of the difference between the degrees of murder, the court, after reading the code sections distinguishing the two degrees, said:

"It seems to me that those two Sections are pretty clear, don't you think? Now, are they or are they not to you? I can give you some extended instructions if you wish but you first take the original definition of murder which is the unlawful killing; say, there was a killing, yes. He was killed, yes. Was it lawful or unlawful? It was unlawful. Was it done with malice aforethought? Yes. Then, that is murder.

"Then find out whether it was first or second degree. Was it perpetrated by means of poison, was it perpetrated by lying in wait? Well, was it or wasn't it? If you decide it was perpetrated by lying in wait, then the murder is first degree. * * * Was it by any other kind of willful, deliberate and premeditated killing? Was it or was it not? If it was, it's first degree and if it wasn't, why, it isn't. * *"

[7] The court followed this by rereading the basic formal instructions previously given on the subject. It is argued that in the first part of this informal instruction above quoted the court took from the jury the question of possible innocence and in effect told the jury that appellant was guilty of murder, leaving to the jury only the question of degree. While the court might better have framed the answers to its questions in less positive fashion, the obvious purpose of the judge, which we believe the jury could not have misunderstood (particularly in view of the other instructions on the subject given both before and after this extemporaneous exposition) was to illustrate the reasoning process by which the jury should arrive at its conclusion. The judge obviously did not intend (and the jury cannot well have believed that he did) to instruct the jury that the answers given were the answers which must be given, but only to illustrate that if those answers were given and the appellant in fact found guilty of murder, they should then proceed to determine the degree of murder in the manner thereafter indicated.

There is also some complaint of the failure of the trial judge to give certain instructions on this occasion requested by the appellant's counsel. The jury had asked only for a restatement of the difference in the degrees of murder and the court restated the basic instructions on that subject. The instructions were directed to and adequately answered the jury's request and we can find no error in the refusal of the court to go further.

[8] There was no error in the court's refusal to permit the placing of a yellow piece of paper on a diagram of the area of the killing to designate the position of Peterson's automobile. The court said: "* * * she can take a pencil and mark it but using another piece of paper to add to the exhibit that is already in evidence, is confusing." The matter lay well within the court's discretion and we can find neither error nor prejudice in this incident.

[9] Appellant offered a piece of granite, part of a barbecue pit, noticed near the scene of the killing on December 3, 1956. This had a mark or gouge on it which appellant contended might show that the bullet had ricocheted. The court sustained an objection stating: "It simply is so remote that it renders it immaterial * * *" We find no error in this ruling. The mark was not noticed until five months after the shooting and no evidence was offered to connect it with the shooting except the mark on the rock itself.

The people were permitted on rebuttal to introduce evidence tending to show that the bullet had not ricocheted. The appellant had introduced some evidence that the bullet might have ricocheted, although the stone was excluded, and in any event the effect of this evidence could hardy have been prejudicial.

[10] Appellant offered in evidence the hospital record of the victim Peterson.

The court withheld its ruling and the matter was not thereafter called to the court's attention. Appellant's counsel was aware that the court had not given a definite ruling, but did not again raise the matter or ask for a definite ruling. In the state of the record appellant cannot complain of this incident on appeal. Spanfelner v. Meyer, 51 Cal.App.2d 390, 392, 124 P.2d 862.

The judgment is affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

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160 Cal.App.2d 178

REALTY COMPANY OF AMERICA, Inc., a California corporation, Plaintiff and Appellant,

v.

Roy W. BURTON, Special Administrator of the Estate of L. W. Coffee, Deceased, and L. W. Coffee, Inc., a California corporation, Defendants and Respondents.

Roy W. BURTON, Special Administrator of the Estate of L. W. Coffee, Deceased, and L. W. Coffee, Inc., a California corporation, Plaintiffs and Respondents,

v.

E. L. REMER, doing business as Realty Company of America, and Realty Company of America, Inc., a California corporation, Defendants and Appellants.

Civ. 22458.

District Court of Appeal, Second District, Division 1, California.

May 7, 1958.

Rehearing Denied June 4, 1958.

Hearing Denied July 2, 1958.

Action by owner of subdivision for rescission of exclusive sales contract with real estate agency and action by agency against owner for declaratory relief and for real estate commissions. From adverse judgment of the Superior Court of Los Angeles County, Newcomb Condee, J., the real estate agency and individual defendant appealed. The District Court of Appeal, White, P. J., held that judgment of court that exclusive contract was wholly ineffectual for any purpose whatsoever was repugnant to purposes and intent of specific findings wherein court limited effect thereof to the action for rescission.

Judgment affirmed as modified.

See also 153 Cal.App.2d 187, 314 P.2d 92.

1. Appeal and Error 🔑931(1)

On appeal, every intendment must be indulged by reviewing court in favor of trial court's findings.

2. Appeal and Error 🔑931(1)

On appeal, only evidence most favorable to successful litigant is to be considered, and where divergent inferences reasonably may be drawn from evidence, that inference is to be indulged which will support trial court's action.

3. Appeal and Error 🔑1010(1)

Unless reviewing court can say that trial court's findings are wholly without substantial support in evidence, findings cannot be disturbed although reviewing court might have reached a different conclusion upon same evidence.

4. Brokers 🔑7, 19

Under exclusive sales contract between property owner and real estate agency for sale of lots in subdivision, relationship of principal and real estate broker was created between the parties and there was imposed upon real estate agency same undivided service and loyalty that is imposed upon a trustee in favor of his beneficiary. West's Ann.Civ.Code, § 2230.

5. Brokers 🔑19, 34

A real estate agent is required to exercise highest degree of good faith toward his principal and he may not obtain for himself an advantage over latter by misrepresentation, deceit or concealment of essential facts of a transaction. West's Ann. Civ.Code, § 2230.

6. Principal and Agent ⚷69(7)

Unless otherwise agreed upon, an agent is burdened with duty not to compete with his principal concerning subject matter of agency. West's Ann.Civ.Code, § 2230.

7. Cancellation of Instruments ⚷47
Declaratory Judgment ⚷347

In action by property owner for rescission of exclusive sales contract and action by real estate agency for declaratory relief concerning validity of notice of rescission given by owner and for other relief, evidence sustained implied finding that owner suffered irreparable injury by competitive activities of real estate agency in acquiring and disposing of other land.

8. Appeal and Error ⚷989

Reviewing court's duty begins and ends with a determination of whether there is in the record evidence of sufficient substantiality, contradicted or uncontradicted, to support conclusion reached by duly constituted arbiter of the facts.

9. Appeal and Error ⚷994(3), 1012(1)

In action by owner of property against real estate agency for rescission of exclusive sales contract and action by agency against owner for declaratory relief concerning validity of notice of rescission of such contract and for other relief, weight to be given to letter from owner's attorneys to agency concerning attempted settlement of differences as to agency's competitive activities was within province of trial court, and it was within exclusive province of court to disbelieve testimony which appeared to him to lack verity and to base his findings upon contrary testimony deemed worthy of credence.

10. Cancellation of Instruments ⚷60

In action by owner against real estate agency for rescission of exclusive sales contract, wherein reference was made to 1952 contract entitled "exclusive sales contract" and prayer of complaint sought rescission and cancellation of that contract as well as 1953 contract and answer prayed for a declaration that 1952 contract was valid, essential elements were present to support judgment decreeing rescission of both contracts.

11. Cancellation of Instruments ⚷22

In action for rescission of exclusive sales contract for sale of lots in subdivision owned by plaintiffs, wherein it appeared that plaintiffs received nothing which could be restored, institution of suit was sufficient notice of rescission. West's Ann.Civ.Code, § 1691.

12. Contracts ⚷259
Fraud ⚷25

Fraud, unproductive of injury, will not justify a rescission nor support an action either for rescission or damages.

13. Cancellation of Instruments ⚷47

In action by owner of subdivision for rescission of exclusive contract for sale of lots in subdivision, evidence of fraud was sufficient to justify a rescission.

14. Cancellation of Instruments ⚷53

In action by owner of subdivision against real estate agency for rescission of exclusive contract for sale of lots in subdivision and action by real estate agency for declaratory relief concerning validity of notice of rescission of exclusive sales contract and for other relief, findings as basis for rescission of contract were not contradictory.

15. Judgment ⚷256(2)

In action by owner of subdivision for rescission of exclusive sales contract and action by agency against owner for declaratory relief and for real estate commissions, judgment of court that exclusive contract was wholly ineffectual for any purpose whatsoever was repugnant to purposes and intent of specific findings wherein court limited effect thereof to the action for rescission.

16. New Trial ⚷99

Courts look with distrust and disfavor upon motions for new trials based on ground of newly discovered evidence and such motions should not be granted unless new evidence is such as to make it reasonably probable that it would change result upon another trial and that moving party exercised reasonable diligence from beginning in endeavoring to discover evidence before first trial.

17. Appeal and Error ⚷981
New Trial ⚷99

Granting of motion for new trial on ground of newly discovered evidence rests in sound discretion of trial court and its decision will not be reversed on appeal unless an abuse of that discretion clearly appears.

18. New Trial ⚷102(8)

Where defendant answered ready when cases were called for trial although aware of absence of a certain person from United States more than a month prior to date of trial and application was not made to postpone trial until return of such person nor was attempt made to discover whereabouts of such person and secure his attendance or deposition, defendants entered upon trial at their peril and contents of affidavits filed by such person upon return did not constitute newly discovered evidence warranting granting of a new trial.

Wolver & Wolver, Eugene L. Wolver, Los Angeles, for appellants.

Avery M. Blount, Pasadena, Edward S. Cooper, Los Angeles, for respondents.

WHITE, Presiding Justice.

Two actions were consolidated for trial; joint findings of fact and conclusions of law were signed and a single judgment was rendered on the issues presented by the two actions.

Appellants herein were the plaintiffs in the initial action and were the defendants and cross-complainants in the second and subsequent action.

The initial action herein was instituted by appellant Realty Company of America, Inc. against respondents seeking declaratory relief, concerning the validity of a purported written "Notice of Rescission" given by respondent L. W. Coffee to appellant dated and served August 3, 1954. The notice of rescission pertains only to the "contract dated August 7, 1953" between appellant Realty Company of America, Inc. as first party and respondent L. W. Coffee as second party. By its complaint appellant seeks the declaratory judgment of the court that said notice of rescission is ineffectual and that the aforesaid contract of August 7, 1953 is in full force and effect and has not been cancelled. The last named contract recited that respondent L. W. Coffee is the subdivider of certain property in Riverside County, designated as "Desert Hot Springs Tract No. 7". It is then set forth that:

"Whereas: Said parties are desirous of arranging for the sale of such units as placed on the market from time to time, subject always to the approval of the Second Party, and that in no event shall performance of a contract exceed a period of five (5) years, and

"Whereas: The parties hereto are desirous and agreeable of arranging for the services of the First Party in the sale and contract of sales of such lots as shown on the proposed map of Desert Hot Springs Tract No. 7 passed by the Riverside County Planning Commission, except Lots 914, 915 and 916, which are reserved by Second party, * * *".

The purpose of said contract is thus defined:

"That the purpose of this agreement is to arrange for the sale or attempted sale either for cash or on contract, of certain lots or parcels of real property owned by Second Party and subdivided but unsold in Desert Hot Springs Tract No. 7 in Riverside County, State of California. It is understood and agreed that said Tract No. 7 is divided into nine units and that one or more units will be made available for First Party from time to time. Being further understood and agreed that when 80% of any one unit is sold and on contract to bona fide purchasers, that the Second Party will make ready another unit for the purpose of additional sales."

The contract then provides that L. W. Coffee warrants that "he has and will have marketable title to all property herein referred to and that upon the completion of any contract for purchase or any cash purchases, he will deliver to the purchaser or purchaser's nominee or assignee, a good, valid and marketable title and Policy of Title Insurance from the Riverside Title Company." It was further agreed that L. W. Coffee would furnish to Realty Company of America, Inc. adequate facilities and documents, such as contracts for the purchase of said property, display maps of said Tract No. 7, and sales maps of each unit "as opened for sale". Realty Company of America, Inc. agreed at its own expense to "furnish all reasonable and necessary advertising, adequate salesmen, tract men and preliminary deposit receipts; that First Party shall make weekly reports to Second Party of all the business activities conducted hereunder by the First Party including the making of any preliminary form of contract or receipts (to be furnished by First Party); First Party shall only use forms of contracts and deeds furnished by or approved by Second Party annexed hereto and designated as Exhibit 'A' for the Contract of Sale and Exhibit 'B' for Deed." There was annexed to the contract and made a part thereof a list of property in Desert Hot Springs Tract No. 7, and first party was "given the right and privilege to sell the same for and on behalf of second party and to obtain, receive and accept deposits or down payments thereon and to give receipts or acknowledgments therefor and preliminary agreements for the purchase thereof in the name of Second Party and to subsequently arrange for a contract (when required) to be signed by Second Party for the sale and purchase of said property."

As to compensation of the first party, the contract provided:

"(a) The First Party's compensation shall be 45% of the schedule Sales Price of each lot. Each lot shall bear its own compensation and/or commission.

"(b) The First Party shall be entitled to the first 10% received on amount of purchase price of each lot by itself.

"(c) The First Party shall be paid 90% of all subsequent monthly payments after interest is first deducted, until such time as First Party shall have received its full compensation and/or commission.

"(d) In the event of cancellation or forfeiture by the purchaser, all compensation and/or commission due First Party shall cease on said lot or lots, However, First Party shall be entitled to all compensation and/or commission on all payments received by Second Party prior to cancellation or forfeiture.

"Seventh: *Interest*

"(a) It is understood and agreed that Second Party shall retain all interest due on subsequent monthly payments.

"(b) That Second Party shall also retain 10% of all subsequent monthly payments, after interest is first deducted."

The contract then provides that second party shall keep true and correct accounts of all collections made and shall account to first party for payments so made on the 5th and 20th days of each month pursuant to a method set forth in the contract. It is then set forth:

"That the within covenants and the rights and privileges herein created in favor of First Party shall be exclusive and shall preclude either Second Party himself or his successors or assigns from selling any of said property so long as the First Party has sold on contract or for cash, $250,000.00 worth of property at List Price in each fiscal calendar year from the date hereof, such exclusive provision shall be applicable for the ensuing fiscal calendar year; that such provision shall apply from year to year hereafter until all lots to which this covenant shall pertain shall have been sold; that in the event such minimum sales shall not be complied with, such exclusive provision shall not thereafter be applicable thereto and thereafter, either party may terminate this agreement by giving to the other party a ninety day notice of termination."

The notice of rescission above referred to provided that it "* * * is hereby given on the ground that Realty Company of America, Inc. has been guilty of fraud and misrepresentation in its dealings with Mr. L. W. Coffee and has failed to exercise the highest degree of good faith, as required by law of real estate brokers." By his answer to the complaint of appellant Realty Company of America, Inc., respondent L. W. Coffee, in support of his notice of rescission alleged:

"(a) Secretly, appellants purchased from Mr. Wardman, approximately eighty acres of land in the Desert Hot Springs area, subdivided the same, and in so doing, misled the general purchasing public to the irreparable injury of defendant, selling such lands from a real estate office made available to Appellants by L. W. Coffee;

"(b) That by the use of intermittent advertising signs, advertised property owned by said L. W. Coffee alternately with property owned by Appellants, whereby the general purchasing public was misled:

"(c) That appellants contacted former purchasers of the land owned by L. W. Coffee and consummated trades with such persons, land owned by said Appellants, using for such purposes, the aforesaid real estate office:

"(d) That Appellants acquired title to real property in the Desert Hot Springs area by falsely representing:

"(1) That a parcel of property known as Block I, Tract 6, was being subdivided by A. Wardman, as owner, and that it had a *bona fide* offer to purchase such property; that Appellants refused to disclose to L. W. Coffee the name of such *bona fide* purchaser, and

> "'that all the statements made by plaintiff to defendant, L. W. Coffee, concerning the bona fide offer to purchase said Block I were false, and were known by plaintiff to be false, and were made for the sole purpose of defrauding and deceiving defendant; and the only purpose of the plaintiff is making said statements was to enable it to acquire and subdivide said Block I, for its own account, to the exclusion of said L. W. Coffee.'

"(2) That in addition, the Appellants acquired property where conditional sales purchasers had defaulted.

"(e) That the Appellants had accepted monies as 'reserve deposits' and that they had appropriated the same and had failed to account to L. W. Coffee therefor, and

"(f) Upon the cancellation of purchase contracts, the Appellants have retained all the monies theretofore paid, and have failed to account to L. W. Coffee therefor."

The second action was filed approximately one month after the prior action. In it, L. W. Coffee and L. W. Coffee, Inc. are the plaintiffs and E. L. Remer, doing business as Realty Company of America, and Realty Company of America, Inc., a California corporation, are defendants. It contains six causes of action. It alleges the execution of agreements on October 17, 1952 and August 3, 1953. The first cause of action alleges the secret profit and the failure to account to L. W. Coffee and said corporation. These allegations are the same as those contained in sub-paragraphs (a) and (b) of the answer in the prior action. The second cause of action alleges a sale of competitive property owned by appellants from the real estate office furnished by L. W. Coffee, and an alleged making of secret profits therefrom without accounting to plaintiffs in said action. These allegations are the same as those contained in sub-paragraph (c) of the answer in the prior action. The third cause of action initially contained the same allegations as those contained in sub-paragraph (d) of the answer in the prior action. During the trial, said cause of action was amended and as amended, alleges: (1) The same allegations as sub-paragraph (d) (1) and (d) (2) of the said answer in the prior action and in addition thereto, alleges (2) the attempt on the part of appellants to acquire said Block I, Tract 6 by means of a contract with one Andrew J. Subsaro, whereby appellants were to obtain the first deed of trust on said property.

In answer to said complaint the appellants herein allege that the schedule of prices annexed to the contract of October 17, 1952, which schedule did not contain a price for Block I, Tract 6, had been found to be mathematically inaccurate and had been supplanted by a new schedule, which contained an owner's, and release price, for said lot, as well as being mathematically correct as to prices for the other lots or parcels of property involved. That as to trades or other property acquired by the appellants, L. W. Coffee and L. W. Coffee, Inc., had in each instance, received in full, all consideration to which they were entitled, to wit, the release price from the property, and that as to trades, this had been done with the specific written authority of L. W. Coffee. That in regard to the purchase of the eighty acres from A. Wardman, the use of signs and the selling of appellants' property from the office furnished by L. W. Coffee, as well as the consent to the sale of Block I, Tract 6, for the aforesaid release price and a bonus of $3,500 all of the same were contained and authorized in a letter written on behalf of L. W. Coffee by his attorneys.

Contemporaneously with the filing of their answer appellants filed a cross-complaint, consisting of fifteen causes of actions and subsequent thereto, an amendment and supplement, containing sixteenth to the twentieth, inclusive, causes of action. Said instruments will be jointly considered for the purpose of resumé. The first five causes of action concern arrangements for the leasing to appellants of an office in the bathhouse at Desert Hot Springs, for the sale of the real property involved in the initial contract. The sixth cause of action concerns the forcible detainer of said office by L. W. Coffee. The seventh and eighth causes of action were for injunctive relief against any possessory action for said demised premises. The ninth cause of action is for real estate commissions due to appellants, as the procuring cause of a buyer ready, willing and able to purchase Block I, Tract 6. The tenth cause of action is a common count upon such facts for appellants' commissions. The eleventh cause of action concerns itself with forty-nine individual purchasers ready, willing and able. The twelfth cause of action is a common count and is for commissions predicated thereon. The thirteenth cause of action is for damages suffered by the withholding of property from sale, contrary to the agreement of the parties. The fourteenth cause of action is for anticipated commissions for Tract No. 7. The fifteenth cause of action is for the cost of billboards advertising the various tracts sold in the area. The sixteenth and seventeenth causes of action allege an agreement, which was to have been reduced to writing, under which the possession of the office in the bathhouse was returned to the respondents, and subsequently rescinded when such written covenant was not delivered to appellants. The eighteenth and nineteenth causes of action are for declaratory relief as to the right of occupancy of said demised premises, and the twentieth cause of action is similar to the thirteenth cause of action, which alleges additional property that should have been, but was not made available for sale under the contract.

In answer to said cross-complaint, the cross-defendants, consisting of the plaintiffs in this cause of action, and L. W. and Lillian Coffee Foundation, Inc., deny all the material allegations of the cross-complaint.

The record reflects that respondent L. W. Coffee first went to Desert Hot Springs area in Riverside County, in 1932. His first development in the area was financed under a trust arrangement by A. Wardman as beneficiary thereof. This arrangement was subsequently modified approximately one year later, whereby Mr. Coffee became the subdivider, promoter and sales agency;

Mr. Wardman would put up the necessary purchase price of the property, transfer fee title to Mr. Coffee, receive no down payment, but reserved as security a promissory note and deed of trust with a release clause for the sale of individual parcels or rights. This procedure had been followed for twenty years. Mr. Coffee had been a licensed real estate broker for a number of years.

The initial arrangement between Mr. Coffee and Mr. Wardman was that for his services Mr. Coffee would receive 50% of the profits from this arrangement.

The first relationship between the parties to this appeal commenced a short time prior to October 17, 1952 when a conference was held between respondent L. W. Coffee and appellant Remer regarding the sale by her organization of the then unsold lots in the Desert Hot Springs area, which numbered 677. Following this and subsequent conferences and negotiations, on October 17, 1952, a contract was entered into. On August 7, 1953, a subsequent contract (here in question) was entered into. Prior to April 5, 1954 differences arose between appellants and respondents. Up to November, 1953, appellants had sold or caused to be sold all but 109 of the aforesaid original 677 lots. In January, 1954, there were approximately 60 scattered lots available for sale by appellants, which were being sold as many as 23 on a weekend. Mr. Coffee had indicated at the time of the execution of the second contract of August 7, 1953, that Tract 7 would be available on or before October 1, 1953. For various reasons, as found by the court, Tract 7 was never sufficiently completed so that the same was eligible for public sale. Assertedly, to "prevent the possibility of the loss of their trained sales forces", appellants had obtained certain property in what is referred to as "Desert Hot Springs Annex". Such property was being sold by appellants from the real estate tract office furnished by respondents and in the bathhouse real estate office rented by appellants from respondents. Certain billboard advertising was used to promote and exploit the public sale of such property. The final matter of controversy concerns itself with the sale of Block I, Tract 6, wherein appellants had a contemplated sale, and as hereinafter indicated, Mr. Coffee was unwilling to acquiesce therein, upon the assumption that appellants were seeking to obtain such property for their own benefit. On May 5, 1954, Mr. Coffee and Mr. Hart, one of his attorneys, together with Mr. Robinson, secretary of the Realty Company of America, Inc., Mr. Carpenter, its sales manager, and Mr. Eugene L. Wolver, attorney for said corporation, met in the office of Mr. Wolver. A lengthy discussion was had at such conference as to the aforesaid matters, at the conclusion of which it was agreed that Attorney Hart would, in writing, make known Mr. Coffee's response thereto. On May 12, 1954, Mr. Hart sent to Mr. Wolver his response, as follows:

"After our meeting on Wednesday, May 5, I went over all the matters we had discussed with Mr. Coffee, and made the following recommendations regarding his relations with the Realty Company of America, Inc., with which he has agreed.

"1. In regard to the development of the 80 acres by the Realty Company of America, Mr. Coffee will cooperate to the fullest, which means that the Realty Company of America can use the signs as proposed; can continue selling its property from office furnished by Mr. Coffee; Mr. Coffee will make no derogatory remarks to any of the members of Realty Company of America, or its agents, and will in no way interfere with the sale of said property, directly or indirectly.

"2. In regard to the development of the N½ of Sec. 30 for sale by the Realty Company of America, Mr. Coffee is progressing as rapidly as his finances will allow. He feels that it is better to have the subdivision laid out in a first class manner for sale, rather than to start selling it now under bond. He feels that by waiting a far higher price will be received for the individual lots.

"In regard to the developement and sale of the N½ of Sec. 30, Mr. Coffee realizes that it is necessary for the Realty Company of America to have a large staff of salesmen who are well trained and equipped in selling, and to do this, they must have something to sell.

"Mr. Coffee will cooperate in every way to see that these ideas can be followed; however, he estimates that with the summer hot month coming on, it will be fall before he is able to have the property ready for sale.

"3. In reference to Block I, Mr. Coffee consents to the sale of same to one person on condition that he is paid, in addition to the release price, the sum of $3,500; which said sum is to be paid from the first monies received. Mr. Coffee further agrees that if the property is used in accordance with sales contract, for flat or duplex purposes, the property carries with it hot water rights.

"It is our sincere hope that in the future we can solve all our problems in an amicable manner and have informal conferences from time to time with a view toward helping one another in the development of Desert Hot Springs."

The foregoing epitomizes the general factual background surrounding this litigation and the issues presented on this appeal.

Following trial before the court, findings were made, and predicated thereon judgment was rendered that the above mentioned contracts dated October 17, 1952 and August 7, 1953 "are null and void and wholly ineffective for any purpose whatsoever, and that the same be and hereby are rescinded, cancelled and terminated". Upon appellants' complaint filed in the original action, judgment was rendered for respondent Coffee. As to appellants' cross-complaints, judgment was entered for respondent cross-defendants therein. From such judgment this appeal is prosecuted by E. L. Remer, doing business as Realty Company of America and Realty Company of America, Inc.

Appellants first challenge the sufficiency of the evidence to support the findings upon which the judgment was predicated.

[1–3] The function of and limitation upon an appellate tribunal in the determination of a claim of "insufficiency of the evidence" is thus enunciated in Bedford v. Pacific S. W. Corp., 121 Cal.App. 162, 163, 8 P.2d 558, 559:

> "It is a common-place of appellate procedure that every intendment is to be indulged by the appellate court in favor of the trial court's findings; that only the evidence most favorable to the successful litigant is to be considered, that, where divergent inferences reasonably may be drawn from the evidence, that inference is to be indulged which will support the trial court's action; and that with all this in mind, unless the court can say on appeal that the findings are wholly without substantial support in the evidence, they cannot be disturbed. It is not sufficient that upon the same evidence the appellate court might have reached a different conclusion as triers of the facts. The burden is upon the appellant to demonstrate that as a reasonable man the trial judge could not reasonably have reached the conclusion that he did from the evidence before him."

[4–6] Before proceeding to a discussion of the findings here under attack, it should be borne in mind that under the Exclusive Sales Contract, which is the subject of this action, a relationship of principal and real estate broker was created between the parties. Under California law, there is imposed upon the real estate agent the same undivided service and loyalty that is imposed upon a trustee in favor of his beneficiary (Sands v. Eagle Oil & Refining Co., 83 Cal.App.2d 312, 318, 188 P.2d 782; Langford v. Thomas, 200 Cal. 192, 197, 252 P. 602). Section 2230 of the Civil Code charges such an agent with the duty of fullest disclosure of all material facts concerning the transaction in question that might affect the principal's decision (Langford v. Thomas, supra, 200 Cal. at page 196, 252 P. 602; Rattray v.

Scudder, 28 Cal.2d 214, 223, 169 P.2d 371, 164 A.L.R. 1356). The agent is required to exercise the highest degree of good faith toward his principal. He may not obtain for himself an advantage over the latter by misrepresentation, deceit or concealment of the essential facts of a transaction (Bell v. Scudder, 78 Cal.App.2d 448, 454, 177 P.2d 796). Unless otherwise agreed upon, an agent is burdened with the duty not to compete with his principal concerning the subject matter of the agency.

[7] Appellants assail the finding that on or about May 15, 1954 they acquired the 80 acres of barren desert land for the purpose of subdividing the same and placing the land upon the market for purchase by the general public under the name of Desert Hot Springs Annex, and that the same was done for the purpose of misleading the general purchasing public, and doing irreparable injury to respondents as the original owner and subdivider in the Desert Hot Springs area, and selling said properties in competition with the Desert Hot Springs property of respondents. In support of their claims appellants assert there was evidence that they did not attempt to acquire and develop the 80 acres in question until after receipt of the letter (hereinbefore set forth and hereinafter to be considered) from the attorney for respondents. That prior to acquisition of the land there had been several conversations with respondent Coffee in which it was suggested that the latter become the purchaser and subdivider of such property. However, there is in the record testimony that respondent Coffee was advised of the purchase of the 80 acres some two weeks after a discussion between Mr. Carpenter of appellant Realty Company of America and respondent Coffee. That appellant Realty Company of America then commenced to sell the Desert Hot Springs Annex property and ceased actively selling property owned by respondents, in violation of the Exclusive Sales Contract, which is the subject of this litigation. That such sales continued after respondent Coffee complained of appellants' actions. Certain pictures were introduced into evidence showing that appellants were advertising to the public that they were the exclusive agents for respondent Coffee, when in truth and fact they were selling their own land in open competition with respondent.

Appellants complain of the findings that they have contacted many persons, who have theretofore purchased Desert Hot Springs property, and have urged them to trade said property for undeveloped acreage of desert land owned exclusively by appellants, and that in so doing, appellants have made derogatory remarks concerning respondents regarding the future of Desert Hot Springs, and the ability of the respondent L. W. Coffee to develop Desert Hot Springs as planned; that appellants have consummated trades of certain pieces of Desert Hot Springs property for undeveloped desert acreage; that appellants have become the sole owner of Desert Hot Springs property, which they have offered for sale to members of the general buying public, in competition with the property known as Desert Hot Springs and owned by the respondents; that all of said sales and trades have been carried on in the tract office of respondents, which was made available to appellants, for the sole purpose of selling Desert Hot Springs property owned by respondents. Appellants direct our attention to evidence that the first trouble between them and respondent Coffee was over the so-called "trades". That this was within the first six months, after a half dozen such trades had been made, after which respondent Coffee objected to trades. That four months after the commencement of operations, an agreement was reached, that the respondents would let the trades to date "go through", but would thereafter be paid the release price for any lot, upon which a trade was taken. That this understanding was confirmed by the respondents' letter of February 4, 1954. That in this letter the method to be pursued thereafter, as to trades, was established in detail; the appellants being authorized therein "so long as you pay the release price of any lot in any of my tracts in Desert Hot Springs, you can make any trade that you so choose and whatever you take in is yours. * * *" That in regard to trades, the court found there was no secret profit or failure to account. That there is no evidence in the record that the appellants at any time did not pay to respondents the full release price for every lot involving a trade. But, there is evidence in the record that appellant Realty Company of America did contact parties who had contracted to purchase property from respondent Coffee in the Desert Hot Springs area for the purpose of making trades with said parties; that appellants acquired their interests in the lands which said parties had contracted to purchase from respondent; that appellant would then sell said lands in competition with respondent and in violation of the exclusive sales agreements, and would then sell and transfer to such parties property in Desert Hot Springs annexed to property which was owned by appellant and acquired by them from A. Wardman in violation of the said exclusive sales contracts.

[8] It would unduly prolong this already lengthy opinion to set forth in detail the contention of appellants that other findings are barren of support in the evidence. Suffice it to say that while the evidence was extremely conflicting, appellants have not met the burden imposed upon them to demonstrate that as a reasonable man, the trial judge could not reasonably have reached the conclusion that he did from the evidence before him. As has been so often repeated, our duty begins and ends with a determination of whether there is in the record evidence of sufficient substantiality, contradicted, or uncontradicted, to support the conclusion reached by the duly constituted arbiter of the facts (Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183). Weighed in the crucible of that rule, appellants challenge to the sufficiency of the evidence to support the findings is unavailing.

[9] Appellants next contend, "That the contents of the letter of May 12, 1954 from Respondents' attorneys, (heretofore quoted herein) should not have been disregarded, and the same is binding upon the Respondents". It is contended that the letter provided authorization for appellants (a) to proceed with the acquisition and development of the aforesaid 80 acres in the Desert Hot Springs "annex," with Mr. Coffee's fullest cooperation, and with no interference with the sale of such property, directly or indirectly by Mr. Coffee; (b) the right to use the proposed advertising signs in the sale of such property, and the continued right to sell such property from the office furnished by Mr. Coffee; (c) the discontinuation of derogatory remarks by Mr. Coffee; (d) that finances had prevented the completion of Tract 7, and that it would be advantageous to wait, so that the same could be laid out for sale, in a first class manner, and that it would be "fall" before such property would be ready for sale; (e) that by so waiting, a far higher price would be received for the undivided lots; (f) in order to sell such property when so ready, the appellants must preserve and retain "a large staff of salesmen who are well trained and equipped in selling, and to do this, they (appellants' salesmen) must have something to sell," thus the necessity for acquiring such 80 acres and any other resalable property; (g) Mr. Coffee consents and authorizes the sale to one person of Block I, Tract 6, upon the following conditions: (1) that he be paid the release price of $12,000, and in addition, the sum of $3,500, aggregating $15,500; (2) which sum is to be paid from the first money received, and (3) if the property be used in accordance with the sales contract, or for "flat or duplex" purposes, the property carries with it hot water rights.

Appellants assert that certain findings that they placed the property on the market to respondents' "irreparable injury" and without respondents' knowledge or consent, sold the same from the office furnished by the latter, and that advertising billboard signs were used in advertising such property, are illustrative of the fact that the court disregarded the contents of the aforesaid letter. This contention of the claimed disregard for the letter is based on a portion of the trial court's "memorandum opinion", wherein it is stated, "The entire contract between the parties was properly rescinded because of completely changed conditions brought about principally by Realty. It would be inequitable to continue the contract in effect under the changed conditions.

"A dispute existed between the parties during the time of conference of Coffee and his attorney with Realty and its attorney, and much of this evidence must be discarded because it was an attempted compromise of an existing dispute."

There is no doubt that even though statements are allegedly made during a conference at which the parties were attempting to compromise their difficulties, that fact does not justify exclusion of the evidence if it was otherwise admissible (People ex rel. Dept. of Public Works v. Union Machine Co., 133 Cal.App.2d 167, 173, 284 P.2d 72; California Home Extension Ass'n v. Hilborn, 37 Cal.2d 459, 465, 235 P.2d 369). However, in the case at bar the letter in question was not only read into the record but was introduced into evidence as an exhibit. Therefore, it cannot be said that the letter was "disregarded" by the court. The weight to be given this evidence was within the province of the trial court. The record is replete with statements concerning various meetings between the parties and their counsel referred to by appellants' counsel as "for the laudable purpose of trying to adjust this matter preventing litigation. I think both he (respondents' counsel) and I concurred in the theory that an amicable settlement is preferable to litigious conduct." Also, the evidentiary value of the letter in question was merely cumulative and corroborative of other testimony offered by appellants, which the court rejected in favor of conflicting testimony adduced in behalf of respondents. While the court did say with regard to the letter "much of this evidence must be discarded because it was an attempted compromise of an existing dispute", kindred evidence was received in other forms, and as heretofore pointed out, it was within the exclusive province of the trier of facts to disbelieve testimony which appeared to him to lack verity, and to base his findings upon contrary testimony deemed worthy of credence.

[10] For the first time on appeal, appellants contend that a judgment of rescission should not have been rendered because of the absence of essential elements to sustain such a judgment. In this regard it is first contended that there was no notice of rescission as to the contract of October 7, 1952 and that the only notice of rescission alleged or proven herein pertains solely to the subsequent agreement of August 7, 1953. That in its judgment the trial court decreed the rescission of both contracts.

With this contention we cannot agree. In the primary or original of the two actions now engaging our attention, reference is made to the contract of October 17, 1952, entitled "Exclusive Sales Contract", and the prayer of said complaint petitions for rescission and cancellation of this contract as well as the contract of August 7, 1953. Furthermore, in their answer to this complaint, appellants prayed the court to declare "That certain Exclusive Sales Agency Contract dated October 17, 1952, * * * valid, binding, enforceable and legal between the parties hereto."

Appellants further urge a non-compliance with the provisions of Section 1691 of the Civil Code in that respondents made no offer to restore to appellants any benefits received by the former from the latter as a result of the transaction (Williams v. Smith, 127 Cal.App.2d 607, 612, 274 P.2d 204; Crosswell v. Eckels, 101 Cal.App.2d 271, 273, 225 P.2d 663; Clanton v. Clanton, 52 Cal.App.2d 550, 557, 126 P.2d 639). Appellants do not direct our attention to what respondents could have restored to appellants or what the former could have offered to restore. The complaint herein filed by respondents constituted an action in equity.

[11] In actions in equity there are certain exceptions to the general rule enunciated by Section 1691 of the Civil Code (Kelley v. Owens, 120 Cal. 502, 510, 47 P. 369, 52 P. 797). In the case at bar, since it appears respondents received nothing which could be restored, the institution of the suit was sufficient notice of a rescission in a case such as this. And, where, as here, we are concerned with an equity case, and no legal prejudice to appellants could have resulted, the rule concerning the filing of the action as being sufficient notice of rescission is especially true.

[12, 13] It is true as urged by appellants that fraud unproductive of injury will not justify a rescission nor support an action either for rescission or damages (Cutler v. Bowen, 10 Cal.App.2d 31, 36, 51 P.2d 164; Darrow v. Houlihan, 205 Cal. 771, 774, 272 P. 1049). In the instant case the record is replete with testimony not only of fraud but of resultant injury. For instance, there is testimony that after cancellations of sales made by appellants they failed to disclose to respondents such cancellations and return of the property; that appellants did not place said property upon the market for sale, or make such property again available for sale. Had this been done respondents would have been apprised of the fact that appellants had wrongfully retained moneys received from such cancellations.

There is also evidence that appellants retained said sums. As heretofore pointed out, there is evidence that respondents were damaged by appellants' conduct in the sale of lands in competition with respondents and in violation of the exclusive sales agreements. Other evidence of injury to respondent appears in the record, some of which is heretofore set forth herein. To us, it appears that appellants' contention as to the absence of actual injury or detriment to respondents by reason of the conduct and actions of the former, lacks substance.

[14] Appellants next urge that claimed contradictory findings require a reversal of the judgment. The pleadings and the issues presented by the consolidated cases herein are varied and complex. First, there was the complaint in the original action filed by appellants herein for declaratory relief and the answer thereto. Then, there was the complaint filed by respondents for rescission of the exclusive agency contracts, accounting and damages. There is the answer thereto and cross-complaint by appellants herein for declaratory relief, injunction, money due, indebitatus assumpsit and damages. Then respondents' answer thereto, followed by an amended and supplemental cross-complaint filed by appellants. The complexity of the issues framed by these pleadings and raised by the evidence is manifest from the evidentiary features of the case above narrated. In framing the lengthy findings made herein, the court below, except in two instances, adopted a formula, of which the following is typical: "That all of the allegations contained in Paragraph 1 of first cause of action of the complaint are true and correct." "That all of the allegations of paragraph II of the fifth cause of action of said complaint are true and correct, except it is not true that defendants have retained all sums designated as reserve deposits as their sole and exclusive property, and have failed at all times to account to plaintiffs for any of said sums." "That all the allegations set forth in paragraph III of answer to first cause of action of said complaint are untrue. That *this finding is binding in this action only and may be retried in another action pending between these parties.*" (Emphasis added.) As to all other paragraphs of the answer the finding was simply that "the allegations thereof are untrue." In the findings on the cross-complaint and answer thereto the same system was adopted, except as to paragraph VII of the first cause of action, with reference to which the finding reads that all of the allegations thereof "are untrue. That this finding is binding in this action only and may be tried in another action pending between these parties." The foregoing method adopted by

the court in making findings necessitates an examination of all the pleadings as well as the evidence adduced at the trial. Aided by such an examination and viewing the findings in their entirety, which we are required to do, we are satisfied that it cannot justly be said that they are so contradictory as not to justify the conclusions of law drawn therefrom, or the judgment rendered thereon except as hereinafter set forth.

[15] Appellants next complain that the findings do not justify nor support the provision in the judgment that the contracts between the parties, "Are null and void and *wholly ineffectual for any purpose whatsoever.*" (Emphasis added.) The italicized portion of the judgment is not in keeping with, and is repugnant to the purposes and intent of the specific findings, wherein the court, as indicated in our discussion of the findings, limited the effect thereof to the *within action.* The contract between the parties dated October 17, 1952 contained a proviso "* * * That no termination shall effect or release any monies or other consideration to which First Party shall be entitled under the terms hereof." The record bears out appellants' contention that the aforesaid italicized provision of the judgment "* * * could well be deemed to preclude any recovery upon such contract, a situation *which both court and counsel sought to avoid, during the trial herein.*

"Prior to the trial of the within cause, another action had been filed, and was pending at the time of the trial hereof, and both parties sought not to prejudice such action, which is for commissions earned by the Appellants, prior to any notice of termination of their agency." (Emphasis added.) That the court did not intend the judgment herein to affect the other action for commissions is implicit in the findings made. The judgment should therefore be modified to exempt therefrom the other action for real estate commissions, which was pending at the time of the trial with which we are here concerned, and which it was stipulated should not be affected by the judgment herein.

Finally, appellants urge that the trial court abused its discretion in not granting their motion for a new trial. The motion for a new trial was principally predicated upon affidavits. Those of A. Wardman and Bradford Cook would tend to impeach the testimony of respondent L. W. Coffee with reference to the holding of the trial judge in his "Memorandum Opinion" that the contract between the parties hereto was properly rescinded because of "*completely changed conditions* brought about principally by Realty (appellants)". (Emphasis added.) It is urged that the foregoing affidavits "indicate that such 'completely changed conditions' were the result solely by the conduct of said L. W. Coffee, and the insistence of A. Wardman that the Realty Company of America, Inc. would not alter its sales campaign and sales force in the Desert Hot Springs area". Appellants contend that the contents of these affidavits constituted "newly discovered evidence, material for the moving party herein, which could not have been discovered or produced with reasonable diligence at the trial of the captioned cause".

[16, 17] Appellants concede the rule to be as stated in Re Estate of Emerson, 170 Cal. 81, 82, 148 P. 523, that "* * * the courts look with distrust and disfavor upon motions for new trials based on the ground of newly discovered evidence; that such motions should not be granted by trial courts unless the new evidence is such as to make it reasonably probable that it would change the result upon another trial; that the moving party must state in his affidavits facts which show that he exercised reasonable diligence from the beginning in endeavoring to discover the evidence before the first trial; that the decision of these questions rests in the sound discretion of the trial court; and that its decision will not be reversed on appeal unless an abuse of that discretion clearly appears." See also Monnette v. Title Ins. etc. Co., 107 Cal.App. 313, 324, 290 P. 668; Vertson v. Los Angeles, 116 Cal.App. 114,

120, 2 P.2d 411; Bradbury Estate Co. v. Carroll, 98 Cal.App. 145, 154, 276 P. 394; Laverne v. Dold, 17 Cal.App.2d 180, 183, 61 P.2d 497; Carvalho v. Lusardi, 114 Cal. App.2d 733, 737, 251 P.2d 37. However, appellants, as shown by the affidavit of their counsel, admit that on October 7, 1955 when negotiations for a settlement seemed "improbable" and that the matter would proceed to trial, appellants' counsel sought to obtain the testimony of A. Wardman at the trial of the instant causes, "and for the first time, learned and ascertained that said A. Wardman was not in the State of California or the United States, but was on a world wide tour, and could not either be contacted nor could his whereabouts be ascertained for the taking of a deposition. That by reason of the fact that said A. Wardman was constantly traveling, his deposition could not be taken, and affiant did not have any information, knowledge or belief as to what his testimony would be, so that interrogatories for a written deposition could be prepared or that the same could be stated in any affidavit for continuance or otherwise. That said A. Wardman did not return to the United States or the State of California from said trip until the 14th day of December, 1955, and by reason thereof, affiant was unable to cause said witness to be subpoenaed, or his testimony to be otherwise produced on behalf of affiant's clients.

"That until the preparation of the affidavit of A. Wardman, filed contemporaneously herewith, affiant did not have any information, knowledge or belief that Bradford Cook had had any discussion with Mr. L. W. Coffee, or could testify in the manner and as to the facts more fully set forth in the affidavit of Bradford Cook, filed contemporaneously herewith."

[18] In the case at bar, we are confronted with the fact, as was the trial judge, that on November 15, 1955, when the consolidated cases were called for trial, appellants' counsel answered "Ready", although, according to counsel's affidavit, he was aware of the absence of Mr. Wardman from the United States on October 7, 1955, more than a month prior to the date of trial. Hence, it is not strictly newly discovered evidence, and it is not claimed that any application was made to postpone the trial nor to give a further opportunity to discover Mr. Wardman's whereabouts and secure his attendance or deposition. Having failed so to do it must be held that appellants entered upon the trial at their peril (Broads v. Mead and Cook, 159 Cal. 765, 768, 116 P. 46; Scanlon v. San Francisco etc. Ry. Co., 128 Cal. 586, 589, 61 P. 271). It is also significant that at no time prior to the signing of findings of fact, conclusions of law and entry of judgment, did appellants make any motion to reopen the case so that the court might hear the testimony of both Mr. Wardman and Mr. Cook. The affidavit of appellants' counsel shows that Mr. Wardman returned to the United States on December 14, 1955, while the findings of fact, conclusions of law and judgment were not signed until April 26, 1956. We are satisfied that appellants have not met the burden resting upon them to show an abuse of discretion by the trial court in denying their motion for a new trial upon the ground urged therefor.

For the reasons herein stated, the judgment is modified by adding thereto, at the end of the paragraph designated I, and following the words, "rescinded, cancelled and terminated", the words, "but without prejudice to an action now pending in this Court between the parties hereto involving commissions allegedly earned by defendant E. L. Remer doing business as Realty Company of America, and Realty Company of America, Inc., a California corporation." As so modified, the judgment is affirmed. The parties will bear their respective costs on appeal.

FOURT, J., and DRAPEAU, J. pro tem., concur.

160 Cal.App.2d 277

BULLOCK'S, Inc., a corporation, Plaintiff and Respondent,

v.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a National Banking Association, etc., et al., Defendants and Appellants.

Civ. 22635.

District Court of Appeal, Second District, Division 2, California.

May 9, 1958.

Action for a declaratory relief to establish value of rental property as a basis for determining the rentals to be paid therefor. Judgment for the lessee in the Superior Court of Los Angeles County, William J. Palmer, J., and the lessors appealed. The District Court of Appeal, Fox, P. J., held that the terms of the lease indicated that land's fair market value was to be used in determining rental value, and that trial rulings were not prejudicial and that the lessors were not entitled to costs and attorneys fees.

Affirmed.

1. Landlord and Tenant 🔑201

Provisions of lease established that parties intended that appraised market value of land as basis for determining the rental to be paid therefor on June 1, 1956, should be used as basis for calculating rental for the 10-year period commencing on that date.

2. Evidence 🔑113(1)

While the word "value" has several different meanings, it is well recognized that value, in connection with legal problems, ordinarily means market value, and the term cannot be given a limited meaning, as distinguished from its usual definition, unless an intention to so use it appears. West's Ann.Code Civ.Proc. § 16.

See publication Words and Phrases, for other judicial constructions and definitions of "Value".

3. Evidence 🔑113(16)

When applied without qualification to property of any description, "value" means the price it will command in the market.

4. Landlord and Tenant 🔑201

Under lease imposing duty on appraisers to determine value of the land for rental purposes, which value was to be determined as of June 1, 1956, "for the purpose of fixing rent" for a 10-year period commencing on that date, quoted phrase did not show an intent to qualify the word "value" and give it a meaning different from ordinary market value, and disclosed intent that annual rent for the 10-year period commencing June 1, 1956, should be 5 per cent of the fair market value of the land on that date. West's Ann.Code Civ. Proc. § 16.

See publication Words and Phrases, for other judicial constructions and definitions of "For the Purpose of Fixing Rent".

5. Landlord and Tenant 🔑201

Where lease called for a determination of the value of the land by appraisers to fix the rental therefor, and parties were contracting for the lessors to receive as rent a 5 per cent return on the value of the land, such value to be redetermined every 10 years, lease disclosed that when the parties referred to the "value of the land" they meant its monetary worth or marketable price or its market value. West's Ann.Code Civ.Proc. § 16.

6. Landlord and Tenant 🔑201

Terms of lease as a whole indicated that the use of the phrase "market value" in the repair and maintenance section of the lease providing for appraisal did not indicate that the parties intended some other criterion of value in the rental provisions because of the absence of the word "market", especially in view of the condemnation provisions of the lease making reference to the "value of the land".

7. Trial 🔑382

In a case tried without a jury, the evaluation of a witness' testimony and weight to be given it are matters within the discretion of the trial court.

8. Evidence ⚷574

In actions to establish value of property to determine rent to be paid therefor, trial judge properly gave more weight to testimony of lessee's experts with respect to value than those of the lessors where cross-examination indicated that lessee's witnesses were fairly familiar with the data upon which they based their opinions.

9. Appeal and Error ⚷1170(7)

In action to establish value of property as basis for determining rentals therefor, charts showing vehicular passenger traffic entering the downtown area between certain dates, were, if erroneously admitted, not prejudicial, where they bore little relevance to the questions before the court. West's Ann.Const. art. 6, § 4½.

10. Appeal and Error ⚷1170(7)

In action to determine value of property for rental purposes, alleged error in restricting testimony of expert of the defendant and in excluding an exhibit of the defendant was not prejudicial under the circumstances. West's Ann.Const. art. 6, § 4½.

11. Landlord and Tenant ⚷238

In action to determine value of rented property as basis for determining rental, denying costs and attorneys' fees to lessors was not improper, though lease provided that lessee would pay lessors' costs and reasonable attorneys' fees if latter became involved in litigation arising out of lessee's use of leased property or its acts in connection therewith, where suit arose out of terms of lease itself and a disagreement of the arbitrators as to the rental value, was as much a fault of lessors as of lessee.

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Iverson & Hogoboom, Los Angeles, for appellants.

Macfarlane, Schaefer & Haun, and E. J. Caldecott, Los Angeles, for respondent.

FOX, Presiding Justice.

This is a declaratory relief action to establish the value of certain property as a basis for determining the rental to be paid therefor.

The property in question has a frontage of approximately 35½ feet and a depth of approximately 149½ feet. It is situated in Los Angeles on the west side of Broadway between Sixth and Seventh Streets. The respondent has occupied this and adjoining property for some fifty years, and operates thereon its department store known as Bullock's Downtown. The property was originally leased in 1906 for fifty years by respondent's predecessor in interest. Rent was based upon a fixed percentage of the value of the land. In 1943 respondent entered into a new lease for the subject property commencing immediately after the termination of the prior lease.

The new lease was also for a term of fifty years, commencing June 1, 1956. It contained many provisions identical to those of the prior lease. The rent to be paid for the ten-year period commencing June 1, 1956, was set at "an amount equal to five per cent of the appraised value of the leased land fixed as hereinafter provided, but not less that $17,750 per year."[1] The lease

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[1] The pertinent rental provisions in the lease read as follows:

"Rent

"For the ten-year period commencing June 1, 1956, the annual rent shall be an amount equal to five per cent of the appraised value of the leased land fixed as hereinafter provided, but not less than $17,750.00 per year.

"For the remaining part of the term the annual rent shall be an amount equal to five per cent of the appraised value of the leased land fixed as hereinafter provided, but not less than $6,000.00 per month.

"The annual rent shall be paid in twelve equal monthly installments payable in advance on the first day of each calendar month.

"Appraisement

"The appraised value of the land shall be determined and fixed as at June 1, 1956, for the purpose of fixing rent for the ten-year period commencing June thereafter set forth provisions for appraising the value of the land. The appraisal was to be determined as of June 1, 1956, and was to cover the leased land, exclusive of buildings and improvements thereon. Provision was made for the selection of an arbitrator by both the lessors and the lessee. In the event that the arbitrators failed to agree upon a value or failed to agree upon the appointment of a third arbitrator, "the value of said land * * * [was to] be determined by the Superior Court of the County of Los Angeles in an action * * brought therein for that purpose."

Arbitrators were appointed by the lessee and the lessors, but the arbitrators did not agree upon a valuation nor upon the appointment of a third arbitrator. After the expiration of the periods prescribed in the lease, respondent filed this action, requesting that the court determine the value of the land so that rent could be established as provided in the lease. Appellants answered seeking similar relief and praying for an award of their costs in the proceedings, including attorneys' fees.

The trial court determined that the value called for in the lease was the land's fair market value, and set that value at $478,980. The court entered judgment accordingly, also ordering that each side should bear its own costs. The lessors have appealed.

[1–4] Appellants' initial contention is that the trial court erred in basing his decision as to the value of the land on its fair

1, 1956, as at June 1, 1966, for the purpose of fixing rent for the ten-year period commencing June 1, 1966, as at June 1, 1976, for the purpose of fixing rent for the ten-year period commencing June 1, 1976, as at June 1, 1986, for the purpose of fixing rent for the ten-year period beginning June 1, 1986, and as at June 1, 1996, for the purpose of fixing rent for the ten-year period beginning June 1, 1996. The appraisements shall be of the leased land exclusive of the buildings and improvements on the leased land and shall be made as follows: One hundred twenty (120) days before the commencement of each of said periods the Lessors shall appoint an arbitrator and immediately notify the Lessee in writing of the said appointment and of the name and address of the said arbitrator so appointed by them, and the Lessee shall also similarly at said time appoint an arbitrator and immediately notify the Lessors in writing of the said appointment by it. If the said two arbitrators do not within twenty (20) days after their appointment as aforesaid agree upon the value of the said land, then they shall immediately appoint a third arbitrator, and the decision of any two of said arbitrators shall be binding upon the parties hereto, such decision in each respective instance to be rendered on or before thirty (30) days before the commencement of each of said respective periods. The award by said arbitrators shall be made in writing, signed by said arbitrators in duplicate, one of which documents shall be delivered to the Lessors and one to the Lessee herein. Each party will pay the charges of the arbitrator appointed by it and the expenses incurred by such arbitrator. The charges for services of the third arbitrator and the other expenses of the arbitration shall be borne by the parties in equal shares. It is expressly understood and agreed that if the parties hereto can, before the commencement of any of said periods, mutually agree upon the value of said land for either or any of such periods, then no appraisement need be made for any of such periods for which such value is so mutually agreed upon. In such case the amount agreed upon shall be evidenced by a writing, signed in duplicate by the respective parties.

"If for either or any of such periods the parties hereto do not mutually agree upon the value of said land, or if either party hereto for either or any of such periods fails to appoint an arbitrator as hereinbefore provided, or if for any of such periods said arbitrators fail to agree, and failing to agree do not appoint a third arbitrator as hereinbefore provided, or if for either or any of such periods said arbitrator or any two of them, as hereinbefore provided, do not agree upon a valuation before the thirtieth day preceding such or any of such periods, then the value of said land for such or any of such periods shall be determined by the Superior Court of the County of Los Angeles in an action or actions brought therein for that purpose.

"The provision for minimum rent is not as indication of opinion of value at the present time or for the future and shall not be considered in any way in connection with the appraisements or de-market value on the date in question.[2] Their theory is that the language used in the lease ("the value of said land," "the appraised value of the leased land," and "the appraised value of the land * * * for the purpose of fixing rent") meant something different from fair market value. We cannot agree with this contention. Our principal task in this case is to determine the intent of the parties from the language appearing in the lease. A careful reading of the lease convinces us that the parties intended that the fair market value of the land on June 1, 1956, should be used as the basis for calculating the rental for the ten-year period commencing on that date. The lease itself states that in the event arbitration fails the court is to determine "the value of said land." While the word "value" has several different meanings, it is well recognized that "'value,' in connection with legal problems, ordinarily means market value." Bagdasarian v. Gragnon, 31 Cal.2d 744, 753, 192 P.2d 935, 940. "The term cannot be given a limited or special meaning, as distinguished from its usual definition, unless an intention to so use it appears." Bunnell v. Baker, 104 Cal.App. 313, 317, 285 P. 877, 879, 286 P. 1090; see, also, Code Civ.Proc. § 16. "When applied without qualification to property of any description, ["value"] necessarily means the price it will command in the market." 2 Bouv., Law Dict., Rawle's Third Revision, p. 3387. There is nothing in the rental provisions which indicates that something other than market value was intended. The duty of the appraisers was to determine the "value of the land." This value was to be determined "as at June 1, 1956, for the purpose of fixing rent for the ten-year period commencing June 1, 1956, as at June 1, 1966, for the purpose of fixing rent for the ten-year period" commencing on that date, and so forth for the five decades of the lease. Appellants argue that the phrase "for the purpose of fixing rent" shows an intent to qualify the word "value" and give it a meaning different from ordinary market value. But it is obvious from the context in which the words are used that they refer only to the ten-year period for which the appraisal in question fixes the value of the land, such value being an essential factor for determining the rent to be paid during such period. The only word which qualifies "value" in the rental provisions is "appraised," and this merely means that the "value" is ascertained by appraisers; that which is being determined is still the "value of the land." Moreover, the parties provided elsewhere in the lease: "The language in all parts of this lease shall in all cases be construed simply according to its fair meaning * * *." Since the usual definition of "value" in an appraisal context is "monetary worth of a thing; marketable price" (Webster, New International Dictionary, 2d ed.), it is clear that the parties intended that the annual rent for the ten-year period commencing June 1, 1956, should be five per cent of the fair market value of the land on that date.

[5] Appellants properly point out that "value" means value *in use* (i.e., the utility of an object) as well as value *in exchange* (i.e., an object's worth in terms of marketable price). See 2 Bouv, op. cit. supra, p. 3387. But it is clear that the parties did not intend *use* value in the rental provisions. The lease calls for a determination of the value of the land, not the value of the use of the land for any particular purpose. The entire context shows that the parties had in mind the property's worth rather than its utility for a given purpose. The issue should not be confused by the fact that the actual annual rent figure is

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terminations of value herein provided for."

[2] Paragraph III of the judgment reads: "The words 'the value of said land', 'the appraised value of the leased land', 'the appraised value of the land' and 'the appraised value of the land shall be determined * * * for the purpose of fixing rent for the ten-year period commencing June 1, 1956 * * *', as such terminology is used in the section of said lease numbered 4, all denote the same concept of value as is denoted under the law by the term 'fair market value'."

obtained by taking five per cent of the appraised value. It is obvious from the rental provisions that the parties were contracting for the lessors to receive as rent a fixed percentage return on the value of the land, such value to be redetermined every ten years. They might have agreed on four per cent or six per cent, but they chose five instead. Moreover, it must be remembered that this is a "net" lease—i.e., the lessee pays *all* taxes and other expenses in connection with the property. From the method of calculation which the parties agreed upon it may reasonably be inferred that they were thinking in terms of interest rate on a capital investment. They fixed the net rate of return on the lessor's investment at five per cent, but they also provided for fluctuation in the value of such investment. They realized that this capital asset might fluctuate in value from time to time and therefore provided for periodic reevaluation in order that the lessors might continue to receive a five per cent return on the value of their investment. When the parties referred to the "value" of the land in question they meant its monetary worth or marketable price—i.e., its *market value.*

Appellants argue that "if the parties had intended market value, they would have said market value." However, we have already pointed out that using merely the word "value" in the lease indicates that the parties meant market value. In fact, it seems clear that if the parties had intended anything *other than* market value, they would have said so expressly.

[6] In this connection appellants also argue "market value" was not intended because, while those words were not used in the rental provisions, they did appear in a provision of the lease concerning repair and maintenance of the building and improvements on the property. It should first be noted that the latter provision deals with an altogether different subject matter—the method of determining the minimum cost of reconstructing improvements under certain conditions. Moreover, reading the lease as a whole makes it obvious that use of the phrase "market value" in the repair and maintenance section does not indicate that the parties intended some other criterion of value in the rental provisions because of the absence of the word "market." This is illustrated by the condemnation provisions of the lease which make several references to the "value of the land." It is elementary that "value" in connection with condemnation proceedings ordinarily means market value. San Diego Land & Town Co. v. Neale, 78 Cal. 63, 67–68, 20 P. 372, 3 L.R.A. 83; Joint Highway Dist. No. 9 v. Ocean Shore R. Co., 128 Cal.App. 743, 753–754, 18 P.2d 413. The parties were undoubtedly referring to market value in the condemnation provisions even though they did not use the word "market."

The final paragraph in the condemnation section lends further support to our conclusion that the parties meant market value in the rental provisions. The paragraph provides that in the event of partial condemnation of the leased property the rent for the balance of the ten-year period during which the condemnation takes place shall be reduced by a sum equal to five per cent per annum "of the amounts awarded as compensation for the land taken and damages to the portion of the land remaining."[3] Compensation for the land taken plus damage to the land remaining (severance damage) is equivalent to the difference between the market value of the land before condemnation and the market value of what is left after condemnation. The parties have thus provided for a reduction in rent based upon the difference between the market value of the land before condemnation and the market value of what remained thereafter. And the reduction is calculated in the same manner as that provided for calculating rent—five per cent per annum of the predetermined amount. Since the lease provides that a reduction in rent due to partial condemnation is to be measured by the drop in market value of the property covered by the lease, it may reasonably be inferred that the parties were thinking in terms of market value when they drafted the provisions of the lease relating to the calculation of rent.

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[3] The entire paragraph reads as follows: "If a part of the leased property is condemned and taken and the lease is continued in force and the actual possession of said part is required and taken during a ten-year period for which the appraised value has been fixed on the basis of the entire leased property, the rent for the balance of the said ten-year rent period provided for in Paragraph 4 hereof shall be reduced by a sum equal to five per cent (5%) per annum of the amounts awarded as compensation for the land taken and damages to the portion of the land remaining."

The cases relied upon by appellants are not in point. They deal with rental value—the value of the use of the land for any purpose for which it is adapted. Rental value is measured partially in terms of time, by the month or by the year, et cetera. The parties were not fixing rental value in the lease, they were fixing rent. They determined such rent by taking a fixed percentage of the full value (not the rental value) of the land. The parties based rent upon the *fair market value* of the property rather than upon its rental value for any given period of time.

From the foregoing it is clear that the trial court did not err in basing his decision as to the value of the property on its fair market value.

[7, 8] Appellants' next contention is that the trial court erred in disregarding the testimony of their expert witness concerning the value of the land. They also contend that the court erred in refusing to strike the testimony of one of the respondent's experts (Sayer) on the ground that he failed to consider the effect of the lease on the value of the property in determining that value. It is elementary that in a case tried without a jury the evaluation of a witness' testimony and the weight which it is to be given are matters within the discretion of the trial court. Donlon v. Donlon, 140 Cal.App.2d 428, 430, 295 P.2d 51; Beeler v. Plastic Stamping, Inc., 144 Cal.App.2d 306, 308, 300 P.2d 852. The trial court in the instant case did not abuse that discretion merely by giving more weight to the testimony of respondent's experts than to that of appellants' experts.[4] Nor did the

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[4] The following is a brief summary of the testimony of each of respondent's expert witnesses:

Mr. Sayer testified that he had examined the lease and that he inspected the property and maps of the area; he obtained the assessed valuation of properties in the area; he secured information concerning all the sales of nearby property over a period of five years; he obtained the sales volume figures of lessees in the vicinity; he interviewed owners and proprietors. He stated that he took into consideration all of the above factors. He considered the physical aspects of the property, the terms of the lease concerning the method of appraisal, the rentals being paid in the area, and the effect of decentralization of the downtown property. He gave consideration of varying degrees to at least fifteen of the thirty sales he had investigated, and gave particular consideration to three sales within six months of the date of valuation. He was of the opinion that the market value of the property was $450,000.

Mr. Little also visited the property, obtained records of sales and leases of nearby property within five years, talked to owners, and examined other properties in the vicinity. He obtained the square footage of the various properties and their assessed values. He secured data concerning retail sales volumes in the downtown area. He interviewed buyers and sellers of comparable properties, studied market conditions, spoke with mortgage bankers familiar with the downtown area, and read the lease on the subject property. He considered the size and scope of the subject property to determine its "highest and best use, either with the present or an alternative improvement." He concluded that the property had a fair market value of $443,500.

Mr. Ross testified that he examined the property and photographed it. He obtained information concerning nearby sales, rentals, and so forth. He examined several leases, including the lease in question. He examined much data concerning the conditions of downtown Los Angeles during the period in question. He prepared a map of the area and used it in his considerations. He court err in refusing to strike Sayer's testimony. His method of appraisal (in regard to ignoring the effect of the lease on the property's value) finds judicial support in two well-reasoned decisions dealing with lease provisions quite similar to those in the case at bar: Columbia Theatre Amusement Co. v. Adsit, 211 Ill. 122, 71 N.E. 868, and Springer v. Borden, 210 Ill. 518, 71 N.E. 345. People ex rel. Department of Public Works v. Dunn, 46 Cal.2d 639, 297 P.2d 964, relied upon by appellants, does not state a contrary rule. That was a condemnation case in which the judgment was reversed because the trial court had stricken the testimony of an expert witness when it appeared that his opinion as to the value of the land included an amount as a "bonus factor" for a lease upon the property. The court held that the jury should have been permitted to consider the expert's testimony in regard to the lease because income from property in the way of rent is a proper element to be considered in arriving at the compensation to be paid for the taking of property. The question involved in the case at bar is entirely different. While rental income is normally a proper factor to be considered in determining the value of property, it obviously cannot be considered when property is being appraised for the very purpose of determining the rent which should be paid. The rent cannot even be determined until a valuation of the land has been made. This principle is ably explained by the court in the Springer case (71 N.E. at page 346):

"The lease provided that the lessee should pay as rent a sum equal to 5 per cent. of the cash value of the demised premises, exclusive of the buildings and improvements which might be thereon. * * * The court construed the value of the demised property as contained in the lease to mean the cash value of the naked lot with a clear title in fee simple. The complainant insisted that the court ought to find the cash value of the fee simple as depreciated by the lease upon it, or, in other words, the cash value of the reversion. * * * Anyone buying the reversion would pay more if the lease called for 10 per cent. per annum on the value than if it called for 5, as in this case, and would pay more if the lease called for 5 per cent. than if it called for 4, which the evidence showed to be the basis for the market value of such estates when the cause was heard. Certainly, it would never be thought that a tenant must pay more rent by raising the value of the reversion because the rental fixed in his lease is high, and consequently the reversion more valuable, and it would be equally unjust that he should pay less by reducing the valuation because his lease calls for a low rate and therefore the reversion is less valuable. The value of anything, in the common understanding, is the value of the full title, and not a value over and above some incumbrance. The cash value of the lot, exclusive of the buildings and improvements thereon, can mean nothing else than the value of the full title to the lot. According to the theory of complainant, a lease under very favorable terms to the lessee may be made still more favorable to him by showing that the terms of the lease depreciate the value of the reversion. A reduction in the value of the reversion would be equal to a reduction of rent, and the reduction of rent would reduce the value of the reversion, and so on in endless succession. The rule contended for is wholly impractical, for the reason that, as long as the net annual rental is unknown, the net value of the reversion cannot be ascertained, one of the necessary elements for fixing such value being lacking. No such plan for fixing the rentals could have been anticipated by the parties. Our conclusion is in accord with the decision in Goddard v. King, 40 Minn. 164, 41 N.W. 659, and it is supported in principle by Philadelphia Library Co. v. Beaumont, 39 Pa. 43, and

studied the above data and arrived at a valuation of $450,000.

Cross-examination of each of these witnesses indicated that they were thoroughly familiar with the data upon which they based their opinions, including the rentals of other property in the vicinity.

Lowe v. Brown, 22 Ohio St. 463. The value of the property for the purpose of fixing the rents could neither be increased by the fact that the burden on the lessee was great and the terms of the lease favorable to the lessor, nor reduced by the fact that the burden was light and the lease favorable to the lessee." It is thus clear that the ruling in the Dunn case is not applicable to the case at bar.

The cases cited by appellants in support of the testimony of their expert are not in point. Those cases involved valuation of a lease or leasehold interest rather than valuation of land.

[9] Appellants contend that the trial court erred in receiving certain charts in evidence and in permitting one of respondent's witnesses to testify concerning figures on the charts. They argue that the charts were hearsay and that there was an insufficient foundation for their admission into evidence. The charts in question show the vehicular passenger traffic entering the downtown area between 1941 and 1955. They bore little relevance to the questions before the court. Even if it were to be conceded that there was error, such error was not prejudicial and cannot be the basis of a reversal. Calif. Const. Art. VI, § 4½.

[10] Appellants contend that the court restricted the testimony of their expert when he was giving the reasons for his opinion as to the value of the property, and that the court erred in denying the admission into evidence of one of appellants' exhibits. The record discloses that appellants' expert was permitted to testify in great detail concerning the method by which he arrived at his opinion and his reasons therefor. The chart in question was a per front-foot per month breakdown of rentals paid by other stores near the subject property. The witness testified that he used the data appearing on the chart in order to check the opinion at which he had arrived. Even though the chart was not received in evidence, the witness was permitted to testify that he had checked the rentals of the nearby stores and used the data in forming his opinion. It is thus clear that no prejudicial error could have occurred.

[11] Appellants' final contention is that the trial court erred in denying them costs and attorneys' fees in this action. The lease provided that the lessee would pay the lessors' costs and reasonable attorneys' fees if the latter, without fault on their part, became involved in litigation "arising out of the Lessee's use of the leased property or its acts in connection with this lease * * *."[5] However, it is clear that the instant suit did not arise out of respondent's use of the property or its acts in connection with the lease. The suit arose out of the terms of the lease itself. The lease requires such a suit in the event the appointed arbitrators do not agree upon the value of the land or upon the appointment of a third arbitrator. The disagreement of the arbitrators cannot be said to be an act by respondent in connection with the lease. Such disagreement is as much the fault of the lessors as it is the fault of the lessee. The lessors are therefore not entitled to costs and attorneys' fees under the provision now under consideration.

That the parties did not intend the lessors should recover costs and attorneys' fees in such a suit as the present one is demonstrated by the arbitration provisions in the lease. It is provided that "each party will pay the charges of the arbitrator appointed by it and the expenses incurred by such arbitrator"; and that "the charges for services of the third arbitrator and the other expenses of the arbitration shall be borne by the parties in equal shares." Thus, the parties contemplated that the expenses of arbitration would be shared. No express provision is made in the arbitration section concerning costs and attorneys' fees in a suit to determine the value of the property. Since these expenses are the result of a substitute for arbitration, the obvious conclusion is that the parties intended that they should be shared. If, regardless of the outcome of such a suit, the lessee should be required to pay the lessors' costs and attorneys' fees, then the lessors would always be in a position to hold out for an increase in valuation equal in amount to their costs of litigation which the lessee would have to bear in any event. Such a one-sided advantage could not have been intended by the parties.

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[5] The entire paragraph in question reads as follows:

"If the Lessors without fault on their part shall be made parties to any litigation commenced by or against the Lessee involving the enforcement of any of the rights or remedies of the Lessors against the Lessee, or arising on account of a default of the Lessee in respect of any of the covenants or conditions in this lease, or arising out of the Lessee's use of the leased property or its acts in connection with this lease, then the Lessee will pay all costs and reasonable attorney's fees incurred by or assessed or charged against the Lessors in connection with such litigation, and will also pay the costs and reasonable attorney's fees incurred by the Lessors in enforcing the covenants and conditions of this lease."

The judgment is affirmed.

HERNDON, J., concurs.

ASHBURN, J., deeming himself disqualified, did not participate herein.

160 Cal.App.2d 290

Willie Mae JOHNSON and Fletcher Jones, Plaintiffs and Respondents,

v.

HOLMES TUTTLE LINCOLN-MERCURY, Inc., a corporation, Defendant and Appellant.

Civ. 22542.

District Court of Appeal, Second District, Division 3, California.

May 9, 1958.

Rehearing Denied June 2, 1958.

Hearing Denied July 2, 1958.

Action for breach of contract to procure liability insurance. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., rendered judgment on verdict for plaintiffs and defendants appealed. The District Court of Appeal, Vallée, J., held that evidence established meeting of minds in automobile dealer's agreement to procure full coverage, including liability insurance, for purchaser of automobile as basis for recovery by injured persons as third-party beneficiaries.

Affirmed.

1. Contracts 🔑56

Mutual promises constitute consideration. West's Ann.Civ.Code, § 1605.

2. Contracts 🔑54(1)

A single consideration may support several counterpromises. West's Ann.Civ. Code, § 1605.

3. Insurance 🔑104

Evidence established meeting of minds in automobile dealer's agreement to procure full coverage, including liability insurance, for purchaser of automobile as basis for recovery by injured persons as third-party beneficiaries.

4. Evidence 🔑518

In action on automobile dealer's agreement to procure "full coverage" of insurance for purchaser of automobile, expert testimony of insurance salesman that "full coverage" when used by layman included specified amounts of liability insurance was admissible to explain the phrase "full coverage," not for purpose of creating a contract, and was also admissible as in effect merely a statement of the law which every person was presumed to know and of which court could take judicial notice. West's Ann.Vehicle Code, § 415; West's Ann.Code Civ. Proc. § 1870, subd. 12.

5. Contracts 🔑187(1)

Action by third-party beneficiary does not rest on ground of actual or supposed relationship between parties but on basis that the law, operating on acts of parties, creates duty, establishes privity, and implies promise and obligation on which action is founded. West's Ann.Vehicle Code, § 415; West's Ann.Civ.Code, § 1559.

6. Contracts ⚷187(1)

A third party may enforce a contract if he can show he is a member of class for whose benefit it was made, without necessity that he be named and identified as an individual. West's Ann.Vehicle Code, § 415; West's Ann.Civ.Code, § 1559.

7. Contracts ⚷187(1)

It is no objection to maintenance of action on contract by third party that suit mght be brought also against the promisee. West's Ann.Vehicle Code, § 415; West's Ann.Civ.Code, § 1559.

8. Contracts ⚷187(1)

The test for determining whether a contract was made for benefit of third person is whether intent to benefit third person appears from terms of contract. West's Ann.Vehicle Code, § 415; West's Ann.Civ.Code, § 1559.

9. Insurance ⚷591½

The statute requiring policy to authorize action by judgment creditor against liability insurer is part of every policy and creates a contractual relation which inures to benefit of any person who may be negligently injured by insured, as completely as if such injured person had been specifically named in policy. West's Ann.Insurance Code, § 11580; West's Ann.Vehicle Code, § 415; West's Ann.Civ.Code, § 1559.

10. Insurance ⚷591½

The primary purpose of statute requiring policy to authorize action by judgment creditor against liability insurer is to protect injured person when insured is bankrupt or insolvent. West's Ann.Insurance Code, § 11580.

11. Contracts ⚷187(1)

Automobile dealer's agreement to procure liability insurance for purchaser of automobile was not for sole benefit of purchaser but inured to benefit of third persons who might be protected by full coverage, and hence persons injured by insured's negligence could recover on such agreement. West's Ann.Insurance Code, § 11580; West's Ann.Vehicle Code, § 415; West's Ann.Civ.Code, § 1559.

12. Appeal and Error ⚷1040(10)

In action for breach of contract to procure liability insurance, overruling of special demurrer attacking complaint for failure to allege that agreement was for express benefit of plaintiffs was not prejudicial where depositions were taken before trial, cause was fully and fairly tried, and defendant did not claim surprise.

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Getz, Aikens & Manning, Thomas C. Murphy, and DeWitt Morgan Manning, Los Angeles, for appellant.

A. J. Blackman, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from a judgment for plaintiffs as third party beneficiaries of an oral agreement to procure public liability and property damage insurance.

The agreement is alleged to have been entered into between Holmes Tuttle Lincoln-Mercury, Inc., called defendant, and Phillip R. Caldera and his wife, Ruth, in connection with the purchase by the Calderas of a new Mercury automobile from defendant on November 23, 1953.

On December 11, 1953, about three weeks after the Calderas purchased the car, Phillip Caldera was involved in an accident with the Mercury. Plaintiffs, Willie Mae Johnson and Fletcher Jones, a passenger, were injured and Johnson's car was damaged.

Separate actions were filed by plaintiffs against Phillip Caldera. Judgments were entered May 23, 1955 in favor of plaintiff Johnson for $4,413.89, and in favor of plaintiff Jones for $2,070. These judgments remain unsatisfied.

Plaintiffs allege defendant, by its salesman Harry Rozany, had agreed with Caldera at the time the Mercury was purchased to procure "full coverage" insurance for Caldera, including public liability and property damage, for the operation of the Mercury; both Caldera and defendant understood the insurance was to be obtained for the usual term and for no less than the minimum legal limits; defendant failed to obtain the public liability and property damage insurance after Caldera had performed all of the terms of the agreement on his part. The prayer is for the amounts of the judgments obtained against Caldera with interest. In a jury trial the verdict was for plaintiffs as prayed. Defendant appeals from the judgment which followed.

On November 23, 1953 Caldera appeared with his wife, Ruth, at the showroom of defendant for the purpose of purchasing a new Mercury. One of defendant's salesmen, Harry Rozany, approached the Calderas and discussed with them the prospective purchase of a new Mercury like the one then in the showroom. After about five minutes Rozany took them to a "closing room" where terms were discussed for about an hour and the purchase consummated. The Calderas told Rozany they had a 1948 Chevrolet as a trade-in and $900 cash as a down payment. They indicated they could not afford to make payments of over $80 a month on the balance. During the discussion Caldera told Rozany he wanted "full coverage insurance," and Rozany replied, "Oh, yes, you are getting it." Rozany made out the papers and sold them "another insurance," a policy by which the insurer engaged to pay the balance of the purchase price of the car in the event of the death or disability of Caldera. The premium of $2.50 to $3.00 a month was to be included in the installment payments. Rozany computed the figures in the transaction on "scratch paper." He had Caldera sign the car order and the conditional sale contract in blank. Rozany took the papers "upstairs," saying he was going to complete filling them out.

About December 2, 1953 Mrs. Caldera received by mail a copy of the conditional sale contract dated December 1, 1953 which showed fire, theft, comprehensive, and $50 deductible collision insurance thereon, but which made no reference to public liability and property damage insurance. Mrs. Caldera read only the figures. She called defendant to talk to Rozany but as he was not there she did not talk to him or to anyone. Caldera did not see this copy of the conditional sale contract received by Mrs. Caldera. Neither of the Calderas saw the original sales order until after the first of the year when Caldera went to put in the new certificate of registration and discovered the folded document with the stamped notation "No liability insurance sold on this car," which had been placed in the registration holster and fastened on the wheel by Rozany shortly after he had returned to the closing room with the approved order at the time of the purchase. Caldera first learned he had no public liability and property damage insurance after his wife went to the office of Olympic Insurance Company "to find out about the insurance." That company had issued the collision policy dated December 15, 1953, which the Calderas received December 17, 1953, four days after the accident.

To Caldera, who was 36 years old, employed as a mechanic, and who had been through the ninth grade in school, "full coverage insurance" meant everything that is supposed to be in insurance, including public liability and property damage. The public liability and property damage insurance on the 1948 Chevrolet automobile used as a trade-in had expired in August of 1953, and Caldera testified that since it was an old car and they intended trading it in on a new one any day he thought there was no use in renewing it.

Defendant had a licensed insurance department. Its salesman, Rozany, had been a new car salesman there about three years, during which time he had sold about 300 cars, and on at least one occasion the sale involved the purchase of public liability and property damage insurance. Rozany's experience as a new car salesman was continuous from 1937.

Plaintiffs' expert witness, James P. Bennett, an experienced insurance salesman, testified over objection of defendant that the term "full coverage" when used by a layman meant in the automobile insurance business insurance against damage to his car and against damage caused by his car;

it would include a term of one year, basic limits of $5,000 for injuries to one person, $10,000 for injuries to all persons in one accident, and $5,000 for property damage, as well as $500 medical payments.[1] The premium for such insurance by one using his car to travel to and from work in the particular territory in which Caldera drove would be $63. He also testified there was sufficient information on the purchaser's statement which was signed by Caldera to order the coverage, so long as he had the sales order to identify the car.

[1, 2] Defendant first asserts the evidence does not support the implied finding of the jury that there was a contract to procure public liability and property damage insurance between Caldera and defendant; nor does the evidence support the implied finding that plaintiffs were third party beneficiaries of a contract between Caldera and defendant. It is argued there was no consideration paid by Caldera for defendant's agreement to procure full coverage insurance, including public liability and property damage. The agreement alleged and proved was that in consideration of Caldera's purchasing the Mercury defendant would procure full coverage insurance, including public liability and property damage. Mutual promises constitute consideration. Civ.Code, § 1605; El Rio Oils (Canada) Ltd. v. Pacific Coast Asphalt Co., 95 Cal.App.2d 186, 193, 213 P.2d 1; 12 Cal.Jur.2d 498, § 266; Rest., Contracts, § 77. A single consideration may support several counterpromises. H. S. Crocker Co., Inc., v. McFaddin, 148 Cal. App.2d 639, 645, 307 P.2d 429.

It is interesting to note that the conditional sale contract which Caldera signed in blank recites a total contract balance due of $2,505.73. The policy received by Caldera shows the amount of the contract as $2,598.73, a difference of $93. The insurer must have obtained the contract figure from defendant. The uncontradicted evidence shows that the cost of public liability and property damage in basic limits plus $500 medical payments coverage was $63. Figuring the transaction with one year's premiums in advance as Rozany did with the other coverages, the total charges equal the $93 difference.

[3] The evidence recited, contrary to defendant's claim, shows there was a meeting of minds. It is argued that because Rozany testified he did not know what the term "full coverage" meant there could be no meeting of minds. The jury was not compelled to believe Rozany. He was thoroughly impeached. The jury may have inferred his knowledge from his experience. He had been a new car salesman since 1937, three years with defendant, and had sold around 300 cars "or better." Defendant was a licensed insurance broker with an insurance department operated in connection with its auto sales business. Rozany told Mrs. Caldera full coverage "includes everything."

[4] Referring to the testimony of the witness Bennett, which was admitted over its objection, defendant argues it was erroneously admitted in that it was proof of custom and usage for the purpose of creating a contract, which may not be done. Custom and usage was not relied on to create a contract. It was admitted for the purpose of explaining and interpreting the phrase, "full coverage," and for that purpose it was admissible. Code Civ.Proc. § 1870(12). Furthermore, the testimony was in effect merely a statement of the law which every person is presumed to know and of which the court could take judicial notice. Veh.Code, § 415.

[5] Defendant contends plaintiffs were not third party beneficiaries. "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Civ.Code, § 1559. Where one person for a valuable consideration engages with another to do some act for the benefit of a third person, and the agreement thus made has not been rescinded, the party for whose

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[1] Vehicle Code, § 415.

benefit the contract or promise was made, or who would enjoy the benefit of the act, may maintain an action against the promisor for the breach of his engagement. While the contract remains unrescinded, the relations of the parties are the same as though the promise had been made directly to the third party. Although the party for whose benefit the promise was made was not cognizant of it when made, it is, if adopted by him, deemed to have been made to him. He may sue on the promise. Where a promise is made to benefit a third party on the happening of a certain contingency, the third party may enforce the contract on the occurrence of that contingency. 12 Cal.Jur.2d 493, § 261. The action by a third party beneficiary for the breach of the promisor's engagement does not rest on the ground of any actual or supposed relationship between the parties but on the broad and more satisfactory basis that the law, operating on the acts of the parties, creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded. Washer v. Independent M. and D. Co., 142 Cal. 702, 708–709, 76 P. 654.

[6, 7] It is not necessary that the beneficiary be named and identified as an individual; a third party may enforce a contract if he can show he is a member of a class for whose benefit it was made. Calhoun v. Downs, 211 Cal. 766, 770–771, 297 P. 548; Garratt v. Baker, 5 Cal.2d 745, 748, 56 P.2d 225; Shell v. Schmidt, 126 Cal.App.2d 279, 290, 272 P.2d 92; Woodhead Lumber Co. v. E. G. Niemann Investments, 99 Cal.App. 456, 459, 278 P. 913. It is no objection to the maintenance of an action by a third party that a suit might be brought also against the one to whom the promise was made. Malone v. Crescent City M. & T. Co., 77 Cal. 38, 44, 18 P. 858.

[8] The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. Le Ballister v. Redwood Theatres, Inc., 1 Cal.App.2d 447, 449, 36 P.2d 827. If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract. It is held that a person injured may sue on a contract for the benefit of all members of the public who are so injured since the happening of the injury sufficiently determines his identity and right of action. Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163, 165, 61 A.L.R. 846.

Section 11580 of the Insurance Code reads:

> "A policy insuring against losses set forth in subdivision (a) shall not be issued or delivered to any person in this State unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein.
>
> "(a) Unless it contains such provisions, the following policies of insurance shall not be thus issued or delivered:
>
> "(1) Against loss or damage resulting from liability for injury suffered by another person other than a policy of workmen's compensation insurance.
>
> "(2) Against loss of or damage to property caused by draught animals or any vehicle, and for which the insured is liable.
>
> "(b) Such policy shall not be thus issued or delivered to any person in this State unless it contains all the following provisions:
>
> "(1) A provision that the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy.

> "(2) A provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."

[9, 10] The statute is a part of every policy and creates a contractual relation which inures to the benefit of any and every person who might be negligently injured by the insured as completely as if such injured person had been specifically named in the policy. Malmgren v. Southwestern A. Ins. Co., 201 Cal. 29, 33, 255 P. 512; Bias v. Ohio Farmers Indemnity Co., 28 Cal.App.2d 14, 16, 81 P.2d 1057. The primary purpose of the statute is to protect an injured person when the insured is bankrupt or insolvent. Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 746, 7 P.2d 999, 85 A.L.R. 13. The complaint here alleges Caldera is insolvent and there was evidence to that effect. The statute in effect makes the tortfeasee a creditor beneficiary. It makes the benefit of the policy available to the creditor beneficiary tortfeasee. See 27 Cal.L.Rev. 497, 529.

In James Stewart & Co. v. Law, 149 Tex. 392, 233 S.W.2d 558, 22 A.L.R.2d 639, a corporation—the owner—entered into a contract with a contractor for the erection of certain buildings. The contract expressly obligated the contractor to maintain certain insurance, and also provided that in case any part of the contract was sublet by the contractor the latter should require of its subcontractor the maintenance of automobile liability insurance. The contractor sublet part of the work to a subcontractor who in turn contracted with a truck owner for the hauling of gravel in connection with the performance of his subcontract. Neither the contractor nor the subcontractor required his respective subcontractor to carry automobile insurance and none was carried by the truck owner. While hauling gravel, the latter injured an employee of the owner, and the employee brought suit against the contractor to recover damages on the theory that the contractor had breached its contract with the owner by failing to see that all subcontractors carried automobile liability insurance, and that he, the employee, was a third party beneficiary of such contract. The court held the injured employee was a third party beneficiary under the contract and as such entitled to maintain suit against the contractor.[2]

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2. The court stated (233 S.W.2d 561): "Petitioners appear to place their principal emphasis upon the proposition that Law and Pacific Indemnity are not third party beneficiaries under the contract between North American and Stewart & Company. They invoke the principle that parties are presumed to contract for their own benefit and not that of another. In the application of that principle to the contract before us they take the position that the intent of the parties in requiring automobile liability insurance of contractors and subcontractors was to protect the owner by safeguarding the solvency of the contractor and subcontractors so that they could perform their contracts. If it be assumed that the motive of North American was only the selfish one to protect itself and not that of benefiting third parties, it does not follow that it did not intend to benefit third parties. Motive and intent are not synonymous. In United Fidelity Life Insurance Co. v. Adair, Tex.Civ.App., 29 S.W.2d 940, 943, affirmed Tex.Com.App., 29 S.W.2d 944, the opinion quotes with approval this language clearly pointing out the distinction between motive and intent: 'Intent, in its legal sense, is quite distinct from motive. It is defined as the purpose to use a particular means to effect a certain result. Motive is the reason which leads the mind to desire that result.' The means employed by the contracting parties to effect the result which they had in mind was to require that the contractor and subcontractors maintain various types of insurance. The law presumes that the parties to a contract intend the consequences of its performance. The intent of the requirement that the contractor should see that all subcontractors carry automobile liability insurance was necessarily to provide a method by which claims of liability of the type insured against could be paid by insurers. Respondents' claim

Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862, relied on by defendant, was overruled in Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16.

[11] There is no escape from the conclusion that the agreement between defendant and Caldera was not for the sole benefit of the latter but that it was intended to inure to the benefit of third persons who might be protected by a full coverage policy. Cf. Goff v. Ladd, 161 Cal. 257, 258, 118 P. 792; French v. Farmer, 178 Cal. 218, 221, 172 P. 1102; Sunset Lumber Co. v. Smith, 91 Cal.App. 746, 750–751, 267 P. 738. See annotation: 81 A.L.R. 1271; 26 Cal.L.Rev. 627. The intent to confer a benefit on anyone to whom Caldera might become liable as a result of a hazard incident to ownership and operation of the Mercury is obvious. This is precisely what Caldera wanted as a means of obtaining a benefit to himself. It must have been in the contemplation of the parties when Rozany agreed to procure public liability and property damage insurance that injury to third persons might result from ownership and operation of the Mercury. It was reasonable for the jury to infer that Caldera, in making the agreement with defendant, desired and intended that such persons be protected in the event of an accident with the Mercury. The jury's finding that there was a third party beneficiary contract breached by defendant to plaintiffs' damage is amply supported by the record.

[12] The action is for breach of an oral contract to procure insurance; it is not based on fraud, as defendant asserts. Proof of fraud was merely incidental to proof of the contract. Defendant filed a general and special demurrer to the complaint which was overruled. Error is asserted. It is said there is no "allegation that the alleged agreement was for the express benefit of plaintiffs." Sufficient facts are alleged to show that it was for plaintiffs' benefit.[3] While there are some uncertainties in the complaint, no prejudice is shown. Depositions were taken before trial, the cause was fully and fairly tried, defendant does not claim surprise, and the error, if any, in overruling the special demurrer did not affect defendant's substantial rights in any way.

Other points made do not require discussion.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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is of that type. Had petitioners required the subcontractor to procure a policy of liability insurance, Law would have benefited thereby, and Pacific Indemity would have been subrogated in part to Law's rights. North American and Stewart & Company must be presumed to have intended that that consequence flow from the performance of their contract. It follows that, in our view, respondents were entitled to maintain this suit on the contract."

[3] It is alleged defendant promised to procure for Caldera full coverage insurance including public liability and property damage for the operation of the Mercury and "At all times mentioned, Plaintiff Willie Mae johnson was and now is within that class of persons for whom the contract aforesaid between Defendant Phillip R. Caldera and Defendant Holmes Tuttle was expressly made." A like allegation is made with respect to plaintiff Jones.

160 Cal.App.2d 538

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Sam GARZA and Celestino Villareal, Defendants,

Sam Garza, Appellant.

Cr. 6072.

District Court of Appeal, Second District, Division 2, California.

May 16, 1958.

Defendant was convicted of selling a preparation of heroin. The Superior Court of Los Angeles County, Herbert V. Walker, J., entered judgment, and defendant appealed. The District Court of Appeal, Ashburn, J., held that defendant was not denied fundamental rights by trial court's failure of its own motion to furnish defendant with name of informant who accompanied police officer to whom defendant sold the preparation, where name of informant was known to defendant.

Affirmed.

1. Poisons ⚷9

Evidence warranted conviction for selling a preparation of heroin. West's Ann. Health & Safety Code, § 11500.

2. Poisons ⚷9

In prosecution for selling a preparation of heroin, testimony of police officer to whom defendants sold the preparation needed no corroboration. West's Ann. Health & Safety Code, § 11500.

3. Witnesses ⚷216

In prosecution for selling a preparation of heroin, defendant was not denied fundamental rights by trial court's failure of its own motion to furnish defendant with name of informant who accompanied police officer to whom defendant sold the preparation, where name of informant was known to defendant. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ⚷1116

Where the evidence taken before the grand jury was not in the record brought to the District Court of Appeal, defendant's point that the trial court erred in denying his motion to dismiss indictment for want of sufficient competent supporting evidence would not be considered on defendant's appeal from judgment of conviction. West's Ann.Pen.Code, § 995.

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Floyd H. Schenk, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Ray R. Goldie, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Convicted of three charges of selling a preparation of heroin (Health & Safety Code, § 11500) defendant appeals from the judgment.

[1] Appellant claims insufficiency of the evidence but his brief does not comply with the rule pertaining to the presentation of that argument. Rule 15 of Rules on Appeal. However, our consideration of appellant's major contention requires an examination of the evidence and we find it to be amply sufficient.

At the times here pertinent defendant operated the San Antonio Cafe in the city of Los Angeles. On April 8, 9 and 18, 1957, he sold heroin to Police Officer Nelson, each transaction being the subject of one of the counts of the indictment.

On the first occasion the officer was accompanied by one Daisy, an informant, who introduced him to defendant as "her old man." The officer was carrying a suit of clothes and a coffee pot. Garza asked about the size of the suit and pronounced it too short. Asked how much he would give for the coffee pot, defendant said "a half", which term in underworld parlance signifies a half gram of heroin. Defendant then spoke in Spanish to his employee Villareal and told the officer, who did not understand that language, "I am having my boy take care of you. It will be in just a minute." In about five minutes Villareal handed Nelson a bindle of heroin which was wrapped in a Blue Star razor blade cover. Defendant kept the coffee pot.

On April 9, Nelson went again to the cafe. He then had a number of shirts which he showed to defendant who selected two and asked what Nelson wanted for them; he was told "a half;" then defendant spoke in Spanish to Villareal who went behind a cooking stove, then behind the bar and wrapped a bindle of heroin in a book of matches. Nelson said, "Hey, man, give me a match." Villareal threw the match book containing the heroin to Nelson who left the two shirts with Garza. Villareal asked about a shirt for himself and told Nelson he could give "a real good one with a lot of stuff in it." Garza was present at the time.

On April 18th Nelson returned to the bar with a brown beaver-type hat. Garza said it was too big but "Colalos wants a hat." Nelson: "Well, you know what I want." Garza: "Yeah, I know. Colalos is a pusher, too." The hat deal did not go through, so Nelson brought from his automobile eight more shirts similar to those produced on the former occasion. Garza asked how much he wanted for them and he said, "Well, eight would bring me one and a half." Garza said: "No. Cash." Nelson said that three or four dollars would be fine. So Garza took the shirts, sold two of them to another customer for $6, showed the money to Nelson and said he would give him "a half" for it. Nelson assented and defendant said: "It will be in just a minute. I will have my boy take care of you." Nelson said "Okay," took a seat at the bar and after he had waited a few minutes defendant asked if he had been taken care of. He said "No," defendant spoke to Villareal in Spanish and he then came to Nelson, picked up a book of matches and placed a bindle of heroin therein. Nelson said, "Hey, man, give me a match." Villareal then handed the book to Nelson who said, "Cool," and left the bar.

Defendant denied all of these sales, testifying that he paid $7.50 for the coffee pot, $5 for two shirts, sold another two shirts to a customer for $6, delivering the money to Nelson. Also that he loaned Nelson $2 on the hat on April 18th. This is a different defense from the one advanced to Officer Bowser, who had a conversation with defendant at the Police building on the day of his arrest. After certain evasions and denials on defendant's part, Officer Nelson was called into the room and read his notes to defendant. Bowser said: "'What do you have to say to that, Mr. Garza?' And at that time he said to Officer Nelson, 'I never really sold you anything.' And I said, 'Now, just a moment, Mr. Garza. Do you mean by that that you never actually handed Officer Nelson anything?' And he said, 'Yes.' And I said, 'But you have listened to all these facts that Officer Nelson has just read to you, and you do recall these transactions, where the merchandise was exchanged for narcotics.' And he says, 'Yes, but I never actually handed him anything.'"

[2] Nelson's evidence needed no corroboration; the court rejected Garza's; and manifestly the evidence is sufficient to sustain the conviction upon all three counts.

[3] Appellant's major contention is that he was denied fundamental rights through nondisclosure of the name of the informant who accompanied Officer Nelson on the first occasion. There was no informant present on the 9th or 18th of April.

The subject was first introduced at the beginning of the cross-examination of Nelson:

> "Q. When you entered this place of business on April 8th, who was with you? A. There was another person with me, sir.
>
> "Q. Who was that person? A. Sir, I would like to refer to the Code of Civil Procedure, 1881.5 without giving that source of information.
>
> "Q. This was an informant who was with you? A. Sir? I can't hear you, sir.

"Q. Was this an informant that was with you? A. Yes, sir.

"Q. Was this informant present during the entire conversation you had with Mr. Villareal and Mr. Garza? A. No, sir. * * *

"The Court: He is asking you, Was the informant present during part of the conversation?

"The Witness: I am not too sure, sir. * * *

"The Court: Well, don't your notes show?

"The Witness: No, sir. * * *

"Q. By Mr. Bratton: Have you had occasion to use this informant before? * * *

"The Witness: Yes, sir."

That is all that occurred with reference to the informant until defendant took the witness stand. There was no demand for disclosure of the informant's name and no motion or request to the court to require such disclosure. As to the effect of failure to make such a demand, see Lorenzen v. Superior Court, 150 Cal.App.2d 506, 513, 310 P.2d 180; Robison v. Superior Court, 49 Cal.2d 186, 316 P.2d 1. As it did not affirmatively appear during the examination of Officer Nelson that the informant was present at the conversation between him and Garza, there was no occasion for revealing the name at that time.

Counsel for appellant, having conceded that trial counsel "did not further ask the court to compel the witness to answer," argues that it was the affirmative duty of the judge to require a disclosure even though no request for a ruling was made. Reliance is placed upon cases such as People v. Golsh, 63 Cal.App. 609, 219 P. 456; People v. Sheffield, 108 Cal.App. 721, 293 P. 72, 77; People v. Frahm, 107 Cal.App. 253, 290 P. 678; People v. Harris, 87 Cal.App.2d 818, 198 P.2d 60; People v. Diaz, 105 Cal.App.2d 690, 234 P.2d 300, to the effect that the judge in a criminal trial is charged with the duty of protecting the fundamental rights of the defendant. But those cases do not hold, nor are we aware of any to the effect that the judge must assume to conduct the defense of one who is represented by counsel. Probably this failure to press for an answer from the witness is explained by the fact that, as appeared from his own later testimony, defendant knew the identity and name of the person who accompanied the officer.

It has been held that a disclosure of the name of an informant is not required in the absence of a showing that he or she was in some manner a participant in the transaction upon which defendant is being tried; that this is so even though proper motion or other demand therefor is made. So held in People v. Moore, 154 Cal.App.2d 43, 46, 315 P.2d 357; People v. Gonzales, 141 Cal.App.2d 604, 607, 297 P.2d 50; People v. Dewson, 150 Cal.App.2d 119, 125, 310 P.2d 162; People v. Alaniz, 149 Cal.App.2d 560, 567, 309 P.2d 71. On the other hand a right to disclosure is recognized in cases where the informant has been a participant in some manner or to some degree in the crime. This rule is based upon the theory that his or her testimony may be valuable to defendant in refutation of the testimony of the enforcement officer or by way of impeachment of the witness. Such cases are: People v. Lawrence, 149 Cal.App.2d 435, 450, 308 P.2d 821; People v. Castiel, 153 Cal.App.2d 653, 656, 315 P.2d 79; People v. Alvarez, 154 Cal.App.2d 694, 696, 316 P.2d 1006; People v. Cox, 156 Cal.App.2d 472, 319 P.2d 681; People v. Williams, —— Cal.App.2d ——, 323 P.2d 824; People v. Marquez, 160 Cal.App.2d 362, 324 P.2d 918.

Clearly there was no occasion for revealing the informant's name prior to the time that defendant Garza took the witness stand and reopened the subject. He testified:

"Q. Do you recall on the 8th day of April having met Officer Nelson in your place of business? A. Yes, I do.

> "Q. Who was present when you met Mr. Nelson? A. There were several people present at the time.
>
> "Q. Can you tell me who they were? A. Well, Mr. Celestino Villareal was one, a colored girl by the name of Daisy—I don't know her last name—but she came in there with Officer Nelson, and she introduced me to him as her old man.
>
> "Q. Did you know this party called Daisy? Had you known her before? A. Yes.
>
> "Q. Did you enter into a conversation then with Mr. Nelson in the presence of this party? A. Yes, I did.
>
> "Q. What was the gist of your conversation with Mr. Nelson? A. It was in reference to this coffee pot."
>
> Again:
>
> "Q. Did this girl by the name of Daisy—did you call her—? A. Yes.
>
> "Q. Did she enter into the conversation at this time? A. She was just sitting there in the booth, didn't say a word."

That is all that occurred during the presentation of the defense concerning the subject of the informer. There was no request for any further information about Daisy. She was known to defendant, he said she was present during the conversation and of course he was fairly apprised of the need of her testimony to corroborate his own. Villareal was present at the same conversation, but counsel's reply brief aptly says, "further more having plead guilty to a felony, he would have been impeached and of little or no value to the defendant." Hence defendant knew he needed Daisy, with whom he was acquainted. The conversation was on April 8, 1957, and the trial began on July 29, 1957. No competent showing was made or is made as to why defendant had not located Daisy and produced her as a witness. In fact, he needed no disclosure for he knew the witness and knew she had firsthand knowledge of the conversation. He claims that he did not know that she was an informer but that is immaterial; if it has any significance, it is by way of emphasis upon the fact that he himself should have had Daisy present at the trial. The rule which appellant invokes was designed to afford information which this defendant had, and it cannot be capitalized unless proper steps are taken at or before the trial.

Upon motion for new trial the point now argued was raised for the first time,—that defendant had been denied a fundamental right because the court did not force a disclosure of Daisy's name notwithstanding the absence of a request for a ruling. The argument took the form of a claim of newly discovered evidence. The court said: "What is your newly discovered evidence, if any? Mr. Schenk: The only basis would be to have the confidential informer brought into court to testify. The Court: Not newly discovered evidence. Mr. Schenk: No, brought out at the trial." Certainly this showing afforded no ground for a new trial.

The circumstances here presented do not show a disregard of any of defendant's fundamental rights, nor do they warrant the overriding of the public interest which requires use of informants in the suppression of the nefarious trade in which defendant was engaged. Traffic in narcotics spreads as a great blight over the State. It is the imperative duty of every law enforcement officer to use utmost zeal to stamp it out and the duty of the courts to lend all legitimate aid to that end. We must not permit undue theoretical refinements to work the liberation of proven peddlers of narcotics. This defendant is clearly guilty of the charges against him. He should not and cannot be released because of the court's failure to furnish him of its own motion information as to a possible defense witness whose name he knows and whose presence at the first criminal transaction was known to and remembered by him.

[4] Appellant also argues that the court erred in denying his motion to dismiss the indictment under Penal Code, § 995 for

want of sufficient competent supporting evidence. The point cannot be considered because the evidence taken before the grand jury is not in the record brought to this court.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

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160 Cal.App.2d 264

Gladys Torregano STEVENS, Petitioner,
v.
The SUPERIOR COURT of the State of California, in and for the CITY AND COUNTY OF SAN FRANCISCO, Respondent.
Civ. 18097.

District Court of Appeal, First District, Division 1, California.
May 9, 1958.

Proceedings on petition for writ of mandate, certiorari and prohibition to review determination of trial court with respect to proceedings in which individual sought determination that she was pretermitted heir of testator. The District Court of Appeal, Peters, P. J., held that individual who claimed that she was pretermitted heir of testator and had been omitted from will for reason testator thought she was dead, had right to appeal on settled narrative statement and trial court, by striking proposed narrative statement, deprived individual of right of appeal on a settled statement and assumed to decide point whether or not individual was a pretermitted heir and abused its powers when it attempted to prevent individual from submitting record she needed to intelligently argue point.

Writ of mandate issued in accordance with views expressed; order purporting to amend heirship decree annulled. Alternative writ of prohibition discharged.

1. Appeal and Error 🔑655(3)

Under rules on appeal providing that an appellant, in lieu of reporter's transcript, may file a proposed narrative statement, court may strike narrative statement only where proposed narrative statement is wholly insufficient, a sham and a fraud. West's Ann.Rules on Appeal, rule 7 and subds. (c, d).

2. Appeal and Error 🔑607(1)

Under rules on appeal providing that an appellant, in lieu of reporter's transcript, may file proposed narrative statement, it is duty of trial court to settle proposed statement, not to make one. West's Ann.Rules on Appeal, rule 7 and subds. (c, d).

3. Descent and Distribution 🔑71(7)

Individual, who claimed that she was pretermitted heir of testator and had been omitted from will for reason testator thought she was dead, had right to appeal on settled narrative statement and trial court, by striking proposed narrative statement, deprived individual of right of appeal on a settled statement and assumed to decide point whether or not individual was pretermitted heir and abused its powers when it attempted to prevent individual from submitting record she needed to intelligently argue point. West's Ann.Prob. Code, § 1080; West's Ann.Rules on Appeal, rule 7 and subds. (c, d).

4. Descent and Distribution 🔑71(7)

Nunc pro tunc order purporting to amend an heirship decree after an appeal had been taken was not an appealable order. West's Ann.Prob.Code, § 1240.

5. Certiorari 🔑1

Petition to review determination of trial court, which had entered a nunc pro tunc order purporting to amend an heirship decree after appeal had been taken, would be treated as petition for writ of certiorari.

6. Judgment ⚿746, 948(1)

Benefit of prior adjudication constituting an estoppel may be waived and prior adjudication must be pleaded, and, unless pleaded, it is waived.

7. Appeal and Error ⚿440

The filing of notice of appeal deprives trial court of power to later amend or modify its judgment.

8. Judgment ⚿326

Where contention that a former decree in heirship proceedings was res judicata as to individual's claim that she was pretermitted heir of testator was not raised at trial or in pleadings, and trial court held that individual was not pretermitted heir and individual filed notice of appeal, trial court could not enter nunc pro tunc order attempting to add to judgment the former decree in heirship proceedings and nunc pro tunc order was an attempt by trial court to correct judicial error, not to correct mere clerical error. West's Ann. Prob.Code § 1080.

Bergen Van Brunt, Allan L. Sapiro, San Francisco, for petitioner.

Wallace, Garrison, Norton & Ray, San Francisco, for respondent.

PETERS, Presiding Justice.

This is a petition for an appropriate writ in a controversy involving the propriety of the trial court's rulings in striking a proposed narrative statement, and in purporting to amend the decree involved after an appeal had been taken from it.

Ernest Torregano died testate in January of 1954. His will contains three provisions that are here relevant. The first of these is the second paragraph which provides:

> "I declare that I am a widower and that I have no children, issue of my marriage; that my deceased wife's name was Pearl C. Torregano; that my entire estate is separate property."

The thirteenth paragraph of the will provides:

> "I give, devise and beqeath to any person or persons who may contest this my Last Will and Testament, or assert any claim to share my estate by virtue of relationship or otherwise the sum of One Dollar ($1.00) each in settlement of their said claim or claims."

By the fourteenth paragraph of the will the residue of the estate was devised to the brother of the deceased, Alfred Torregano, if he should survive the testator, and if not, then to his brother's wife and to the testator's nieces.

The Bank of America has been appointed executor of this will.

In January of 1957, the petitioner, Gladys Torregano Stevens, filed a petition seeking a determination that she is the daughter and pretermitted heir of Ernest Torregano. This petition alleges, in substance, that petitioner is the daughter of the testator, that she was unintentionally omitted from the will, and that she is a pretermitted heir under section 1080 of the Probate Code. Alfred Torregano, as the real party in interest, in due course, answered this petition, setting up as his sole defense that under paragraph 13 of the will petitioner was disinherited and under paragraph 14 he was entitled to the residue of the estate.

The case proceeded to trial on this issue in May of 1957. At the commencement of the trial Alfred Torregano moved to dismiss on the ground that, under the will, petitioner, even if a daughter, as a matter of law, was not a pretermitted heir. The motion was taken under submission. Then a jury was selected, and, over a period of 5½ days, the parties presented their respective cases to the jury. Both sides then rested. Before argument the trial court granted the motion to dismiss, ruling that, as a matter of law, and regardless of the evidence, the petitioner is not a pretermitted heir of Ernest Torregano and was entitled to the sum of $1 only. It entered its decree accordingly. After denial by the trial court of petitioner's motion for a new trial, on September 13, 1957, petitioner filed a notice of appeal and her election to appeal on a settled statement.

On September 26, 1957, Alfred Torregano moved the trial court for an order to amend *nunc pro tunc* the decree appealed from that had been entered May 27, 1957, to add to it the determination that in January of 1955 one Janet Bryant had filed a petition in the Torregano estate for a decree determining to whom distribution should be made and establishing the rights of all persons interested therein; that notice of this proceeding was given as required by law; that on February 11, 1955, the court issued its decree determining heirship, finding that the various persons mentioned in the will, not including petitioner, were entitled to certain fixed sums, and that the residue of the estate was vested in Alfred Torregano. Petitioner objected to the motion on the grounds that since an appeal had been taken from the May 27, 1957, decree, the trial court was without jurisdiction to amend that decree; that the issues as to the existence or effect of the Bryant decree were first raised by Alfred Torregano in September of 1957; that petitioner did not know of the death of her father until December, 1956, and was never served with process in the Bryant proceeding. The trial court rejected petitioner's objections and entered its order amending its May 27, 1957, decree, *nunc pro tunc,* on September 30, 1957, by adding to it the pertinent facts in reference to the Bryant heirship proceeding, and by concluding that the Bryant decree "is final and binding on all persons."

Petitioner attacks this *nunc pro tunc* order, pointing out that she cannot appeal from it as a special order after final judgment because section 1240 of the Probate Code, which lists the appealable orders in probate proceedings, does not include such orders. Her major contention is that the trial court attempted in this fashion to amend its prior decree by correcting it for a judicial error after it had lost jurisdiction by reason of the appeal. This constitutes one of the two matters involved in this petition.

The second matter relates to petitioner's unsuccessful attempt to secure a settled statement on her appeal from the May 27, 1957, decree. On November 26, 1957, petitioner filed her proposed settled statement with the trial court. Alfred Torregano moved to strike those portions of the proposed settled statement containing the narrative statement of the evidence on the ground that all such evidence was irrelevant to the points involved on the appeal. The real party in interest also moved to augment the clerk's transcript portion of the settled statement by adding thereto the *nunc pro tunc* order above mentioned.

On January 10, 1958, a hearing was had on the settlement of the proposed settled statement. At the conclusion of that hearing the trial court granted the motion of Alfred Torregano to strike all of the narrative statement of the oral proceedings, and ordered that the settled statement be augmented by including therein the *nunc pro tunc* order of September 30, 1957, and the several documents relating thereto. The correctness of these rulings constitutes the second matter involved in this petition, and will first be considered by this court.

Petitioner avers, and it is not denied, that Alfred Torregano made no showing that any portion of the proposed narrative statement was false, fraudulent or unsupported by the record, made no proposed amendments to her narrative statement, and has not proposed any corrections thereto. Petitioner further avers that by granting the motion to strike, the trial court has prevented the appellate courts from reviewing the evidence in order that the circumstances existing at the time of the making and execution of the decedent's will may be fully understood; that in petitioner's case, among other things, the narrative statement and oral proceedings show, by unrebutted testimony, that the decedent, who was an attorney, believed that his daughter, the petitioner herein, was dead at the time he executed the will. It is contended that such evidence may and should be considered in construing the will.

[1] The trial court clearly abused its powers in striking from the proposed settled statement the narrative statement of the oral proceedings. This conclusion necessarily follows from a consideration of the duties of the trial court in ruling upon settled statements. Under the Rules on Appeal the appellant may select the method by which the record shall be prepared—the judgment roll, full reporter's transcript, agreed statement or settled statement. Rule 7 confers the legal right to proceed on a settled statement. That rule provides for the filing by appellant, in lieu of a reporter's transcript, of a proposed narrative statement. The respondent is then given the opportunity to file proposed amendments. Rule 7(d) then provides for a hearing on the settlement of the statement. The judge is then required to "settle the statement and fix the time within which the appellant shall engross it as settled." When the appellant files the engrossed statement, with time given to respondent to object, it is "presented by the clerk to the judge for certification." The rules do not provide for a motion to strike the narrative statement except in Rule 7(c) where it is provided that the appellant, if he has had an entire or partial transcript of the oral proceedings prepared and refuses to comply with a court order to allow its use by respondent, a motion to strike the proposed statement may be granted. As was said in Sweet v. Markwart, 115 Cal.App.2d 735, 742, 252 P.2d 751, 755, "a motion to strike is not a means of testing the propriety or sufficiency of the proposed statement except in extreme cases where it can be said that the statement is fraudulent or sham." That case also held that the rules applicable to motions to strike in connection with the old proceeding for the settlement of a bill of exceptions were applicable to motions to strike when a record is prepared under Rule 7. The court referred to Walkerly v. Greene, 104 Cal. 208, 37 P. 890, and stated that under the rule of that case (115 Cal.App.2d at page 742, 252 P.2d at page 755) "* * * it was only in a gross case of palpable and deliberate fraud that the severe penalty of striking out the bill and thus denying the party a hearing upon the merits of his case could be properly imposed; that the right of a judge to strike out or refuse to settle a bill of exceptions was limited to a case of gross and manifest fraud on the part of the one proposing it."

The court in the Sweet case went on to state that if the appellant has prepared a statement, even if deficient, that contained "those portions of the oral proceedings which he deemed material to the determination of his points on appeal, the court could not strike it out, but must proceed to settle it." It is only where the proposed narrative statement is wholly insufficient, a sham and a fraud, that the court may strike it. Keller v. Superior Court, 100 Cal.App.2d 231, 223 P.2d 309; Western States Const. Co. v. Municipal Ct., 38 Cal. 2d 146, 238 P.2d 562.

[2, 3] It is quite obvious that under the Rules it is the duty of the trial court to settle a proposed statement, not to make one. The appellant has the legal right to choose his method of appeal and to present any legal argument he may desire. The theory of the trial court in striking the proposed narrative statement, as disclosed by its memorandum opinion, was that under the case of Van Strien v. Jones, 46 Cal.2d 705, 299 P.2d 1, and other cases, the fact, if it be a fact, that the evidence shows that decedent thought that petitioner was dead when he executed the will and so excluded her unintentionally, is immaterial because the interpretation of the disinheriting clause is purely a question of law to be determined from the will alone. Petitioner contends, and argues at length, that the provisions of the will involved in the Van Strien case were radically different from those here involved, that this will shows on its face that it is ambiguous, and that, in such a case, the oral testimony is admissible to show that the deceased thought his daughter was dead when he executed the will. This, so it is contended, makes petitioner a pre-

termitted heir. That is the very point that will be decided on the appeal on its merits. We express no opinion on it now. Petitioner, right or wrong, has the legal right to present the point. The trial court, by striking the proposed narrative statement, assumed to decide the point. The effect of its order was to compel the petitioner to appeal on the judgment roll alone, and to deprive her of the right to appeal on a settled statement. It was not for the trial court to decide in passing on the record that its order of dismissal was correct because the oral evidence could not be used to interpret the will. By purporting to so decide the trial court assumed the functions of the appellate court. That is not the purpose of a proceeding to settle a proposed statement. The trial court abused its powers when it attempted to prevent the petitioner from submitting the record she needed to intelligently argue the point.

In view of the fact that the Van Strien case was decided by a divided court, and in view of the differences between the will in that case and in the instant one, it cannot be said that by arguing for a rule contrary to that announced by the majority in the Van Strien case, the petitioner was fraudulent, or that her position was sham or frivolous. Even if the decided cases without question held that oral testimony cannot be considered, and we do not so construe them, the petitioner has the legal right to seek a reversal of those cases. This she would be prevented from doing if the order granting the motion to strike is allowed to stand.

It is apparent that a writ of mandate should issue. Although Alfred Torregano has not seen fit to submit amendments to the proposed narrative statement, in the interests of justice, the trial court may permit him to do so, and the court is then ordered to settle the proposed settled statement in accordance with the views herein expressed.

[4, 5] The other point raised is the propriety of the *nunc pro tunc* order of September 30, 1957, purporting to amend the heirship decree after the trial court had lost jurisdiction of that decree. This is not an appealable order, so that this portion of the petition may be treated as a petition for a writ of *certiorari.*

[6–8] This order of September 30, 1957, was obviously a nullity. The contention that the Bryant decree was *res judicata* was not raised in the pleadings or at the trial. The first mention of it in the record is in the motion to amend *nunc pro tunc* the heirship decree. Thus, the order *nunc pro tunc* was an attempt to add to the judgment already rendered and then on appeal the defense of *res judicata.* It is too elementary to require extended discussion that the benefit of a prior adjudication constituting an estoppel may be waived, that it must be pleaded, and unless pleaded it is waived. See cases collected 29 Cal.Jur.2d p. 258, § 282. The basis of the rule is that there are several valid defenses that may exist to such a plea so that the issue must be passed on by the trial court.

It is clear that the amendment *nunc pro tunc* by adding this defense to the action was an attempt by the trial court to correct a judicial error and not to correct a mere clerical one. The filing of the notice of appeal deprived the trial court of the power to later amend or modify its judgment. Wagner v. Shapona, 123 Cal.App.2d 451, 267 P.2d 378. The attempt to do so was an attempt to correct a judicial error. See Lankton v. Superior Court, 5 Cal.2d 694, 55 P.2d 1170; Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988; Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9; In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89; 29 Cal.Jur.2d 17; 3 Witkin, California Procedure, p. 1894. This the court had no power to do. The amending order *nunc pro tunc* should be annulled.

Let a writ of mandate issue in accordance with the views herein expressed. The order of September 30, 1957, purporting to amend the heirship decree is annulled. The alternative writ of prohibition is discharged.

BRAY and FRED B. WOOD, JJ., concur.

160 Cal.App.2d 427

CITY OF HAYWARD, a municipal corporation, Plaintiff and Respondent,

v.

Marian Cecile MOHR, Defendant and Appellant.

Civ. 17800.

District Court of Appeal, First District, Division 2, California.

May 14, 1958.

Condemnation case. The Superior Court, Alameda County, A. T. Shine, J., made a determination adverse to the condemnee, and she appealed. The District Court of Appeal, Brazil, J. pro tem., held that right, which had been reserved to condemnee and her successors, to make sewer connections to any sewer line constructed by grantees of easement, did not constitute "property," within meaning of constitution, for taking or damaging of which compensation would have to be paid.

Affirmed.

1. Eminent Domain 🔑240

In action in eminent domain to procure right-of-way for sewer purposes, finding, that diminution in value together with just compensation for property taken or damaged was a certain sum, was sufficiently specific, notwithstanding objection to failure to find more specifically on issue of damage to remaining parcel as result of taking. West's Ann.Code Civ.Proc. § 1248, subd. 2.

2. Eminent Domain 🔑85

It is only value of, and damage to, property itself which may be considered; and if condemnee's right, to make connections to sewer line without any charge for rent or for connections, was not appurtenant to land subsequently condemned or damaged as result of taking, condemnor could not be required to make compensation therefor. West's Ann.Civ.Code, § 801; West's Ann.Const. art. 1, § 14.

3. Easements 🔑1

The essential qualities of easements are: (1) they are incorporeal, (2) they are imposed on corporeal property, (3) they convey no right to participation in profits arising from such property, (4) they are imposed for benefit of corporeal property and (5) there must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests.

4. Easements 🔑1

An easement is an incorporeal interest in servient estate.

5. Easements 🔑2

Easement for construction, maintenance and operation of sewer line and drainage ditch constituted an interest in land, but was not of itself either land or an estate in land, and could not act as servient tenement for claimed easement of free service, reserved in grant, with adjacent lands of grantor as dominant tenement; and such reserved right to free sewer service could not itself constitute an easement.

6. Eminent Domain 🔑85

Right, which had been reserved to condemnee and her successors, to make sewer connections to any sewer line constructed by grantees of easement, did not constitute "property," within meaning of constitution, for taking or damaging of which compensation would have to be paid. West's Ann.Const. art. 1, § 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Property".

Harold D. Mefford, Hayward, for appellant.

John W. Scanlon, City Atty., Hayward, Breed, Robinson & Stewart, Special Counsel, Oakland, for respondent.

BRAZIL, Justice pro tem.

Appellant, Mrs. Mohr, is the owner of a 108 acre parcel of land just south of the City of Hayward, and immediately north of Middlefield subdivision. In December 1950, the appellant by indenture conveyed an easement to the Middlefield

Company, which at that time was opening up a subdivision in unincorporated territory right next to Mrs. Mohr's property. The easement covered a strip of land twenty-five feet wide across the southwesterly corner of the Mohr parcel, and it was for the construction, maintenance and operation of a sewer line and drainage ditch. The area embraced within the easement is only 625 square feet. In this indenture for an easement there is reserved to the grantor the right to use the strip of land for any purpose not inconsistent with the stated use thereof by the grantee.

The provision in the deed of December 1950, which forms the basis of the controversy involving value of property taken by respondent in a condemnation action is as follows:

"As a further consideration for the execution of this indenture [a deed signed by grantor and grantee] by First Parties, [Marian Mohr Fry, formerly Marian Mohr and Jeryl R. Fry, her husband] First Parties, their heirs, executors, administrators, successors and assigns, shall have and they are hereby granted the right and privilege of making sewer connections to any sewer line constructed by Second Party in the easement and right of way herein granted for furnishing sewerage facilities for any improvements hereinafter constructed by First Parties, their heirs, executors, administrators or assigns, or by any tenant of First Parties, on all lands owned by First Parties adjoining the hereinabove described easement, without any connection fee being charged or paid therefor and free of any sewer rental."

The Middlefield Company transferred the subdivision to Treeview Homes, Inc. and that company constucted an eight inch sewer line in the 25 foot easement. By written contract, the respondent took over the actual maintenance of the line which was connected with the City's sewer system. There was however no transfer or assignment of the easement, as distinguished from the physical sewer line, from either Middlefield Company or its successor in interest, the Treeview Homes, Inc.

The respondent filed an action in eminent domain for a right of way for sewer purposes over a strip of land 53 feet wide, also across the southwesterly corner of appellant's property, which 53 foot strip includes within its dimensions the whole of the aforementioned 25 foot easement. Neither Middlefield Company nor Treeview Homes, Inc. was made a party defendant in this action. Upon obtaining an order for immediate possession, the City built a new 18 inch sewer line parallel to the old 8 inch line, then took up the smaller line and put in a 30 foot wide drainage ditch. The ditch is on the side of the 53 foot right of way which is farthest from Mrs. Mohr's property. The new sewer line is then embedded in the ground between the Mohr property and the new drainage ditch which more than covers the original 25 foot easement.

The portion of the land sought to be condemned which was used for the drainage ditch does not as a matter of law constitute an exclusive use, but as a practical matter it would be difficult to use it for any other purpose. It is physically possible to reconstruct a sewer line in the original 25 foot strip, but it would be expensive and impractical as the bank of the ditch would have to be reinforced and the sewer line would have to be encased in a concrete jacket. The balance of the right of way sought by respondent is, of course, not exclusive as the 18 inch sewer line lies under the surface of the ground. Up until trial of the action, the appellant had as yet had no occasion to make any sewer connections as her property was in an undeveloped state.

The trial court found that the diminution in value of the larger parcel remaining and the just compensation to which the owner was entitled by reason of the acquisition of the 53 foot right of way was $429. No evidence was received or permitted on the damage, if any, to the appellant arising out of any right she may have had by reason of the provision in the December 1950 deed reserving to the grantor the right of free sewer connection and free sewer rental. The trial court determined that whatever rights the appellant may have had by reason of the reservation in that first deed, they were not property rights which required an award in a condemnation action.

[1] The appellant first makes a technical objection that the trial court did not make a specific finding upon the issue of damages resulting from the taking to the remaining parcel, in addition to a finding of the value of the land taken. Cited in support of this claim are People v. Ocean Shore R., Inc., 22 Cal.App.2d 657, 72 P.2d 167 and Code of Civil Procedure, section 1248, subd. 2. In the Ocean Shore case the condemnor sought a fee title for highway purposes, while here only a non-exclusive easement for a sewer line and drainage ditch is being condemned. Also in the cited case there was no finding at all on the diminution in value, if any, to the remaining portion; and here the court found the diminution in value together with the just compensation for the property taken or damaged to be $429. There is nothing in Code of Civil Procedure, section 1248, subd. 2, which requires a more specific finding on the subject than was made by the trial court.

The court made no award of damages for any impairment of appellant's right to make sewer connection free of charge and to have free sewer rental under the provisions of the December 1950 deed. The trial court determined that those rights, whatever else they might be, were not property such as is contemplated by the provisions of Article I, Section 14 of the state Constitution, which would require an award in a condemnation action for their impairment or loss.

Appellant's position is stated in the opening brief in this manner: "That this right to receive sewer service for any future improvements constructed on her remaining adjacent lands is a valuable property right appurtenant to these remaining lands", and furthermore, "there can be no question that the right reserved here by appellant constitutes an interest in real property, the taking or damaging of which is compensable."

The appellant is concerned with what she asserts is a valuable right; the right to have all her remaining property use a sewer line in the original 25 foot easement without any charge for rent or for connections. If her remaining lands do have this right as appurtenant to the land, then it could well be very valuable, for considering the number of houses that can be built on 108 acres of land and multiplying the result by the individual connection fee and the yearly rental therefor, we would find the amount of money involved to be considerable.

[2] Whether the trial court is right or wrong is determined by a consideration of the free service provision of the December 1950 deed which created the original 25 foot easement. The city, not having sued the owners of the easement and not having acquired it by assignment or deed, this action is not concerned with what damage or loss to the easement, if any, may have resulted from the taking in the City's condemnation action. Nor does the present action concern itself at all with any contractual rights or obligations that may exist between Mrs. Mohr and either the Middlefield Co. or its successor, Treeview Homes, Inc. In discussing the problem presented by this appeal, we assume that a right to free sewer connections and free sewer rental can be the subject of a burden or servitude upon land even though not specifically mentioned in Section 801 of the Civil Code. If the so-called reservation is not appurtenant to the land taken or damaged by the City of Hayward, but is only a personal contract of some kind, then it is not the kind of property for the impairment or loss of which compensation is required to be paid by the condemnor under the provisions of Article I, Section 14 of the Constitution.

"This is so [no damages for loss of business located on land taken] because it is only the value of, and the damage to, the property itself, which may be considered."

People v. Ricciardi, 23 Cal.2d 390, 396, 144 P.2d 799, 802—a proceeding in eminent domain.

[3, 4] The essential qualities of easements are: 1. They are incorporeal; 2. They are imposed on corporeal property; 3. They convey no right to a participation in the profits arising from such property; 4. They are imposed for the benefit of corporeal property, and 5. There must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests. Kellett v. Ida Clayton & G. W. Wagon Road Co., 99 Cal. 210, 212, 33 P. 885. An easement is an incorporeal interest in the servient estate. Elliott v. McCombs, 17 Cal.2d 23, 30, 109 P.2d 329. "An easement is generally defined as an '"interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion or lawful use out of or over the estate of another."'" Mosier v. Mead, 45 Cal.2d 629, 632, 290 P.2d 495, 498.

"Like a natural right, an easement constitutes a limitation on the possessor rights of an owner of land." (American Law of Real Property, Vol. 2, p. 231.)

"Under the definition of an easement given in the Restatement of the Law of Property, six factors are stressed, (a) the fact that it is an interest in *land* which is in possession of another; (b) the content of the interest as a 'limited use or enjoyment of the *land* in which the interest exists,' (c) the availability of protection of the interest as against interference by third persons; (d) the absence of terminability at the will of the possessor of the *land;* (e) the fact that it is not a normal incident of a possessory *land* interest; and (f) the fact that it is 'capable of creation by conveyance.'

"While an easement is clearly an *'interest in land'* for the creation of which compliance with the Statute of Frauds is requisite, it is equally clearly never an *'estate in land.'"* (Powell on Real Property, Vol. 3, p. 385, Emphasis added.)

The foregoing statement that an easement is not an *estate in land* is consistent with sections of the Civil Code dealing with interests in property. Section 701 of that code reads: "Interests in Real Property. In respect to real or immovable property, the interest mentioned in this Chapter are denominated estates, and are specially named and classified in Part 2" of that division of Civil Code as an estate in real property.

[5] Under the foregoing rules and definitions the claimed right of free sewer connection and rental created by the indenture of 1950, could not itself be an easement. The easement granted to Middlefield Co. by appellant while it is an *interest in land,* it is not itself either *land* or an *estate in land.* It could not therefore act as the servient tenement for the claimed easement of free service, with the adjacent lands of the grantor as the dominant tenement. Whether the claimed right of free connection and rental reaches the dignity of a contract need not here be decided; but surely it appears to be no more than as described in appellant's answer on file to the complaint in eminent domain as "that certain written contract of 20 December 1950."

Balestra v. Button, 54 Cal.App.2d 192, 128 P.2d 816; Newell v. Redondo Water Co., 55 Cal.App. 86, 202 P. 914, cited by appellant in support of her position that the indenture of 1950 created an easement for the benefit of her remaining lands are not in point, for each involves the imposition of a burden on land or an estate in land, and not, as we have here, upon another easement, which is after all an incorporeal interest.

The case from which the following quotation is taken involves an action in eminent domain where it became important to determine whether or not certain deed restrictions imposed on all lots in a tract for the mutual benefit of each lot, was a property right for which compensation must be made in such condemnation action.

"It therefore appears that the city may proceed as contemplated unless the plaintiffs and others similarly situated in the tract have such property interest in the portion of lot 2 acquired by the city as would require that such interest be purchased or condemned before the city may be permitted to construct a public street thereon. It was conceded by counsel for the plaintiffs at the oral argument, and we think properly, that the legal situation of the parties hereto would be the same whether the proposed street were to be improved on property acquired by the city by voluntary dedication or by proceedings in eminent domain. * * * (citation). If the plaintiffs are possessed of a property right in said portion of lot 2 it may be taken for granted that they would be necessary parties defendant in any suit brought by the city to condemn said land for street purposes. * * * The plaintiffs expressly 'do not contend that parties may by private contract restrict the exercise of the power of eminent domain,' yet by private contract with their neighbors they have created, if their position be sustained, an estate inherent in each lot in the tract protected against the taking or damaging thereof without compensation, and have brought about a situation where the number of parties defendant and of the interests to be appraised in condemnation would be manifold. In cases of large tracts the increase in number would practically be prohibitive. It is true that the increase in the number of the defendants and interests to be appraised is not determinative or controlling, provided an estate be created which must be measured in money in the condemnation suit, but such results may be considered where we approach a contention that by private contract an estate in land unknown to the common law or the law of this state is created which would have the result of greatly increasing the cost of condemnation proceedings and making them more burdensome on the public. As above noted, the interest sought to be imposed on said portion of lot 2 is no more than a negative easement or an equitable servitude. It does not rise to the dignity of an estate in the land itself. It is not a property right, but is a contractual right cognizable in equity as between the contracting parties, not binding on the sovereign contemplating a public use of the particular property taken." Friesen v. City of Glendale, 209 Cal. 524, 530, 531, 288 P. 1080, 1082.

[6] The rights of appellant, whatever else they may be, do not constitute property, within the meaning of Article I, Section 14 of the state Constitution, for the taking or damaging of which compensation must be paid in an action in eminent domain.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

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160 Cal.App.2d 609

A. Arthur MESCHINI, by his General Guardian, Helen M. Palmer, Plaintiff and Appellant,

v.

GUY F. ATKINSON COMPANY, a corporation, Delmer Ellis Furrer and Jack H. Keller, Defendants and Respondents.

Civ. 9159.

District Court of Appeal, Third District, California.

May 19, 1958.

Rehearing Denied June 11, 1958.

Hearing Denied July 16, 1958.

Action for personal injuries sustained when an automobile driven by plaintiff collided with a tractor and scraper combination operated by defendant and owned by a co-defendant, when the two vehicles were passing each other in opposite directions on a bridge. The Superior Court, Madera County, Stanley Murray, J., entered judgment adverse to plaintiffs and he appealed. The District Court of Appeal, Peek, J., held that instruction informing jury of statute authorizing issuance of special permits to move oversized vehicles upon the highways indicated to jury that defendants, having obtained permit, could lawfully operate their oversized vehicles on the highway, and was therefore inadequate in failing to present to jury issue of whether evidence showed a violation of statute setting forth speed limits of such oversized vehicles, or a violation of conditions set forth on such permit as to yielding right of way and as to protection on bridges or narrow roads.

Judgment reversed

1. Trial ⚿203(1)

It is the duty of a court to instruct on every theory of the case finding support in the evidence.

2. Trial ⚿253(4)

In action for personal injuries sustained when an automobile driven by plaintiff collided with a tractor and scraper combination operated by defendant and owned by a co-defendant, when the two vehicles were passing each other in opposite directions on a bridge, instruction informing jury of statute authorizing issuance of special permits to move oversized vehicles upon the highways indicated to jury that defendants, having obtained permit, could lawfully operate their oversized vehicles on the highway, and was therefore inadequate in failing to present to jury issue of whether evidence showed a violation of statute setting forth speed limits of such oversized vehicles, or a violation of conditions set forth on such permit as to yielding right of way and as to protection on bridges or narrow roads. West's Ann. Vehicle Code, §§ 694 and subd. (e), 670.05 (e), 710.

3. Appeal and Error ⚿1066

In action for personal injuries sustained when an automobile driven by plaintiff collided with a tractor and scraper combination operated by defendant and owned by co-defendant, when the two vehicles were passing each other in opposite directions on a bridge, instruction on contributory negligence which failed to include all necessary elements, and in particular, to directly instruct jury upon burden of proof was prejudicial.

4. Automobiles ⚿246(22)

In action for personal injuries sustained when an automobile driven by plaintiff collided with a tractor and scraper combination operated by defendant and owned by a co-defendant, when the two vehicles were passing each other in opposite directions on a bridge, requested instruction by plaintiff as to negligence of driver of a piece of equipment preceding equipment driven by defendant was properly refused in view of fact it lacked essential element of proximate cause.

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Law Offices of C. Ray Robinson, Merced, and Angell & Adams, San Francisco, for appellant.

Stammer, McKnight & Barnum, Fresno, for respondent.

PEEK, Justice.

This is an action to recover damages for personal injuries sustained as the result of a collision between an automobile driven by plaintiff and a Euclid tractor and scraper combination operated by the defendant Furrer and owned by the defendant Guy F. Atkinson Company, referred to herein as Atkinson. Plaintiff appeals from the judgment entered pursuant to the verdict of the jury.

The second amended complaint set forth three causes of action against the defendants: The first alleged a dangerous condition and negligent operation of the Euclid; the second was predicated upon the alleged dangerous and negligent operation of the convoy; and the third alleged the operation of a convoy of vehicles in excess of the maximum width and weight as permitted by the applicable sections of the Vehicle Code, all of which directly and proximately caused the collision and plaintiff's injuries.

The defendants' answer admitted the collision and the operation of the convoy but denied generally the allegations of the complaint relating to negligence and proximate cause, and as affirmative defenses pleaded contributory negligence and assumption of risk.

As a result of the collision plaintiff suffered serious injury and was unable to testify. His wife, who was an occupant of the car at the time of the accident, suffered a loss of memory of the accident and of the events immediately preceding it and likewise was unable to testify in any particular regarding the accident. There were no disinterested eyewitnesses; hence the record consists primarily of photographic evidence and the testimony of Atkinson's employees.

The collision occurred on a clear day on the bridge spanning Berenda Slough on U. S. Highway 99, immediately southeast of Chowchilla in Madera County. The bridge which was approximately 24 feet wide and 500 feet long was surfaced with asphalt. In the absence of an obstruction, such as other vehicles, it could be seen from the south for a distance of from one-quarter to one-half mile. A white line separating the north and south lanes of traffic was not in the exact center of the roadway. At the south end of the bridge the northbound lane was 12′3⅞″ wide, and the southbound lane was 11′8⅝″ wide. One hundred feet farther north the northbound lane was 12′2⅝″ wide and the southbound lane was 11′11″ wide. Along each side were narrow concrete curbs and then wooden bridge railings. At both ends of the bridge the highway was 24 feet wide and, in addition, had a 4-foot shoulder on either side.

Defendants' convoy was traveling south and included first a Ford pickup truck driven by defendant Keller, Atkinson's foreman; then five DW–20 Caterpillar tractor and scraper combinations; then one Euclid tractor and scraper; and finally two Ford flatbed trucks. The Caterpillar tractors and scrapers were each 11′7″ wide and the overhall length of each was approximately 44 feet. Only the Euclid appears to have been directly involved in the collision. It was an earth-moving machine consisting of a large tractor trailing a bucket type scraper or dirt remover. It was 11′6″ wide, somewhat over 40 feet long, and it weighed approximately 25 tons when empty.

On the left side of the front bumper of the pilot car was a 3′ x 4′ sign reading "Caution Wide Load Following" which had been issued by the Department of Motor Vehicles. An 18″ x 20″ red flag extended out diagonally from the left front corner of the sign. As the convoy proceeded across the bridge, the defendant Keller held a similar red flag out of the lefthand window of the Ford pickup he was driving and waved it up and down until he was some distance past the bridge. Each unit of the convoy following the pilot car was equipped with two red flags extending diagonally from each end of the front bumper. The maximum speed of the Caterpillars and the Euclid was governed at 30 miles an hour. Estimates of the speed of the convoy as it traveled across the bridge varied from 15 to 25 miles per hour.

The plaintiff who was driving north had been passing the convoy for approximately a quarter of a mile and was immediately to the rear of a Ford automobile. His speed was estimated at from 40 to 70 miles an hour. The Pontiac car which he was driving was 6′4⅝″ wide at the widest point and 16′10¾″ long. The last of the five DW–20 tractors was just leaving the bridge as plaintiff's northbound automobile entered onto the south end. According to the defendant Furrer, to his knowledge he did not drive the Euclid over the center line on the bridge, nor did he see the Caterpillar driven by Harris, which was directly ahead of him, cross the line. The defendants Dodson, who was driving the truck immediately to the rear of the Euclid and Harris testified they did not see the Euclid cross the white line. Harris, however, testified that he could have driven his Caterpillar a foot or so over the line at some point on the bridge.

Furrer also testified that prior to driving onto the bridge he raised the bowl of the scraper, allowing it to clear the concrete curb, and turned on his headlamps.

He estimated the southbound lane to be 13 to 14 feet wide, and the distance between his Euclid and the DW-20 immediately in front of him as approximately 200 to 250 feet. When he was nearly halfway across the bridge he saw an oncoming Ford car 100 to 125 feet south of the south edge of the bridge. He did not see plaintiff's car until it was some 250 to 300 feet north of the south end of the bridge and approximately 75 feet from his vehicle and traveling at 60 to 70 miles per hour. The Ford passed him at the same rate of speed with a clearance of three feet. "All of a sudden, it [the Pontiac] seemed to just leap out from the bridge and come across into my lane of traffic and bump into me * * * the Pontiac hit me approximately dead center, with the Pontiac car, of [sic] my left front wheel."

According to Furrer, immediately after the collision which occurred in the southbound lane, he lost control of the steering mechanism of the tractor and more or less careened into the northbound lane of traffic, going up and coming to rest on the top of the Pontiac.

Additional evidence was introduced to the effect that the Pontiac appeared to strike the easterly guard rail and then to careen or bounce into the southbound lane. There was further testimony, although conflicting, concerning the exact point where the impact occurred and also in regard to debris on the bridge and the skid marks made by plaintiff's car. Further conflicting testimony also appears regarding the place where plaintiff's wife was thrown on the highway. The testimony concerning the speed and stopping distance of the vehicles in the convoy was also in conflict. The defendant Keller estimated that the speed of the convoy in crossing the bridge was 15 to 20 miles an hour and that the Caterpillars and the Euclid, when operated at a speed of 15 miles per hour, could be stopped in 50 to 60 feet; at 20 miles an hour, 60 feet; and at 25 miles an hour, 60 to 70 feet. The defendant Furrer fixed the speed of the Euclid when crossing the bridge at 20 to 25 miles per hour and estimated that the equipment, when operated at 25 miles per hour would permit a stop within 80 to 90 feet; at 20 miles per hour, in 55 to 65 feet; and at 15 miles per hour, in 30 to 40 feet.

The Vehicle Code, section 694, sets forth regulations governing size, weight and load. In paragraph (e) thereof it is provided that "* * * special mobile equipment and highway construction or maintenance equipment shall not exceed a width of 120 inches." By the terms of section 710 of that code, the Department of Public Works may, in its discretion, issue special permits authorizing the operation of vehicles or special mobile equipment exceeding the maximum specified. Under the provisions of section 670.05, subdivision (e), equipment operated under special permit as authorized in the code "* * * shall not be operated at a speed in excess of that permitting a stop in 32 feet."

Defendants introduced into evidence a permit issued to the Guy F. Atkinson Company to "* * * drive five (5) DW 20 Caterpillar units towing carryalls 11′6″ wide and one Euclid tractor towing carryall 11′ 6″ wide * * *" The permit was issued subject to compliance with all applicable laws and to printed general provisions on the reverse side thereof, among which were the following:

> "2. *Yield Right of Way.* When being passed by vehicles traveling in either direction, no portion of the equipment or trailers shall extend beyond the center line of pavement or traveled way.
>
> "3. *Protection on Bridges or Narrow Roads.* When crossing bridges or on roads so narrow that it is impossible to comply with paragraph 2 one man shall be posted behind and one man ahead of such equipment to warn and direct approaching traffic."

Plaintiff's primary contentions relate to certain instructions proposed by him in accordance with his theory of the case which the court refused to give, and to certain instructions which were given at the request of the defendants as regards the permit and the question of contributory negligence.

[1] The rule is well established that " 'it is the duty of the court to instruct on every theory of the case finding support in the evidence.' " Leming v. Oilfields Trucking Co., 44 Cal.2d 343, 352, 282 P.2d 23, 28, 51 A.L.R.2d 107. The pleadings and the facts in the present case, when viewed in light of the quoted rule, warranted proper instructions on plaintiff's theory of recovery which was not limited to a single negligent act, but was based upon asserted multiple acts of negligence—the negligence of the driver, Harris, in crowding the plaintiff; the negligence of Furrer, the driver of the Euclid; and the negligence of the foreman, Keller, in failing to maintain adequate warning to approaching vehicles of the narrow bridge and the overwidth convoy.

[2] There can be no question but that the statute and the permit formulated a standard of conduct which the court should have adopted in submitting to the jury the question of defendants' liability. Hopper v. Bulaich, 27 Cal.2d 431, 164 P.2d 483. The jury had before it the terms, conditions and restrictions of the permit and was entitled, under proper instructions, to consider whether the evidence showed a violation of the permit and the applicable statutes, and if so, whether such violation was the proximate cause of plaintiff's injuries. The court, however, after receiving the permit in evidence, refused to adopt the regulatory standard therein set forth for guidance of the jury, but gave the following instruction:

> "The Plaintiff in his Complaint alleges that certain of the equipment being driven and operated by the Defendants was of widths and weights in excess of that permitted by law to be operated on a public highway. However, the Defendants claim that it was not unlawful or negligent to drive or operate said equipment upon said highway because they had obtained from the State Department of Public Works a written permit to do so. In this connection, you are instructed that Section 710 of the Vehicle Code of California provides that the State Department of Public Works, with respect to highways under its jurisdiction, may, at its discretion, upon application in writing, and if good cause appears, issue a special permit in writing authorizing the applicant to operate or move a vehicle or combination of vehicles or special mobile equipment of size or weight of vehicle or load exceeding the maximum specified in said Code upon any highway under its jurisdiction for the maintenance of which it is responsible."

While it is true, as defendants contend in support of the instruction as given, that it sets forth the conflicting theories of the parties, we cannot agree with the additional argument that it goes no further. One cannot escape the conclusion that the instruction at least indicated to the jury that the defendants, having obtained a permit, it was then lawful for them to operate any overweight, or overwidth vehicle on the highway, and wholly omitted the provisions of the permit. A second instruction much to the same effect was also given.

[3] Plaintiff's next contention relates to the instructions on contributory negligence, of which there were many. It would seem unnecessary to discuss each in detail. Suffice it to say that the basic error appearing in the instructions so attacked stems from the failure of the court to include all necessary elements and in particular, to directly instruct the jury upon the burden of proof. A formula instruction, the court said in Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 170, 153 P.2d 338, 341, "* * * may be justified only if it contains all of the elements essential to a recovery [citing cases], and the absence of any one of the necessary elements may not be compensated for or cured by the fact that other instructions state the omitted

factors required to sustain the verdict directed. * * *"

The trial court gave an instruction, appearing below, almost identical to one condemned by this court in Colbert v. Borland, 147 Cal.App.2d 704, 712–713, 306 P.2d 53:

> "You are instructed that the burden is upon the Plaintiff to prove the affirmative of his case by a preponderance of the evidence.
>
> "Therefore, you are instructed that you may not speculate as to whether any negligence on the part of any Defendant was a proximate cause of the collision or of the Plaintiff's damages, and if the evidence leaves these things a matter of conjecture or doubt, then the Plaintiff has not sustained the burden of proof required of him under the law.
>
> "In other words, if after considering all of the evidence, you find that the accident may have been caused in several different ways, and you further cannot determine what was the proximate cause of the accident, or that any act or failure to act on the part of any Defendant was a proximate cause of the accident, then your verdict must be for the Defendants."

In the Colbert case we held: "The error in this instruction is so obvious as to require little comment. Concerning a similar instruction, the court said in Greenleaf v. Pacific Tel. & Tel. Co., 43 Cal.App. 691, 185 P. 872: '* * * To what avail are the instructions as to the sufficiency of a preponderance of the evidence to support a verdict, and as to its efficacy if it produces unprejudiced conviction in their minds, when followed by the explicit direction that the degree of certainty indicated must not only be beyond a reasonable doubt, but must not admit of any doubt at all? Even in a criminal case, requiring the minds of the jurors to be satisfied beyond a reasonable doubt, this instruction would be erroneous. That it must be considered prejudicial, under the state of the evidence here, there can be no question.'"

[4] Plaintiff further contends the court erred in refusing his instruction concerning the negligence of Harris, the driver of the DW–20 tractor, in crowding plaintiff off the highway and thereby setting in motion the facts which caused the ensuing collision. Defendants' answer is that a general instruction in this regard was given, and hence the refusal of the court to give the particular instruction proposed by plaintiff was not error. "* * * [T]he giving of a general instruction which covers the subject in an abstract way does not justify the refusal of a requested particular instruction correctly applying the law to a specific matter." Barnett v. Garrison, 93 Cal.App.2d 553, 558, 209 P.2d 426, 429. Although the evidence as summarized warranted a proper instruction on this phase of plaintiff's theory, plaintiff's proposed instruction lacked the essential element of proximate cause; i. e., if the negligence of Harris was the proximate cause of plaintiff's injuries.

By reason of the necessity of a reversal, it becomes unnecessary to discuss the remaining contentions of plaintiff. This includes his contention that the permit constituted new matter which must be affirmatively pleaded. Even assuming the correctness of his argument, should a new trial ensue such error, if any, may easily be corrected by amendment.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

160 Cal.App.2d 312

Harley J. BRIGGS, Plaintiff and Appellant,
v.
Frieda BRIGGS, Defendant and Respondent.
Civ. 22722.

District Court of Appeal, Second District,
Division 1, California.
May 12, 1958.

Action by husband to annul his marriage to the defendant wife. From an order vacating and setting aside default judgment in the Superior Court of Los Angeles County, Kenneth N. Chantry, J., the husband appeals. The District Court of Appeal, White, P. J., held that where the order appointing a guardian ad litem for the wife was neither signed by the court and filed with clerk or entered in the minutes, the order was ineffective and that judgment annulling marriage was properly vacated for alleged fraud of the husband.

Order affirmed.

1. Mental Health 🔑490

The court has no power to appoint a guardian ad litem for an insane party defendant until the person for whom such guardian is to be appointed has been properly brought into court.

2. Mental Health 🔑498

In husband's action for annulment of marriage where the wife had been adjudged incompetent and at time of service of summons and complaint she had no guardian, the service upon her personally was sufficient. West's Ann.Code Civ.Proc. §§ 372, 373, 411, subds. 4, 9.

3. Mental Health 🔑490

The validity of the appointment of a guardian ad litem for an insane person is not affected by the fact that no prior notice of the application therefor was served on the insane person. West's Ann.Code Civ. Proc. §§ 372, 373.

4. Appeal and Error 🔑900

In the absence of a showing to the contrary, on appeal, it must be presumed that the lower court performed its duty.

5. Mental Health 🔑490

In husband's action for annulment of marriage, where wife had been adjudged incompetent and record showed that purported order appointing a guardian ad litem for the wife was neither signed by the court and filed with the clerk nor entered in the minutes of the court, the order was ineffective. West's Ann.Code Civ.Proc. §§ 372, 373.

6. Mental Health 🔑491

In husband's action for annulment of a marriage against the wife who had been adjudged incompetent, where order appointing a guardian ad litem for the wife was ineffective, answer of attorney as such guardian had no more effect than would an answer filed by any other stranger and stipulations made by such attorney as such a guardian were likewise without effect.

7. Mental Health 🔑496

Improper failure to appoint a guardian ad litem for incompetent does not affect the jurisdiction of the court that proceeded without such appointment to decide the case.

8. Mental Health 🔑514

A judgment made and entered without the appointment of a guardian ad litem against an incompetent who has no general guardian, may be vacated in a proceeding for that purpose if no innocent purchaser has acquired rights under it.

9. Infants 🔑71
Mental Health 🔑474

The statutes regarding appointment of guardians ad litem were enacted to protect minors and insane and incompetent persons, not to preclude them from their legal rights.

10. Mental Health 🔑514

A default judgment taken against an incompetent not represented in the action by general guardian or guardian ad litem should be set aside when properly disaffirmed.

11. Marriage 🔑7

The degree of mental capacity at the precise time marriage is solemnized controls its validity and a marriage contracted during a lucid interval is valid. West's Ann.Civ.Code, § 82, subds. 3, 4.

12. Judgment ⚷375

Fraud which prevents a real trial of the issues justifies the setting aside of a default judgment.

13. Marriage ⚷65

An order vacating a judgment annulling the marriage of husband to the wife was proper on the ground of alleged fraud of the husband preventing a real trial of the issues. West's Ann.Civ.Code, § 82, subds. 3, 4.

◆

Walter M. Rheinschild, Hollywood, for appellant.

Henry J. Sullivan, Burbank, for respondent.

WHITE, Presiding Justice.

Plaintiff husband appeals from the order vacating and setting aside a judgment annulling his marriage to the defendant.

The judgment was rendered October 15, 1948, and upon defendant's motion set aside April 23, 1957. The record contains many affidavits both supporting and opposing said motion. The affidavits are in direct conflict. Ignoring the conflicts and considering all the affidavits in the light most favorable to the order granting the petition to vacate the judgment, a fair summary of the facts surrounding the marriage of the parties is as follows.

February 3, 1944, defendant, then a single woman, was committed to Camarillo State Hospital, hereafter referred to as "Camarillo". Plaintiff and defendant had been close friends for several years prior to defendant's commitment, and plaintiff knew about her commitment and visited her often during her stay at Camarillo.

May 25, 1948, plaintiff and defendant's mother visited defendant at Camarillo. Defendant was given a pass in their care. The two of them helped defendant select and buy a new outfit and change into it. Then plaintiff and defendant were married at Ventura and the latter returned to Camarillo.

June 3, 1948, defendant was given a leave of absence in the custody of her husband, the plaintiff. They went to defendant's mother's home and started cleaning and rearranging plaintiff's home to make it a suitable home for the two of them. June 8, 1948, defendant became quite ill and mentally deranged and on June 24th she was placed by plaintiff husband in a private neuropsychiatric sanitarium where she remained until July 26, 1948, when she was returned to Camarillo. Plaintiff continued to visit defendant at Camarillo and to sign in as "her husband".

August 12, 1948, complaint for annulment or divorce was filed. August 18, 1948, a copy of the complaint and summons was left, according to the affidavit of service, with "Frieda Briggs" and "Guy Craigg, Records Office, Camarillo State Hospital". Plaintiff continued to visit defendant at Camarillo. According to defendant's affidavit, a few days after the service of the summons and complaint upon her and before the expiration of defendant's time to answer, plaintiff told her that "he was not going through with it, that he realized he had made a mistake, that he loved her and always would love her" and that he had dismissed the complaint. Defendant did not answer and her default was entered.

September 27, 1948, plaintiff filed a petition for appointment of guardian ad litem for defendant, stating that she had been served, that the time for answer had expired, and that she was insane. The same day a form of order appointing guardian ad litem was filed. The form was never signed by the judge, and the record contains no minute order appointing a guardian ad litem.

In opposition to defendant's motion to set aside the judgment, plaintiff's attorney, Walter M. Rheinschild, avers that he filed a petition for the appointment of guardian ad litem for the defendant and prepared the order, pursuant to the Superior Court's rules, leaving blank spaces so that the

Clerk of the Court could insert the name of the attorney who would be appointed, and affiant was told that the attorney who was appointed would notify him of his appointment; that on or about September 30, 1948, affiant was informed by E. L. Overholt that he had been appointed guardian ad litem for the defendant; affiant on that date wrote Attorney Overholt giving him the date and case number of defendant's commitment to Camarillo, enclosing a copy of the summons and complaint in the instant action, and stating "She was paroled to plaintiff on the 25th of May, 1948, and recommitted on July 26, 1948. I believe the best protection for both parties would be for you to file an answer".

Also in opposition to defendant's motion to set aside the judgment, Attorney E. Llewellyn Overholt avers that pursuant to the rules of the Superior Court, his name was in the list of attorneys who would be appointed as guardian ad litem for insane persons; that under the court rules when an attorney was so appointed guardian ad litem the Court Clerk would inform the attorney as to the title and number of the case and the name of the attorney who had filed the petition for the appointment of the guardian ad litem; that affiant did on or about September 30, 1948, receive such notice and on the same day affiant telephoned plaintiff's attorney, who sent him the letter referred to in the affidavit of Attorney Rheinschild; that affiant prepared and filed an answer; that affiant did not check the file in the instant action to ascertain if the order of his appointment as guardian ad litem had been signed by the judge but relied upon the clerk's statement that he had been appointed; that affiant examined the file of the proceedings wherein defendant had been committed to Camarillo; and that "as a result of affiant's investigations it was impossible for affiant to make a meritorious defense on behalf of the defendant in this action".

An answer was filed by defendant's purported guardian ad litem on October 8, 1948. It admits her commitment and recommitment to Camarillo, and her stay from June 24 to July 26, 1948 in the private Neuropsychiatric Sanitarium to which she was sent by her husband soon after their marriage, and denies on information and belief, or lack thereof, the other averments of the complaint. The prayer is that "the Court determine the facts and grant such relief as will protect the interests of defendant and do equity to plaintiff * * *"

Also on October 8, 1948, a stipulation signed by attorney for plaintiff and "E. Llewellyn Overholt, defendant by her guardian ad litem in pro per", that the "matter may be heard" on or after October 15th was filed. Beneath the stipulation, under the same date, appears the consent of plaintiff's attorney "that the default be set aside" and "that the answer may be filed", and "It is so ordered Oct. 8, 1948" signed by the Court Commissioner.

October 15, 1948, "Judgment of Annulment of Voidable Marriage (Default)" was signed, filed and entered. Said judgment contains the following recital: "* * * it appearing that defendant was duly served with process and has not appeared or answered the complaint, and that the default of defendant has been entered * * *"

Plaintiff's attorney avers that "the Court Reporter, George Webber, who took the testimony of the witnesses at the trial on October 15, 1948, informed affiant that he had destroyed his notes pursuant to Superior Court rule"; that Dr. Lewis Scharf, M.D., was the physician who was on the medical staff at Camarillo and who had charge of the defendant; that he testified that he informed the plaintiff when asked if the defendant was cured that she was and it would be safe for him to marry her; that Dr. Scharf also testified that he had been in error and upon her return to Camarillo about July 26, 1948 he examined defendant and found that she was insane and dangerous.

Dr. Lewis E. Scharf, M.D., avers that he was employed at the Camarillo State Hospital as a psychiatrist and neurologist from January to August, 1948; that he had personal charge of the defendant; that to his "best recollection" defendant was confined in the restricted ward "where the patients had to be watched night and day by the nurses, due to their suicidal tendencies" both before and after her 24-hour pass on May 25, 1948 and until June 3, 1948, when she was given a leave of absence in the custody of the plaintiff; that she was at all times insane and incompetent to enter into a marriage contract, and that he so testified at the trial on October 15, 1948. Dr. Scharf does not aver that he was asked by plaintiff, or that he informed plaintiff in May, 1948 that defendant was cured or that it would be safe for plaintiff to marry her. While there is no denial of the averment of plaintiff's attorney that Dr. Scharf did so testify, the omission of that averment from Dr. Scharf's affidavit and the statements therein made by him as to defendant's mental condition before and after her leave on May 25, 1948, warrant the inference that Dr. Scharf did not so advise plaintiff or testify at the default hearing. Further, the averment by plaintiff's attorney that Dr. Scharf testified that he had advised plaintiff on or about May 25, 1948 that defendant was cured and it would be safe for him to marry her casts grave doubt upon Dr. Scharf's averment in his own affidavit in opposition to defendant's motion to set aside the judgment that both before and after her marriage on May 25, 1948, she was a dangerous and violent patient confined in the "restricted ward".

According to defendant's affidavit, plaintiff never told her that he had obtained an annulment of their marriage. He continued to visit her as before and to take her to motels and hotels on 24-hour passes issued to her in his care. He continued to sign the visitor's register as her "husband". Also, Exhibit B attached to the affidavit of plaintiff is a convalescent leave agreement (undated), which plaintiff avers was signed by him on November 20, 1956. Just under his signature and probably in his handwriting, "Hus" appears as the relationship between patient and the signer.

On November 23, 1956, defendant was discharged from Camarillo and for the first time she and plaintiff were told by the doctors that she was cured. Plaintiff then took defendant, according to her affidavit, to his home where they lived together as husband and wife until on or about January 5, 1957, when defendant learned for the first time that plaintiff had obtained a judgment annulling their marriage in 1948. Her certificate of recovery was issued to her January 3, 1957.

When defendant learned of the annulment on or about January 5, 1957, she left plaintiff's home and on March 4, 1957, she served and filed notice of motion to set aside the default and the judgment on the ground of fraud. Hearing was continued for the filing of more affidavits and the petition was granted April 23, 1957. The instant appeal was taken by plaintiff husband from the order vacating the judgment annulling the marriage.

Appellant urges that the court erred in finding: (a) that no guardian ad litem was appointed by the court; (b) that the service of summons and complaint had never been made upon the defendant; and (c) that plaintiff made representations to defendant which constituted fraud and prevented defendant from protecting her interests.

[1] The court has no power to appoint a guardian ad litem for an insane or incompetent party defendant until the person for whom such guardian is to be appointed has been properly brought before the court. Redmond v. Peterson, 102 Cal. 595, 599, 36 P. 923; Bank of America National Trust & Savings Ass'n v. Carr, 138 Cal. App.2d 727, 739, 292 P.2d 587; Weisfeld v. Superior Court, 110 Cal.App.2d 148, 152, 242 P.2d 29; Akley v. Bassett, 189 Cal. 625, 639, 209 P. 576.

[2] At the time of service of summons and complaint upon the defendant she had no guardian. The service of the summons and complaint upon her personally was therefore sufficient. Code Civ.Proc. § 411, subds. 4 and 9; Sacramento Sav. Bank v. Spencer, 53 Cal. 737, 741; Dunn v. Dunn, 114 Cal. 210, 212, 46 P. 5; Olivera v. Grace,

19 Cal.2d 570, 576, 122 P.2d 564, 140 A.L.R. 1328.

[3–5] Defendant having been adjudged incompetent and having no general guardian, could appear in the instant action only by a guardian ad litem appointed by the court in which the action was pending, or by a judge thereof. Code Civ.Proc. § 372. Upon plaintiff's application, or upon its own motion, it was the duty of the court to appoint a guardian ad litem for the defendant. Code Civ.Proc. § 373. The validity of the appointment of a guardian ad litem for an insane person is not affected by the fact that no prior notice of the application therefor was served on the insane person. Granger v. Sheriff, 133 Cal. 416, 418, 65 P. 873. In the absence of a showing to the contrary, on appeal it must be presumed that the court performed its duty. Jones v. Alameda, 85 Cal.App. 607, 612, 259 P. 976. In the instant action, however, the record shows that the purported order appointing a guardian ad litem for defendant was neither signed by the court and filed with the clerk or entered in the minutes of the court. The order is, therefore, ineffective. Jablon v. Henneberger, 33 Cal.2d 773, 775, 205 P.2d 1, and cases there cited.

[6] The answer of Attorney Overholt as such guardian ad litem filed in the instant action can have no more effect than would an answer filed by any other stranger to the action. The stipulations made by Attorney Overholt as such guardian ad litem are likewise of no effect. Therefore, the judgment vacated by the order from which this appeal was taken was, as recited therein a default judgment taken after defendant had been personally served and had failed to appear and answer.

[7] Improper failure to appoint a guardian ad litem does not affect the jurisdiction of the court that proceeded without such appointment to decide the case. Emeric v. Alvarado, 64 Cal. 529, 600, 2 P. 418; Dunn v. Dunn, 114 Cal. 210, 212, 46 P. 5.

[8] Undoubtedly, however, such a judgment made and entered without the appointment of a guardian ad litem against an incompetent who has no general guardian, may be vacated in a proceeding for that purpose "if no innocent purchaser has acquired rights under it". Dunn v. Dunn, supra.

[9, 10] The statutes regarding appointment of guardians ad litem were enacted to protect minors and insane and incompetent persons—not to preclude them from their legal rights. Doyle v. Loyd, 45 Cal.App.2d 493, 497, 114 P.2d 398. A default judgment taken against an incompetent person not represented in the action by a general guardian or a guardian ad litem should be set aside when properly disaffirmed. In Olivera v. Grace, 19 Cal.2d 570, at page 573, 122 P.2d 564, at page 566, Mr. Chief Justice Gibson, speaking for the Supreme Court, says: "Courts frequently set aside judgments rendered against incompetent defendants where it is probable that injustice has resulted." And at page 575 of 19 Cal.2d, at page 567 of 122 P.2d: "* * * there exists a well-recognized jurisdiction in equity which has been utilized to relieve incompetent defendants from judgments taken under circumstances of unfairness and injustice. Equity's jurisdiction to interfere with final judgments is based upon the absence of a fair, adversary trial in the original action. * * *"

In the instant action, the judgment having been taken by default must have been granted upon the ground alleged in the complaint, that defendant was at the time of the marriage of unsound mind, that she had been committed to Camarillo in 1944, that at the time of the marriage she was a patient there, that plaintiff was informed by defendant and the medical authorities at said hospital that defendant was cured of her mental illness and relying upon said statements he married defendant, that those statements were untrue and had plaintiff known of the true mental condition of defendant he would not have entered into said marriage.

From the complaint and judgment in the instant action it does not appear whether said judgment was granted upon the ground that defendant was at the time of the marriage of such unsound mind as to render the marriage voidable, or upon the ground that the marriage was the result of defendant's fraud upon the plaintiff. Civil Code, § 82, subds. 3 and 4. If defendant was incompetent to enter into said marriage, then it is most likely that she also was incapable of committing fraud upon the plaintiff at that time.

Defendant, of course, was not present or represented in court. The doctors who knew her well during her entire stay at Camarillo were not called. The doctor who testified at the default hearing avers that he testified that he saw defendant a few hours before and a few hours after her marriage, that she was of such unsound mind that she was incapable of entering into a marriage contract, or any contract. Plaintiff's attorney avers that said doctor testified at the default hearing that at the time of the marriage he had been so mistaken as to defendant's mental condition that he had informed plaintiff that it was safe to marry her.

[11] The degree of mental capacity at the precise time the marriage is solemnized controls its validity. Thus, a marriage contracted during a lucid interval is valid. Dunphy v. Dunphy, 161 Cal. 380, 383, 119 P. 512, 38 L.R.A.,N.S., 818; Vitale v. Vitale, 147 Cal.App.2d 665, 666, 305 P.2d 690; Williams v. Williams, 63 Cal.App. 482, 218 P. 783.

[12, 13] Defendant avers that "she was in possession of her faculties and had full knowledge of her acts and their consequences at the time of the marriage—May 25, 1948". That statement, with defendant's claim that plaintiff told her he had dismissed the action, the undisputed evidence that plaintiff continued to visit her through the years, "signing in" at Camarillo as her husband, and the other affidavits both supporting and opposing defendant's motion to vacate the default judgment, fully support the order granting defendant's motion to vacate the default judgment. Fraud which prevents a real trial of the issues justifies the setting aside of the judgment. Jeffords v. Young, 98 Cal.App. 400, 404, 277 P. 163; McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110.

The order is affirmed.

FOURT and LILLIE, JJ., concur.

160 Cal.App.2d 577

Jennie PARODI, Plaintiff and Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Defendant and Respondent.
No. 17710.

District Court of Appeal, First District,
Division 1, California.
May 19, 1958.

Rehearing Denied June 18, 1958.
Hearing Denied July 16, 1958.

Trolley coach passenger's action against municipal corporation for injuries allegedly sustained in coach. The Superior Court, City and County of San Francisco, George W. Schoenfeld, J., granted defendant's motion for directed verdict, and passenger appealed from judgment entered upon motion. The District Court of Appeal, Bray, J., held that where elderly trolley coach passenger's verified claim presented to city alleged that she sustained broken hip at one intersection but she testified at trial that accident occurred at second intersection located 11 blocks from first intersection, claim substantially complied with section of city charter requiring that claim include place of injury and was not invalid, especially in view of fact that city knew that passenger was injured on particular coach and its proof would not have been any different if claim had given second intersection as location of accident, that there was no evidence that passenger did not attempt in good faith to comply with law or that she had any intent to mislead or conceal, and that liability was predicated on negligent operation of moving coach.

Reversed.

Municipal Corporations ⚷741(2)

Where elderly trolley coach passenger's verified claim presented to city alleged that she sustained broken hip at one intersection but she testified at trial that accident occurred at second intersection located 11 blocks from first intersection, claim substantially complied with section of city charter requiring that claim include place of injury and was not invalid, especially in view of fact that city knew that passenger was injured on particular coach and its proof would not have been any different if claim had given second intersection as location of accident, that there was no evidence that passenger did not attempt in good faith to comply with law or that she had any intent to mislead or conceal, and that liability was predicated on negligent operation of moving coach. West's Ann. Code Civ.Proc. § 630; Charter of San Francisco, § 87, St.1935, p. 2421.

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Sidney N. Brandis, John H. Brill, San Francisco, for appellant.

Dion R. Holm, City Atty., Agnes O'Brien Smith, Deputy City Atty., San Francisco, for respondent.

BRAY, Justice.

Plaintiff appeals from a judgment in favor of defendant entered upon a motion made pursuant to section 630, Code of Civil Procedure (granting a previously denied motion for directed verdict after jury fails to reach a verdict).

Question Presented.

Propriety of granting the motion. This depends solely upon whether the variance between the place of accident described in the claim presented to the city and in the original complaint and that described in the amended complaint and in plaintiff's proof is fatal.

Facts.

Plaintiff's complaint alleged that she was injured while a passenger on defendant's trolley coach through defendant's negligent operation of the coach "near the intersection of Steiner and Broadway Streets," San Francisco. The verified claim which she filed with defendant as required by section 87, San Francisco Charter, stated the place of the accident in identical language. At the trial, plaintiff testified that the accident happened at the intersection of Fillmore and Sutter Streets (some eleven blocks from the other intersection). Defendant's evidence showed that the accident happened at the location given in the claim and the original complaint. Plaintiff was permitted to amend her complaint to state the place of accident in accordance with her testimony, namely, Fillmore and Sutter Streets. The location stated in the claim is a hilly area, while the Fillmore-Sutter area is relatively level. Plaintiff's testimony tended to show that while the coach was stopped at Fillmore and Sutter Streets she endeavored to change her seat on the coach and while doing so the coach started with a jerk, throwing her to the floor. Defendant's evidence tended to show that there was no unusual motion of the coach, but that she fell in trying to change her seat while the coach was making a turn at Steiner and Broadway, and that she had admitted that her fall was her own fault. At the proper times, defendant moved for a nonsuit and for a directed verdict on the ground of the variance between the claim and the amended complaint. These motions were denied. After four hours of deliberation the jury deadlocked and were dismissed. Thereafter defendant moved under section 630 for judgment upon its previous motion for a directed verdict. The motion was granted.

Validity of Claim.

Does the giving of the wrong intersection in the city as the place of the accident invalidate the claim? It is conceded that this action will not lie unless the claim required by section 87 of the charter be filed.[1] Section 87 provides in part that the claim must include the "place of the occurrence or injury for which damages are claimed * * *."

The California cases considering claim statutes have held that substantial compliance with the statute only is required and have set forth what is necessary to constitute substantial compliance. Thus Silva v. County of Fresno, 1944, 63 Cal.App.2d 253, 257–258, 146 P.2d 520, 522, states: "* * * the plain purpose of the statute is to guard the county against imposition by requiring notice of the circumstances of an injury upon which a claim for damages is made so that its authorities may be in a position to investigate the facts as to the time and place and to make proper investigation of the condition of the premises and decide whether the case is one for settlement or litigation. When a notice contains the information necessary for that purpose it is substantial compliance with the statute, but when it falls short of that test it is insufficient."

As to what is substantial compliance Perry v. City of San Diego, 1947, 80 Cal.App.2d 166, 169, 181 P.2d 98, 101, says: "* * * it seems clear that the California courts have taken a reasonably liberal view of the claim statutes and that where a reasonable attempt is made to comply with the law in good faith and no intent to mislead or conceal appears the claim will be upheld in the absence of anything indicating that the municipality has been mislead [sic], if the claim substantially conforms to the requirements of the statute."

Uttley v. City of Santa Ana, 1933, 136 Cal.App. 23, 25, 28 P.2d 377, 379, points out: "'* * * when, therefore, there is no evident intention to mislead, but a *bona fide* attempt to comply with the law, the notice is sufficient in the absence of any evidence that it did in fact mislead.'"

Indicate of the liberality of the courts in dealing with notices of this nature are the following situations in which the notices, although apparently defective, were held to be sufficient: failure to specify exact date of injury, Knight v. City of Los Angeles, 1945, 26 Cal.2d 764, 160 P.2d 779; failure to specify the cause of injury to be the negligence of some particular agent, Perry v. City of San Diego, supra, 80 Cal.App.2d 166, 181 P.2d 98; claim filed with wrong official, Milovich v. City of Los Angeles, 42 Cal.App.2d 364, 108 P.2d 960; claim stated injured person's school address instead of residence, Ridge v. Boulder Creek etc. School Dist., 1943, 60 Cal.App.2d 453, 140 P.2d 990; claim gave attorney's address instead of claimant's, Uttley v. City of Santa Ana, supra, 136 Cal.App. 23, 28 P.2d 377; claim did not itemize facts surrounding the injury, Dillard v. County of Kern, 1943, 23 Cal.2d 271, 144 P.2d 365, 150 A.L.R. 1048.

Applying the rules above mentioned to the notice of claim here, we do not doubt that it was sufficient. If the accident occurred as claimed by defendant at the place stated in the claim—Steiner and Broadway, then after the accident the coach was moved to the Fillmore and Sutter intersection where admittedly plaintiff was removed from the coach to an ambulance. There is nothing unreasonable in an elderly woman whose hip was broken by a fall in a moving coach, and who is removed at a particular location, mistaking that location for the place of the injury. The city had already taken statements from plaintiff and the coach operator as to the accident, and could have had no difficulty in tying up the claim with these statements and the removal of the injured plaintiff at the location given in the claim. The testimony of a passenger and the statement of the coach operator differed from that of plaintiff in that the former two gave the place of accident as Steiner and Broadway.

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[1] The law is well settled on this point. See Cathey v. City and County of San Francisco, 37 Cal.App.2d 575, 99 P.2d 1109; Kornahrens v. City & County of S. F., 87 Cal.App.2d 196, 196 P.2d 140.

The claim was sufficient so that defendant's "authorities may be in a position to investigate the facts as to the time and place * * * and decide whether the case is one for settlement or litigation." Silva v. County of Fresno, supra, 63 Cal.App.2d at page 258, 146 P.2d at page 522. There is no evidence that plaintiff did not attempt in good faith to comply with the law or that she had any intent to mislead or conceal. This meets the tests of Perry v. City of San Diego, supra, 80 Cal.App.2d 166, 169, 181 P.2d 98, and Uttley v. City of Santa Ana, supra, 136 Cal.App. 23, 25, 28 P.2d 377. In the Silva case, supra [63 Cal. App.2d 258, 146 P.2d 521], the claim generally described the place of injury as "a public highway approximately four miles east of Dos Palos in the County of Fresno." It was held that this was a substantial compliance as the officials charged with investigation were able to locate the place of the accident and make a proper investigation.

Defendant makes much of the fact that it came to court prepared to defend the charge of negligent operation of the coach at Steiner and Broadway, and then found that plaintiff was claiming for the first time that the accident happened at Fillmore and Sutter.[2] While defendant may have been surprised at the change of location, it was in no wise injured thereby. It knew that plaintiff was actually injured on the coach in question and knew that there had been only one accident thereon and that according to its witnesses the accident occurred at Steiner and Broadway. Had the claim given Sutter and Fillmore as the location its proof would not have been any different nor would defendant have settled the case. It would have attempted to show, as it did, that the accident did not happen at the latter location nor in the manner claimed by plaintiff. Defendant contends that plaintiff's insistence at the trial that the accident occurred at a different place than that previously stated shows bad faith in making an erroneous claim. The disagreement of the jury indicates that some of its members believed plaintiff's story as to the location of the accident.

Defendant relies greatly upon Hall v. City of Los Angeles, 1941, 19 Cal.2d 198, 120 P.2d 13, an action for injuries resulting from a defective sidewalk. The claim did not state the place of the accident. The court recognized the doctrine of "substantial compliance" but held that the failure to state *any* location was fatal to the claim and could not be considered "substantial compliance." The Silva case expressly distinguished the Hall case on the ground that in the Silva case an attempt was made to state the place of the accident while in the Hall case there was no such attempt; therefore there could be no substantial compliance. Johnson v. City of Los Angeles, 1955, 134 Cal.App.2d 600, 285 P.2d 713 (hearing denied by Supreme Court), was an action for injuries resulting from tripping on a defect in a public sidewalk. The claim placed the accident on the southeast corner of an intersection, whereas at the trial it was stipulated that the accident occurred on the southwest corner. The court held that the error in location did not make it difficult for the city to locate the defect complained of, and that therefore there was "substantial compliance," and held the claim to be sufficient. As to the contention of defendant in our case that stating the wrong location is worse than stating no location at all, a similar contention was made in the Johnson case and answered (134 Cal.App.2d at pages 603, 604, 285 P.2d at pages 715): "In the present case respondent says that the erroneous designation of *southeast* corner instead of *south-*

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[2] In addition to the claim and the original complaint stating Steiner and Broadway as the place of the accident, plaintiff stated to a policeman when she was being removed from the coach at Fillmore and Sutter and also to an investigator some ten days later that the accident happened at Steiner and Broadway.

west corner was more misleading than no designation and made it impossible for the city to locate the defect 'from the claim itself.' It is to be noted that said statement is not a statement that the error made it impossible or difficult for the city to locate the defect;—the statement limited the asserted impossibility to locating the defect 'from the claim itself.' * * * In view of the stipulation that the accident actually occurred at the southwest corner, and since there is no implication or any basis for an implication that the claimant acted in bad faith or intended to mislead by designating the place of the accident, it is apparent that the word 'southeast' was inadvertently used in the claim instead of the word 'southwest.' This is not a case, such as the Hall case, where the designation of the place was so general and indefinite that there was no semblance of compliance with the statute."

If a claim which erroneously states the place of injury in a defective sidewalk can be held to be sufficient compliance, a claim involving an injury on a moving coach which erroneously places the coach at the wrong intersection should also be sufficient. For notice to the authorities of the place of injury, it would be very important to know the exact place of injury on a sidewalk where the investigating officials must find a hole or other defect in order to make a proper investigation. There the place of injury is tied up materially with the question of liability. In our case, liability is predicated on negligent operation of a moving bus and the exact place where it was at the time of the injury is not as material.

There seems to be a split of authorities in other jurisdictions on the question of a variance between the claim and the proof as to the location of the place of injury. See 52 A.L.R.2d 966, 975; 68 A.L.R. 1532, 1537. In view of the rule in California as hereinbefore shown, we deem it unnecessary to discuss the cases from elsewhere cited by defendant which seem to follow a different rule.[3]

As no contention is made that the judgment in our case was based upon any ground other than the claimed variance between the claim and the proof, and as we hold that the variance was not sufficient to affect the validity of the claim, it substantially complying with the requirements of the law, the judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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160 Cal.App.2d 631

Clifford B. CASSIN and Hazel Cassin, Plaintiffs and Respondents,

v.

FINANCIAL INDEMNITY COMPANY, Defendant and Appellant.

No. 17050.

District Court of Appeal, First District, Division 1, California.

May 20, 1958.

Insureds brought action against insurer on an automobile liability policy for reimbursement for amount of judgment, costs, and attorney fees incurred by insureds in action brought against them by one, who was injured in a collision with insured's automobile while it was being driven by third person, who was sixty-two years old at the time. The Superior Court, San Mateo County, Murray Draper, J., entered judgment adverse to the insurer, and the insurer appealed. The District Court of Appeal, Fred B. Wood, J., held that where automobile policy expressly provided that the terms, which were in conflict with statutes of State wherein policy was issued, were amended to conform to such statutes, and policy was issued in California where Vehicle Code requires that an automobile liability policy shall insure person named therein and any other person using or responsible for use of motor vehicle or motor vehicles with express or implied permission of insured, alleged preferred rating endorsement, which excluded insurance coverage while automobile was operated by anyone over sixty years of age, was not effective.

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[3] In Cohen v. City of New York, 1946, 270 App.Div. 1017, 62 N.Y.S.2d 455, cited by defendant, the lower court held that there was a fatal variance between the claim and the proof, where the claimant in the claim marked the place of the accident with an "X" and at the trial testified that the correct place was 100 feet west of the "X" in the claim. On appeal, however, the description was held sufficient and the judgment reversed.

Judgment affirmed.

1. Insurance ⚷665(4)

In action by insureds against insurer on automobile liability policy for reimbursement for amount of judgment, costs, and attorneys' fees incurred by insureds in action brought against them by one who was injured in collision with insured's automobile, while it was being driven by one who was sixty-two years old, wherein insurer denied liability on ground that policy bore a preferred rating endorsement, which excluded insurance coverage, while automobile was operated by anyone over sixty years of age, evidence sustained finding that alleged preferred service rating endorsement was not attached to policy.

2. Insurance ⚷435.8

Where automobile liability policy expressly provided that the terms, which were in conflict with statutes of State wherein policy was issued, were amended to conform to such statutes, and policy was issued in California where Vehicle Code requires that an automobile liability policy shall insure person named therein and any other person using or responsible for use of motor vehicle or motor vehicles with express or implied permission of insured, alleged preferred rating endorsement, which excluded insurance coverage while automobile was operated by anyone over sixty years of age, was not effective. West's Ann.Vehicle Code, § 415(a) (2).

3. Insurance ⚷512

Where automobile covered by automobile liability policy was involved in collision while driven by third person with consent of insureds, and one injured in collision brought action for serious personal injuries against insureds and driver, and insurer refused to defend, and judgment was stipulated against insureds for $5,000 and against driver for $1,500, and driver's insurance company paid the driver's $1,500 portion of the judgment and loaned insureds $5,000, with which insureds paid their $5,000 portion of the judgment, and there was no fraud, insureds incurred liability in the amount of $5,000 which was covered by their automobile liability policy.

4. Compromise and Settlement ⚷2

The law looks with favor on voluntary settlement of doubtful rights and controversies, in absence of fraud.

5. Appeal and Error ⚷1042(2)

It was not prejudicial error to strike out certain portions of defendant's answer consisting of allegations of alleged fraud and collusion, where issues of alleged fraud and collusion were not relied on by defendant.

6. Reformation of Instruments ⚷11

In action by insureds against insurer on automobile liability insurance policy for reimbursement, it was not prejudicial error to refuse to permit insurer to file pleading seeking reformation of policy to add a restrictive endorsement, where addition of endorsement would result in a contract that was not agreed on, and would impose a restriction, which, by the very terms of the policy, would erase and elide so as to conform to the Vehicle Code. West's Ann. Vehicle Code, § 415(a) (2).

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Theodore Tamba, Franklin A. Plank, San Francisco, for appellant.

Mullally & Wines, Oakland, for respondents.

FRED B. WOOD, Justice.

Plaintiffs brought this action upon an automobile liability insurance policy issued by the defendant, for reimbursement for the amount of the judgment, costs and attorney fees incurred by them in an action brought against them by Pamela Beaumont who was injured in a collision with plaintiffs' car. Plaintiffs' car was being driven by one Earl Van Dyke, who was 62 years old at the time. Defendant claims that its policy bore a "preferred rating endorsement" which excluded insurance coverage "while the automobile is operated by or in the care of anyone who: * * * (2) Is over 60 years of age."

(1) *Was the policy limited by a preferred rating endorsement? No.*

The complaint pleads the text of the policy (not showing any such endorsement). The answer shows the text of the alleged endorsement but is not verified. Defendant argues that plaintiffs by failing to file an affidavit sanctioned by section 448, Code of Civil Procedure, admitted execution and genuineness of the endorsement. It is possible that section 448 does not apply to a mere addendum as distinguished from an entire instrument. Moreover, defendant by failing to verify its answer may have admitted the genuineness and completeness of the contract as pleaded in the complaint, which was verified. See § 447, Code of Civ.Proc. It happens that these questions need not be decided. The parties treated the execution and genuineness of the alleged endorsement as issues at the trial. It is too late now for defendant to change its theory in that regard.

[1] There is evidence sufficient to support the finding that the alleged preferred service rating endorsement was not attached to the policy.

Plaintiff Hazel Cassin testified that the endorsement was not attached to the policy when she received it. When applying for insurance, she went to a Mr. Legerton at the office of Fireside Finance Company [agent or broker for defendant herein] and asked to renew her insurance which was then with Norwich. He said he had "another insurance company that was just as good, and he would offer me the same protection, and it would be cheaper." He said nothing about restrictions on the new policy, about different rates in case someone less than 25 or more than 60 years of age drove, nor did he mention the words "preferred rate endorsement." The application for insurance signed by Mrs. Cassin had "Pref Rat End" inserted in pencil but Mr. Legerton testified that this was not in his handwriting as were most of the entries in the application. The first page of the policy, in a section labeled "Physical Damage" contains a section embraced by brackets labeled "Endorsements Forming a Part of the Policy at Its Inception Date" with two printed entries ("Wrongful conversion—Type WC–1" and SI Coll.—Type VSI–") and a typed entry "Pref. Rate End." On the next line and in the right-hand column, instead of the left, there is a typed entry "Policy Fee End." with a charge of $5. There appears to be nothing in the policy which explains the entries under endorsements or intimates that these may restrict coverage under the policy. Mrs. Cassin testified that she saw "Pref. Rate End." notation on the face of the policy but thought it referred to the endorsement fee explanation attached to the policy.

The only contrary evidence on the issue of whether the endorsement was physically attached to the policy at the time it was issued was given by Nelson C. Neall, who at the time the policy was issued was employed by Financial Indemnity Company. He testified that he "would say there was a preferred rating endorsement attached to the policy" because the normal practice was to stamp the endorsements and the policy so that part of the stamp would appear on the endorsement and part on the policy, and this particular policy had two partial stamps on the section marked "Exclusions." He could not, of course, testify that this particular operation had been done in this manner as to this particular policy. Also, there was a notation "pref. rat. end" on the front page of the policy and the office copy of the policy had such an endorsement in the file.

Appellant contends the issue was not whether the preferred rating endorsement was *attached* to the policy but whether the parties intended that such endorsement be included in the policy applied for. We doubt that this point is available at this late date. At the beginning of the trial defendant's counsel said he was prepared to prove that the endorsement was attached; that the only issue of fact was whether the endorsement was "on there." Even if this point were now available, we perceive no basis for reversal. Mrs. Cassin testified that she intended to obtain coverage similar to that which she had under the Norwich policy, which did not contain any such exclusion and that Mr. Legerton, the agent of defendant, purported to provide her with such a policy. One could infer from the "Pref. Rate End." on the face of the policy either that the insurance company's intention was different from that of the insured or that this was mistake on the part of the company. Neither conclusion is compelled by the evidence, and the trial judge resolved any conflict in favor of the plaintiffs.

[2] Moreover, even if the endorsement had been attached it would not have been effective here. The policy expressly provided: "Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes." Section 415, Subdivision 2, of the Vehicle Code prescribes as a requirement of a motor vehicle liability policy that it "shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured." Thus, the policy (even if the restrictive endorsement were attached) by its very terms amended itself to conform to this statute, which contains no such age restrictions as are contained in the endorsement.

In Wildman v. Government Employees' Ins. Co., 48 Cal.2d 31, 307 P.2d 359, the court held that such provision in a policy prevailed over an endorsement purporting to restrict liability to use only by members of the insured's immediate family. Indeed, it is doubtful if it would have been competent for defendant to restrict the coverage as the endorsement would have done if attached to the policy. "Inasmuch as sections 402 and 415 of the Vehicle Code set forth the public policy of this state such laws must be considered a part of every policy of liability insurance even though the policy itself does not specifically make such laws a part thereof." At page 40 of 48 Cal.2d at page 464 of 307 P.2d.

[3] (2) *Did plaintiffs incur a liability to Beaumont which is covered by the policy they obtained from the defendant? Yes.*

The action of Beaumont against the Cassins and Van Dyke culminated in a stipulated judgment in favor of Beaumont against the Cassins for $5,000 and against Van Dyke for $1,500. Van Dyke's insurer, Farmers Insurance Exchange, paid Beaumont Van Dyke's $1,500 portion of the judgment and loaned the Cassins $5,000 which they deposited and thereupon paid Beaumont their $5,000 portion of the judgment. Defendant herein questions that transaction, claiming that the Cassins had only an owner's liability under section 402, Vehicle Code, based solely on Driver Van Dyke's negligence, which section 402 imputes to the Cassins; hence the latter's liability could not exceed the amount of the driver's liability. Defendant concludes that the loan transaction was really a payment by Farmers to Beaumont, in discharge of its coverage of Van Dyke's liability.

[4] *First,* it is important to bear in mind that the Beaumont stipulated judgment was the result of a compromise settlement and that the law looks with favor upon the voluntary settlement of doubtful rights and controversies in the absence of fraud. 11 Cal.Jur.2d 3, § 2. Here, there is no evidence of fraud.

Second, with what types of liability were the Cassins confronted when they negotiated this settlement? Beaumont in her complaint alleged two. In one paragraph she pleaded that the Cassins were liable as owners of the car, under section 402 of the Vehicle Code. In another paragraph she alleged that Van Dyke was Cassins' agent, acting in that capacity at the time of the accident. There is evidence that Mrs. Cassin that evening drove this car, recently acquired, over to her friends, the Van Dykes, to show it to them and invited them to ride with her, which they did. They stopped at a bar for a while, taking a few drinks. Upon leaving the bar near midnight, Mrs. Cassin asked Mr. Van Dyke if he would like to drive the car, to see how it operated. He accepted the invitation. Mrs. Cassin sat in the front seat, Mrs. Van Dyke in the rear seat. As they approached the intersection where they wished to make a left turn, Mrs. Cassin was facing the rear, engaged in conversation with Mrs. Van Dyke. Mr. Van Dyke asked Mrs. Cassin if there were any cars approaching from the rear. She assured him there were none and he proceeded with the left turn, immediately colliding with the Beaumont car which was travelling toward them in the opposite bound lane of the street along which they had been driving. This trip, it would seem, was as much that of Mrs. Cassin as it was Van Dyke's, possibly more so. Accordingly, she was potentially liable as principal as well as owner of the car and in addition, perhaps she may have been primarily liable if negligent in her observance of the character and quality of his driving at the time. See Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861, as to the liability of a principal, and Grover v. Sharp & Fellows Contracting Co., 66 Cal.App.2d 736, 741–742, 153 P.2d 83, concerning the duty of an owner, riding in his car when driven by another, to keep a lookout himself and remonstrate against carelessness of the driver.

The Cassins were faced with a complaint that alleged serious personal injuries, general damages in the sum of $40,000, and substantial special damages the amount of which Beaumont had not yet ascertained but requested permission to include by amendment when ascertained.

Meanwhile, defendant had refused to defend the Cassins in the Beaumont action, predicated upon Van Dyke's age and the erroneous assertion of the restrictive endorsement which we have already discussed. And Farmers was ready to lend the Cassins the money with which to pay their portion of the proposed stipulated judgment.

Under such circumstances why should the Cassins not settle upon the terms indicated? Defendant has shown us no reason why it was not legally competent and proper for them to do so.

Third, what about Farmers' part in this transaction? It has insured Van Dyke against his own liability, which all concede. But its policy also provided that if Van Dyke had other insurance against a loss covered by this policy Farmers would not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bore to the total applicable limit of liability of all valid and collectible insurance against such loss; "provided, however, the insurance with respect to * * * other automobiles under Insuring Agreement V shall be *excess* insurance *over* any *other* valid and collectible *insurance available to the insured,* either as an insured under a policy applicable with respect to said automobiles or otherwise." (Emphasis added.)

Van Dyke, under the circumstances which here obtain, was an insured under the policy which defendant had issued to the Cassins. Such insurance was "insurance available to the insured [Van Dyke]" within the meaning of that expression as used in the proviso in the Van Dyke policy above quoted; limited by the Cassin policy to $5,000 for injury to one person in any one accident. If it should develop that the Cassin policy coverage was "valid and collectible" Farmers would be liable only for the "excess" over $5,000, which excess ($1,500) it paid directly to Beaumont. Why should it not enter into the stipulation which liquidated the amount of Van Dyke's liability in the amount of $1,500 and Cassin's in the amount of $5,000; pay Van Dyke's portion; lend the Cassins the amount of their judgment obligation; and take from Cassin a promise to repay this loan to the extent of their recovery, if any, from the defendant and treat the promise to pay as cancelled should there be no such recovery? Defendant has shown us no sound reason why not. The decisions upon which defendant relies are so obviously inapplicable to the facts of this case, a detailed analysis of them seems unnecessary.

Defendant argues that because Farmers took from the Cassins a release of all claims, the loan transaction was something different from what it purported to be. We fail to see how or why. That was simply a part of the compromise and settlement which fixed the amount of the liabilities of Van Dyke and of the Cassins at $1,500 and $5,000, respectively, and did not change those amounts nor make them joint instead of several obligations.

We note in passing that defendant promised to pay the Cassins all sums which the latter "shall become legally obligated to pay as damages." The stipulation and judgment reduced that to a certainty and matured defendant's obligation to pay. The fact that in order to effect the settlement Cassins borrowed the money and borrowed it from another insurance company that had reasons of its own for lending the money is no apparent legal concern of the defendant.

Another argument tendered is that Farmers had no legal capacity to lend its money, that it can "invest" its "assets" in the type of securities only that are indicated therefor by the provisions of sections 1170 and 1370 of the Insurance Code. There is nothing in the record to show under what part of the Insurance Code or other statute the Farmers Exchange was organized or by what statute it is governed. Moreover, the sections cited deal with investment of assets in securities which this loan transaction was not. No sound reason has been given why it was not competent for Farmers to lend the money nor what right defendant has to question it.

(3) *Was it prejudicial error to strike certain portions of defendant's pleadings and to refuse the filing of others? No.*

The gist of the stricken portions of the answer, and the pleadings later not allowed to be filed consisted of allegations of fraud and collusion of the Cassins and Farmers to mulct defendant by defeating it of its right of subrogation to plaintiffs' claim, if any, against Van Dyke.

[5] At the trial, defendant's counsel agreed that the questionability of the form of payment was raised by the denial of payment. And it has not shown how its subrogation rights could have been prejudiced by anything that plaintiffs in fact did. In the record we find neither evidence of nor offer to prove fraud or collusion. *Indeed, defendant's counsel during the trial said he was making no such contention. His claim* in respect to the loan agreement *was* that *it would appear, as a matter of law, by examination of the loan agreement* and the *Farmers insurance policy* to Van Dyke that though in form a loan it was payment to Beaumont by Farmers of Van Dyke's personal obligation against the incurrence of which Farmers had insured. Defendant's counsel reiterated that statement at the conclusion of the trial, when the evidence was closed and the briefing period was to start. Plaintiffs' counsel said, there being no evidence of collusion in the case, he was not going to brief that point. Defense counsel responded by saying "that was stricken, and I am not raising the point in the case," adding that he was relying upon the documents mentioned (the Van Dyke policy, the loan agreement and the draft for $5,000 delivered by Farmers to the Cassins) to support his claim that the loan agreement really showed a payment by Farmers, not a loan, a question of law not of fact. In view of that it is too late now to revive the question of fraud and

collusion. We have examined those papers and find defendant's analysis of them erroneous.

[6] The same may be said concerning the denial of permission to file a pleading that sought reformation of the contract, so as to restore or reinstate the asserted restrictive endorsement. Moreover, it would not be reformation of a contract were it revised to read as it was not agreed upon, and to impose a restriction which the very terms of the contract would erase and elide so as to conform to California's legal requirements.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

160 Cal.App.2d 589

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Hiram MIMS, Defendant and Appellant.

Cr. 3437.

District Court of Appeal, First District, Division 1, California.

May 19, 1958.

Hearing Denied July 16, 1958.

Defendant was convicted of grand theft with two prior convictions and from the judgment of the Superior Court, City and County of San Francisco, C. Harold Caulfield, J., the defendant appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that where trial court, in effect, told defendant that as long as he had counsel he should proceed through such counsel, while it would have been appropriate for court to have told defendant he could discharge his counsel if he desired and proceed to question the witness personally, no prejudice appeared from failure to do so, where defendant was afforded right of consultation with his attorney, and it appeared that defendant wanted a specific question asked of a prosecution witness and court directed counsel to ask the question and he did, and there was no evidence that defendant wanted to discharge his counsel and there was no request that he be permitted to do so.

Affirmed.

1. Criminal Law 🔑641(1)

Under constitutional provision conferring upon accused the right to appear and defend "in person and with counsel", if accused has aid of counsel, he need not leave his defense entirely in hands of his counsel, but accused may confer with his counsel and if he is deprived of that right, prejudicial error occurs, but accused may not proceed with counsel and also elect to ask questions and otherwise handle his own trial since he may have an attorney and act as his own attorney but one or the other must be in charge of defense so that order of court to compel accused to elect to proceed either in person or by counsel is not erroneous. West's Ann.Const. art. 1, § 13.

2. Criminal Law 🔑641(1)

The trial judge has power over conduct of trial, and whether a defendant who has counsel shall be permitted to examine witnesses must be left largely to the discretion of trial court. West's Ann.Const. art. 1, § 13.

3. Criminal Law 🔑1166½(1)

In grand theft prosecution, wherein trial court, in effect, told defendant that as long as he had counsel he should proceed through such counsel, while it would have been appropriate for court to have told defendant he could discharge his counsel if he desired and proceed to question the witness personally, no prejudice appeared from failure to do so, where defendant was afforded right of consultation with his attorney, and it appeared that defendant wanted a specific question asked of a prosecution witness and court directed counsel to ask the question and he did, and there was no evidence that defendant wanted to discharge his counsel and there was no request that he be permitted to do so. West's Ann.Const. art. 1, § 13.

4. Criminal Law ⚿991(1)

Where defendant convicted of grand larceny had two prior felony convictions so that court could not grant probation, and state prison term was called for and once having determined upon the state prison sentence, trial court had no voice in fixing the term, precise sentence being fixed by Adult Authority under statute, trial court did not abuse its discretion in making state prison sentence commence at termination of county jail sentence for vagrancy notwithstanding court's statement that in passing sentence, court would take into consideration fact that in court's opinion defendant committed willful perjury on the stand. West's Ann.Pen.Code, §§ 489, 1168, 1203, 3020.

5. Criminal Law ⚿372(1)

An exception to rule that evidence of other crimes is not admissible is that evidence of similar crimes is admissible to show plan, scheme, system, design or a characteristic behavior pattern of accused, so that if evidence does not relate to any of such features, and has no relation to charged offense, evidence of other crimes is not admissible.

6. Criminal Law ⚿372(5)

In prosecution for grand theft by taking a wallet from a woman on a bus, testimony of three witnesses as to various occasions when they had seen accused mingle in crowded places, put his hand into ladies' purses and remove, or attempt to remove, their wallets, was properly admitted for purpose of showing a common scheme, plan or system and characteristic behavior pattern of defendant, where all of transactions testified to occurred in crowded places and within a period close to the date of the charged offense.

7. Criminal Law ⚿1169(11)

In prosecution for grand theft by feloniously taking a wallet from a woman on a bus, even if it were error to have admitted testimony of witnesses as to various occasions when they had seen accused mingle in crowded places, put his hand into ladies' purses and remove, or attempt to remove, their wallets, such error was not prejudicial where all of testimony of such offenses came into the record without objection, and all of witnesses who testified to such other offenses were thoroughly cross-examined by accused's counsel.

8. Criminal Law ⚿728(2)

Failure to object to alleged prejudicial misconduct of prosecuting attorney amounted to waiver of any objection accused might have had.

◆

Wallace G. Colthurst, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., San Francisco, for respondent.

PETERS, Presiding Justice.

Hiram Mims was charged with having feloniously taken a wallet from Helen Henry on March 11, 1957, and with two prior convictions. He pleaded not guilty to the grand theft charge and denied the priors. He was found guilty of grand theft, and the jury also found that he had suffered the priors. Judgment was entered accordingly. He appeals from the judgment and from the order denying his motion for a new trial.

Defendant does not directly attack the sufficiency of the evidence which is ample to sustain the finding of guilt. Mrs. Henry testified that on March 11, 1957, at between 3 and 3:30 p. m. when she boarded a McAllister Street bus, at Fillmore Street, and as she was going to her seat, she was bumped by the defendant. As she started to fall backwards she noticed that her purse was open and she saw defendant's hand come out of her purse with her wallet which contained $33 and some personal papers. Defendant tried to get off the bus but Mrs. Henry grabbed his coat and accused him of stealing her wallet. The defendant hit and kicked her and denied the accusation. Also on the bus was Richard Evans, a reserve police officer of the San Francisco Police Department, who approached Mrs. Henry and defendant and identified himself as a police officer. He requested the bus driver to stop the bus and he and Mrs. Henry and defendant got off. Mr. Evans began to question the defendant. Both he and Mrs. Henry saw the wallet in defendant's pocket. Mrs. Henry retrieved her wallet and, as she did so, defendant struck her and escaped. Later he was arrested for vagrancy.

The next day, that is, on March 12, 1957, at the Hall of Justice, Mrs. Henry identified the defendant from his picture. She was then taken to Judge Underwood's court, where defendant was appearing on the vagrancy charge, and she identified defendant out of a group of over 20 people. Mr. Evans tentatively identified defendant from his picture, but was not sure until he saw defendant in Judge Underwood's court, where he made a positive identification. Both positively identified defendant at the time of trial.

A store detective from Hale Bros. testified that she had known defendant for over five years; that on numerous occasions she had seen him mingle with crowds of people; that on February 25, 1957, in Woolworth's, she observed him put a hand into a lady's purse and take her wallet; that on the same day she saw him reach into the pocketbook of a lady who was boarding a bus at Fifth and Market; that on March 4, 1957, she saw him reach into a lady's purse on a Powell cable car. On all of these occasions he was wearing a natural beige trenchcoat, the same kind of coat that Mrs. Henry and Mr. Evans testified he was wearing on March 11, 1957.

A San Francisco police officer testified that on March 4, 1957, he saw defendant fumble with the clasp of a woman's purse as he was boarding a bus. He failed to get the purse open.

A store detective for J. C. Penney Company testified that on March 11, 1957, at about 6 p. m. in Macy's she observed defendant lay his hand on the back of a man near that man's pocket. This person also testified to several other occurrences that she observed, all involving attempts by defendant to open women's purses, usually on busses.

When defendant, after his arrest, was informed that Mrs. Henry and Mr. Evans had identified him, he admitted his guilt but denied that Mrs. Henry had taken the wallet out of his pocket, stating "I gave it back to her."

Defendant at the trial denied all the charges. In addition, he testified that on March 11, 1957, he was home until 3 or 3:30 p. m. when he took a suit to a pawn shop on O'Farrell and Fillmore to pawn it. He arrived there about 3:20 p. m. and, after a short delay, pawned the suit. He then went to his doctor at Sutter and Fillmore, but the doctor was not in. He remained in the general area until 4:30 p. m. and saw the doctor. The pawn shop and the doctor's office are only a few blocks from where Mrs. Henry boarded the bus on which she testified defendant was riding.

Defendant denied being on the No. 5 bus on the day in question, and claimed he first saw Mrs. Henry in Judge Underwood's courtroom. He denied making the admissions of guilt to the police, denied that he had taken or attempted to take wallets on the occasions testified to by the other witnesses, but admitted he owned a trenchcoat of the type described by the witnesses.

The records of the pawnshop show that defendant had pawned a suit there at 3:30 p. m. on March 11, 1957. It was stipulated that if the doctor were called as a witness he would testify that defendant called at the office about 3:40 p. m. and was seen by the doctor as a patient between 4 and 4:30 p. m. on that day.

The first contention of appellant is that he was deprived of his constitutional right to act in his own defense. This contention is based on the following facts as shown by the record: As the trial progressed, appellant became dissatisfied with the way his counsel, an assistant public defender, was handling some portions of the case. While the officer who had testified as to the identification of appellant by Mrs. Henry and Mr. Evans was on recross examination, defense counsel informed the court that the appellant had requested him to ask the witness a certain question, and that the appellant wanted permission to ask the question himself. The following then occurred:

> "The Court: You have an unusual case. You represent the Defendant. The situation is the same as in any other case. The attorney could ask the questions. Ordinarily, an attorney is judge of what questions should be asked after consultation. Go ahead, ask the question.
>
> "The Defendant: I should be able to ask a question.
>
> "The Court: Keep quiet, please, Mr. Mims. You have an attorney to speak for you.
>
> "The Defendant. Well, is it against the law for me to speak?
>
> "The Court: Did you hear what the Court said, Mr. Mims? Mr. McNamara, proceed with the question."

Defense counsel then asked the question that appellant desired asked, and it was answered. Then at the close of the examination of this witness defense counsel asked for a conference with the judge in chambers. At this conference the defendant and his counsel were present. Defense counsel told the court that his client had expressed dissatisfaction with the way he was handling the case, and that the client had expressed a desire to subpoena Judge Underwood, the assistant district attorney of that court and the reporter of that court, and also wanted all of the testimony of the police officer who testified in that vagrancy case to be read by the reporter. Defense counsel then stated that in his opinion this would not be proper and that such evidence was not admissible. The court concurred in the advice that defense counsel had given his client, and told appellant that his attorney "has handled this case very ably and very well, under the most difficult circumstances," and that appellant ought to be grateful to his counsel. When appellant expressed the desire to call the witnesses the court told him that "those witnesses are not material," and that what happened at the vagrancy trial was immaterial. When appellant attempted to protest, the court stated:

> "Just a minute, Mr. Mims. Will you keep quiet * * * what happened in Judge Underwood's court is not material to that question.
>
> "The Defendant: But, it is, Your Honor.
>
> "The Court: Well, I am sorry, you are not the judge. We will proceed with the case, Mr. McNamara. The Court thanks you for your services, too * * * And you keep quiet there. If you have anything to say, your attorney will say it for you, Mr. Mims."

On this appeal appellant does not argue directly that the evidence of what occurred in Judge Underwood's court was material or relevant, or that the trial court's rulings thereon were erroneous. His contention is that when the court told him to keep quiet and to speak only through his counsel, he was misled and prevented from exercising his right to dismiss his counsel and defend in person. It is argued that once the conflict appeared between appellant and his counsel the court was under a duty to instruct him that he had the legal right to discharge his counsel. It is contended that failing to do so the court committed prejudicial error.

[1] The point is without merit. It is true that Article I, section 13, of the Constitution confers upon an accused the right "to appear and defend, in person *and* with counsel." Under this section it is the law that if the accused "does have the aid of counsel, he is not required to leave his defense entirely in the hands of his counsel, for the constitution guarantees him the right to appear and defend in person 'and' with counsel. It does not say 'or' with counsel." 14 Cal.Jur.2d p.

384, § 149. This means that a defendant has the right to confer with his counsel, and if he is deprived of that right prejudicial error has occurred. People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180. But the fact that he may defend "in person and with counsel" does not mean that a defendant may proceed with counsel and also elect to ask questions and otherwise handle his own trial. He may have an attorney and act as his own attorney, but one or the other must be in charge of the defense. Thus, an order of the court to compel the defendant to elect to proceed either in person or by counsel is not erroneous. People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806; People v. Glenn, 96 Cal.App.2d 859, 216 P.2d 457; see generally 70 A.L.R. 817.

[2] The trial judge has power over the conduct of the trial. Whether a defendant who has counsel shall be permitted to examine witnesses must be left largely to the discretion of the trial court.

[3] In the present case the court, in effect, told appellant that as long as he had counsel he should proceed through such counsel. While it would have been appropriate for the court to have told appellant he could discharge his counsel if he desired and proceed to question the witness personally, no prejudice appears from the failure to do so. People v. Marcus, 133 Cal.App.2d 579, 284 P.2d 848. It clearly appears from the record that appellant was afforded the right of consultation with his attorney. It also appears that appellant wanted a specific question asked of a prosecution witness. The court directed counsel to ask the question, and he did. No authority is or can be cited in support of the contention that it was prejudicial error to have failed to have informed appellant of his right to discharge his lawyer. There is no evidence that defendant wanted to discharge his attorney, and certainly there was no request that he be permitted to do so. In the absence of some such evidence the court was under no duty to act, and the failure to do so was not error.

[4] The next contention of appellant is that the court in imposing sentence measured the sentence not only by the grand theft conviction, but also imposed a penalty for perjury, an offense not charged or proved.

Just before imposing sentence the trial court stated:

> "And I want to advise you, Mr. Mims, that in passing sentence upon you, the Court is going to take into consideration the fact, in the Court's opinion, you committed wilful and deliberate perjury on the stand. And, as I told Defendants earlier this week, where they do that, the Court is going to take that into consideration in passing judgment on them. The courts never object, at all, to the Defendant who will stand silent if he is accused of a crime, or gets up and tells his story in an effort to extricate himself, but when they get up and commit wilful and deliberate perjury—
>
> "The Defendant: Your Honor—but—
>
> "The Court: —and the jury so found that you did commit wilful and deliberate perjury, and that will be taken into consideration when sentence is passed upon you.
>
> "And I don't want to hear anything from you, at all. That is all. Take him, Mr. Bailiff."

Subsequently, the court sentenced appellant "to the State Prison for the term to start at the conclusion of the sentence you are presently serving in the County Jail."

At the time of sentence appellant was serving a 6-month sentence for vagrancy, a charge to which he had pleaded guilty in Judge Underwood's court. It is the contention of appellant that the trial court imposed the maximum sentence in order to punish him not only for grand theft, but because of a belief that he was guilty of perjury, an offense neither charged nor proved. The passage above quoted is relied upon in support of this argument.

The point is without merit. In view of the fact that appellant had two priors, the trial court was without power to grant probation. Penal Code, § 1203. By virtue of section 489 of the Penal Code the trial court could either have imposed a county jail sentence or a state prison sentence for not to exceed 10 years. Certainly it cannot be held that by electing to send appellant to the state prison the trial court abused its powers. The evidence of guilt was strong and the appellant had two prior felony convictions. A state prison term was called for. Once having determined upon a state prison sentence the trial court had no voice in fixing the term. The maximum is fixed by section 489 of the Penal Code at 10 years, and by section 1168 of the Penal Code the trial judge "shall not fix the term or duration of the period of imprisonment. The precise sentence is fixed by the Adult Authority under the terms of section 3020 of the Penal Code. The trial judge had the discretion to make the sentence start to run at the termination of the county jail sentence. Thus, everything the trial judge did was within his discretion. In determining how he would exercise this discretion the trial judge was entitled to consider the facts of the case, including how appellant had behaved on the witness stand. If he believed that the defendant had committed wilful perjury, and that view is supported by the record, this is a factor that he could consider when he came to exercising his discretion.

Under these circumstances there was no abuse of discretion in imposing the sentence here involved.

Appellant contends that reversible error was committed by admitting into evidence the testimony of the three witnesses who described observing appellant commit, or attempt to commit, other crimes. These three testified as to various occasions when they had seen appellant mingle in crowded places, put his hand into ladies' purses and remove or attempt to remove, their wallets. It is appellant's claim that such evidence was inadmissible.

[5] It is now well settled as an exception to the rule that evidence of other crimes is not admissible, that evidence of similar crimes is admissible to show plan, scheme, system, design or a characteristic behavior pattern of the accused. People v. Cavanaugh, 44 Cal.2d 252, 282 P.2d 53; People v. Coefield, 37 Cal.2d 865, 236 P.2d 570. If the evidence does not relate to any of these features and has no relation to the charged offense, the evidence is not admissible. People v. McCullough, 158 Cal.App.2d 310, 322 P.2d 289; People v. Channell, 136 Cal.App.2d 99, 288 P.2d 326.

[6] In the instant case the evidence did tend to show a common scheme, plan or system and a characteristic behavior pattern of the defendant. The testimony indicated that he would seek out crowded places, frequently a bus, and would open women's purses and remove their wallets. His method of operation in these cases testified to was similar to the method of operation used by the thief who removed Mrs. Henry's wallet. All of the transactions testified to occurred in crowded areas in San Francisco and within a period close to the date of the charged offense.

[7] Even if it were error to have admitted this testimony, such error would not have been prejudicial. All of the testimony of these other offenses came into the record without objection. All of the witnesses who testified to these other offenses were thoroughly cross-examined by appellant's counsel. This being so, the evidence is not now subject to attack. People v. Haines, 64 Cal.App. 628, 222 P. 183.

The last contention of appellant is that the prosecuting attorney was guilty of prejudicial misconduct. In cross-examining appellant the prosecutor stated to the witness that several times during his testimony the witness had referred to his "illness" and then asked: "Your illness is narcotic addiction, isn't it?" When appellant answered: "No, it is not," the prosecutor asked: "You are not an addict?" and appellant replied that he had never been convicted of narcotic addiction.

Then, after appellant had testified that he was innocent of the vagrancy charge but had pleaded guilty to it because he was ill, the prosecutor asked: "You were suffering from withdrawal symptoms, weren't you?" He replied: "I don't know what withdrawal symptoms is. I'm not a doctor. All I know was that I was ill at the time."

[8] No objection to any of these questions was made at the trial. It is too late to raise the point for the first time on appeal. Failure to object amounts to a waiver of any objection he may have had. People v. Johnson, 153 Cal.App.2d 564, 314 P.2d 751; People v. Parrella, 158 Cal.App.2d 140, 322 P.2d 83.

Appellant also objects to the fact that on several occasions during argument the prosecutor referred to matters which disclosed that there may have been a difference of opinion between appellant and his counsel. No objection was made to these remarks during the trial. As already pointed out, failure to object amounts to a waiver.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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160 Cal.App.2d 271

Milan Ira DREW and Gladys C. Drew, husband and wife, Plaintiffs and Appellants,

v.

Leslie MUMFORD and Birdie Mumford, husband and wife, Defendants and Respondents.

Civ. 22972.

District Court of Appeal, Second District, Division 1, California.

May 9, 1958.

Action to restrain defendants from maintaining upon plaintiffs' land a wire fence which defendants allegedly erected in 1956 on same line on which a wooden fence was standing in 1944 when defendants acquired their property and one of plaintiffs was adjoining property owner. From adverse judgment of the Superior Court, Los Angeles County, J. Howard Ziemann, J., the plaintiffs appealed. The District Court of Appeal, Fourt, J., held that evidence sustained implied findings of adverse possession by defendants and agreed boundary.

Affirmed.

1. Injunction 🔑1

Propriety of issuing an injunction rests in sound discretion of court.

2. Appeal and Error 🔑172(1)

Where equitable solution to location of boundary line was offered for first time on appeal, district court of appeal did not have power to grant injunction restraining defendants from maintaining fence upon appellants' land on condition that appellants bear expense of moving fence to true boundary line when complaint made no offer to assume cost of moving fence and no evidence was in record as to cost of moving fence.

3. Boundaries 🔑48(8)

Mere acquiescence in existence of a fence and occupying of land up to it does not amount to an agreement that it is accepted boundary line.

4. Boundaries 🔑46(1)

Coterminous owners may by agreement implied from acquiescence establish and fix their mutual boundary line.

5. Adverse Possession 🔑114(1)
Boundaries 🔑37(5)

In action to restrain defendants from maintaining upon plaintiffs' land a wire fence which defendants had allegedly erected in 1956 on same line on which wooden fence was standing in 1944 when defendants acquired their property and one of plaintiffs was adjoining property owner, evidence sustained implied findings of adverse possession by defendants and agreed boundary. West's Ann.Code Civ.Proc. § 325.

Cyril A. Walton, Los Angeles, for appellants.

James L. Garcia, Jr., Compton, for respondents.

FOURT, Justice.

This is an appeal from a judgment declaring defendants to be the owners in fee simple of a small strip of ground.

In November, 1944, when defendants acquired their property, the adjacent property was owned by plaintiff Gladys C. Drew and her deceased husband. At this time a wooden and wire fence was standing. There is no testimony in the record indicating when or by whom this fence was constructed, or of any agreements which may have been entered into at that time that such fence was or was not to constitute the boundary line between the properties. This fence, which had become dilapidated and which was described as "raggly" was torn down on or about January, 1956, by plaintiff Milan Ira Drew. Later in January or February, 1956, a new wire fence was constructed by defendants. There is a conflict in the evidence as to whether the new wire fence was constructed, as plaintiffs contend, approximately a foot to a foot and one-half further into their property, or whether it was constructed, as defendants contend, along the same line as the wooden fence. The parties did not have any discussions apparently as to the location of the fence except for a comment which Mr. Drew testified that he made to Mr. Mumford after the old fence had been removed that "the best way to do when you were putting up a fence is always to have your property surveyed and you know you have it on the line."

The testimony is undisputed that defendants alone assumed the obligation to pay for the fence and that plaintiffs promised defendants to make a "donation on a fence," and did actually pay to defendants each month for six months approximately one-half of the amount of the contractual obligation assumed by defendants on an eighteen months contract; that plaintiffs thereafter refused to make any additional contributions; that plaintiffs then had their property surveyed, which survey indicated the fence to be located on their property 21 inches from the property line described in their deed; and that plaintiffs then instituted the present action for an injunction to restrain defendants from maintaining the wire fence upon plaintiffs' land, and demanding that defendants be ordered to remove said fence from plaintiffs' property. In their answer defendants asserted title to said property to be in defendants, setting up the defenses of adverse possession, agreed boundary, laches and estoppel.

Findings of fact and conclusions of law were waived, and the only brief which has been filed is appellants' opening brief, in which it is claimed that the trial court should have granted appellants injunctive relief; that title by adverse possession was not established; that there was no agreement between the parties, either express or implied, establishing a boundary line; that appellants were not estopped to claim the true boundary; and that appellants were not guilty of laches.

[1, 2] It is fundamental that the propriety of issuing an injunction rests in the sound discretion of the court, and being a summary and extraordinary remedy, mandatory injunctions are rarely granted in the absence of a clear showing of irreparable damage under particular circumstances indicating the party seeking the injunction is deserving of injunctive relief and has offered to do equity. The complaint makes no mention of any offer by appellants to assume the cost of moving the fence, and appellants concede there is no evidence in the record as to the cost of moving the fence. Nevertheless, appellants in their brief state "it can be assumed that this expense would be trivial comparable to the loss sustained by the appellants if the judg-

ment of the trial court is allowed to stand." This court lacks the power on appeal to design a remedy which appellants for the first time now offer as an equitable solution to the problem, that of granting "the appellants injunctive relief on the condition that they bear the expense of moving said fence to the true boundary line."

[3, 4] Appellants argue correctly that "mere acquiescence in the existence of a fence and the occupying of land up to it does not amount to an agreement that it was an accepted boundary line," relying upon Staniford v. Trombly, 181 Cal. 372, 186 P. 599 and Dibirt v. Bopp, 4 Cal.App.2d 541, 41 P.2d 174. Appellants then recognize "the rule that coterminous owners may by agreement *implied from acquiescence* establish and fix their mutual boundary line." (Emphasis added.) They contend, however, that the rule is applicable only where the true line is otherwise unknown or uncertain, and cite Meacci v. Kochergen, 141 Cal.App. 2d 207, 296 P.2d 573, 576, as authority that "a boundary is considered definite and certain when by survey it can be made certain from the deed." The case of Meacci v. Kochergen, supra, was a quiet title and ejectment action and no special defenses were set up in the answer. In reversing the judgment of the trial court for defendant, the court went on to state (141 Cal.App.2d at page 213, 296 P.2d at page 576): "* * there was no uncertainty as to the true boundary line. The true boundary line was readily ascertainable from the survey made, and *the line sought to be established by the defendant was not certain.* We conclude that, under the circumstances shown, plaintiffs were free to claim the true boundary line as shown in their deed." (Emphasis added.)

That it is the particular factual situation which is determinative was stressed in Wilder v. Nicolaus, 50 Cal.App. 776, 783–784, 195 P. 1068, 1072, "* * * there is no doubt of the existence of the fence and the occupancy of the land as claimed by appellant for a much longer period than required by the statute of limitations. But it is claimed by respondent that there was no uncertainty as to the location of the true boundary line, and there was no agreement that the fence was on the true line.

"We may notice only the latter contention, as it is decisive of the controversy. Whether the circumstances, in the absence of direct evidence, would require a conclusion favorable to appellant, we need not determine, since there is the testimony of two witnesses to the effect that there was no such agreement between the owners of the property at the time the fence was built. This testimony is the subject of mirth and derision on the part of appellant, but its credibility was manifestly for the determination of the trial court." See, also, Moniz v. Peterman, 220 Cal. 429, 435, 31 P.2d 353.

[5] The problem presented by acquiescence in a fence as a boundary line between coterminous owners when the fence was situated 18 inches from the boundary line indicated by a survey made after a dispute had arisen, was considered in Price v. De Reyes, 161 Cal. 484, 119 P. 893, where plaintiffs contended the rule was applicable only if the true boundary was absolutely unascertainable. The court (161 Cal. at page 489, 119 P. at page 895) stated: "We find no such qualification of the rule stated in any of the authorities. Obviously it could not be thus qualified. It is only where the true location is subsequently ascertained that actions of this kind arise. Consequently the rule could not apply if the location was unascertainable. According to all the authorities, it is sufficient if the true location is uncertain and the parties fix the boundary because of its uncertainty and afterwards occupy up to it and make improvements thereon."

In this case when defendants purchased their property they took possession of property up to the wooden and wire fence with the knowledge of plaintiff Gladys C. Drew and her deceased husband. Apparently the new wire fence constitutes the only improvement made on the property, and there is substantial evidence to support an implied finding that the new wire fence was located on the same line as the old wooden and wire fence. There is also substantial evidence to support an implied finding of an implied agreement that the new fence was to be a commonly owned fence on the agreed boundary line between the properties. It is unlikely that defendants would have intended to construct a fence upon plaintiffs' property or to pay all or any portion of the cost of such a fence. In addition, plaintiffs made no objection to the manner or place of construction of the fence before or during the course of its construction, and, on the contrary, impliedly approved thereof by their conduct in promising to contribute to the cost.

The judgment decreed defendants to be the owners in fee simple of the 21 inch strip of ground without indicating the basis to be an agreed boundary, estoppel or adverse possession, each of which was pleaded. In their brief, appellants claim that there is no showing that the occupation of the disputed 21 inches was with any intention to claim ownership of the property as is required for adverse possession. However, there is substantial evidence that at least since 1946 the disputed strip was openly occupied by defendants with an intention to claim it as their own. Appellants also contend that to establish adverse possession, the adverse claimant must prove payment of taxes on the property for the period of five years, citing Code of Civil Procedure, Sec. 325, which is set forth in full: "For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

"*First*—Where it has been protected by a substantial inclosure.

"*Second*—Where it has been usually cultivated or improved.

"*Provided, however*, that in no case shall adverse possession be considered established under the provision of any section or sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State, county, or municipal, which have been levied and assessed upon such land."

In Price v. De Reyes, supra, it was conceded that both parties had paid taxes assessed according to the descriptions in their respective deeds. The court found that the parties had fixed the boundary line, and then stated (161 Cal. at pages 489–490, 119 P. at age 895), "* * * a division line thus established 'attaches itself to the deeds of the respective parties,' and defines the lands described in each deed, so that the one in the possession of the overlap holds the title thereto by the same tenure as he holds the lands technically embraced in the description. (Citing cases.) The consequence is that under such circumstances the payment of taxes assessed in this manner is a payment on the land in the possession of the parties. Furthermore, the natural inference would be that the assessor put the value on the land and improvements of each party as disclosed by the visible possession, rather than that he ascertained the true line by a careful survey and assessed to one a part of the possessions of the other." The case of Price v. De Reyes, supra, was cited with approval in Wagner v. Meinzer, 53 Cal. App. 783, 784, 200 P. 838, and again in Frericks v. Sorensen, 113 Cal.App.2d 759, at page 762, 248 P.2d 949, at page 951, where the court went on to say, "Although these descriptions on the tax roll conformed to the deeds of the parties, they did not describe the parcels which the parties occupied. * * * Payment of taxes under these circumstances was payment of taxes upon land in the possession of the parties. The court correctly determined that plaintiffs and their predecessors had paid all taxes on the land in dispute and that plaintiffs have a good prescriptive title. (Citing cases.)"

Under the circumstances, it would be possible to infer in support of the judgment in the instant case that taxes were assessed and paid on the basis of the property in the possession of the parties.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

160 Cal.App.2d 222

Richard J. BICE and Leila M. Bice, Plaintiffs and Appellants,

v.

James STEVENS and Mabel Stevens (husband and wife), William F. Thompson, Earl L. Morrison and Florence E. Morrison (husband and wife), Earl L. Morrison and Florence E. Morrison, doing business under the fictitious firm name and style of Keystone Realty Company, Roland W. Hoagland, and Farmers and Merchants Bank of Long Beach, California, a Corporation, Defendants,

James Stevens and Mabel Stevens (husband and wife), The Estate of William F. Thompson, deceased, Earl L. Morrison and Florence E. Morrison (husband and wife), and Roland W. Hoagland, Respondents.

Civ. 22567.

District Court of Appeal, Second District, Division 3, California.

May 7, 1958.

Hearing Denied July 2, 1958.

Action to recover damages for fraud in exchange of real property. Plaintiffs appealed from orders of Superior Court of Los Angeles County, Joe Raycraft, J., denying motions for order setting aside a judgment of dismissal with prejudice as to one defendant and for order setting aside in part and amending judgment of dismissal. The District Court of Appeal, Vallée, J., held that where appeal from order denying one motion was not taken within 60 days from entry thereof, appeal must be dismissed, but record disclosed that attorney's dismissal of one party defendant with prejudice was unauthorized by client and court abused its discretion in denying motion to amend judgment of dismissal so as to strike words "with prejudice" and to substitute words "without prejudice".

Appeal from one order dismissed and other order reversed.

1. Appeal and Error 🔑113(4), 356

Order denying motion to set aside judgment of dismissal with prejudice as to one of the defendants and for other relief was appealable, and where appeal from that order was not filed within 60 days from date of entry, District Court of Appeal was without jurisdiction. West's Ann.Rules on Appeal, rule 2.

2. Appeal and Error 🔑113(5)

Where plaintiff moved for order setting aside judgment of dismissal with prejudice as to one of the defendants and for other relief and such motion was denied, order denying subsequent motion to partially set aside and to amend judgment by striking words "with prejudice" and substituting therefor words "without prejudice" on ground of mistake, mistake of law, surprise, etc., was appealable. West's Ann.Code Civ.Proc. § 473.

3. Attorney and Client 🔑101(1)

Attorney who is clothed with no other authority than that arising from his employment in that capacity has no implied power by virtue of his general retainer to compromise and settle his client's claim or cause of action.

4. Attorney and Client 🔑101(1)

Without his client's free and intelligent consent, after full knowledge of all the facts and circumstances, an attorney may not surrender any substantial right of his client, or impair, compromise, or destroy his client's cause of action.

5. Attorney and Client ⚷89

On appeal from order denying motion to set aside in part and to amend judgment of dismissal as to one of the defendants in action, so that words "with prejudice" would be stricken and the words "without prejudice" substituted therefor on the ground of mistake, mistake of law, surprise, inadvertence, and want of any authority from plaintiff, record disclosed that attorney's dismissal of one of the parties defendant with prejudice was unauthorized by client.

6. Judgment ⚷143(3)

Policy of law is to have every litigated case tried on its merits, and it looks with disfavor upon a party who, regardless of merits of his case, attempts to take advantage of mistake, surprise, inadvertence, or neglect of his adversary.

7. Dismissal and Nonsuit ⚷43(1)

Where record disclosed that attorney's actions in dismissing one of the parties defendant with prejudice was unauthorized by client, trial court abused its discretion in denying client's subsequent motion to amend and to set aside in part judgment of dismissal so that the words "with prejudice" were stricken and the words "without prejudice" substituted therefor.

Donald P. Lane, Long Beach, for appellants.

Dolley, Jessen & Painter and Louis Miller, Los Angeles, for respondents James Stevens and Mabel Stevens.

Harry E. Templeton, Los Angeles, for respondents Earl L. Morrison and others.

VALLÉE, Justice.

Plaintiffs have appealed from two orders denying their motions made under section 473 of the Code of Civil Procedure: one motion for an order setting aside a judgment of dismissal with prejudice as to one defendant and for other relief, the other motion for an order setting aside in part and amending the judgment of dismissal.

The action was commenced on November 9, 1949 by plaintiffs for damages for fraud in the exchange of real properties. The cause went to trial; defendants' objections to the introduction of evidence were sustained; and judgment for defendants entered. On plaintiffs' appeal the judgment was reversed as to all defendants except a bank. Bice v. Stevens, 136 Cal.App.2d 368, 289 P.2d 95.

William F. Thompson, one of the defendants, died prior to the reversal. His estate was in probate in the Superior Court of the City and County of San Francisco. Homer A. Thompson was the duly appointed administrator of the estate. Mr. Emory Morris of San Francisco was one of the attorneys for the administrator. The administrator had not been substituted as a defendant in place of the deceased.

The cause was again set for trial for May 7, 1956 in Department A. When it was called, Mr. Poppler, attorney for plaintiffs, answered "Ready" and stated he was dismissing with prejudice as to "defendant William F. Thompson and his heirs and administrator." Thereupon the court dismissed the action as to "William F. Thompson and administrators" and transferred the cause for trial to Department D.

In Department D, at the suggestion of the court, plaintiffs amended the complaint to allege damages of $58,200. The remaining defendants then moved for permission to amend their answers to plead a defense of retraxit. The motions were granted and the trial was reset for September 24, 1956. The answers were amended accordingly.

On June 22, 1956 plaintiffs filed a motion for an order setting aside the judgment of dismissal with prejudice and for a further order permitting plaintiffs to proceed against the remaining defendants; in the alternative, to amend the motion for dismissal with prejudice to exclude acceptance of any consideration for the dismissal. The grounds of the motion were that the motion for dismissal with prejudice was made by mistake, inadvertence, excusable neglect, and without authority from the plaintiffs. The motion was denied on July 26, 1956. The court then granted motions of defendants for trial on the special defenses of retraxit and reset the cause for trial for January 7, 1957.

On September 13, 1956 plaintiffs filed a second motion for an order setting aside in part and amending the judgment of dismissal so that the words "with prejudice" were stricken therefrom and the words "without prejudice" substituted therefor. The grounds of the motion were mistake, mistake of law, surprise, inadvertence, excusable neglect, and want of any authority from plaintiffs. This motion was denied on October 18, 1956.

On December 12, 1956 plaintiffs filed a single document in which they appealed from the order of July 26, 1956 denying their first motion, and from the order of October 18, 1956 denying their second motion.

[1] The order of July 26, 1956 denying the first motion was appealable. (3 Witkin, California Procedure, 2172, § 26.) The appeal from that order was not filed within 60 days from the date of entry of the order. This court is without jurisdiction of that appeal and it must be dismissed. Rules on Appeal, Rule 2.

Defendants assert the order of October 18, 1956 denying the second motion is not appealable because that motion, they say, is substantially a repetition of the first motion to vacate and is based on grounds which were in existence and considered by the trial court in ruling on the first motion.

[2] The former general rule permitted only one motion under section 473 of the Code of Civil Procedure, and once the court ruled on such motion its power with respect to the judgment ceased. The basis for the rule was that to permit a renewal after a previous denial would result in uncertainty as to the status of the judgment; that if a trial court could vacate one denial, why not a second, a third, ad infinitum? It was said that in the interests of expeditious handling of litigation there should be a definite limitation on the power of the trial court to set aside its own orders. (See cases collected 30 Cal.L.Rev. 74.) However, the rule fell with Harth v. Ten Eyck, 16 Cal.2d 829, 108 P.2d 675, in which the court held, on facts similar to those at bar, that where the trial court considered a second motion under section 473 to set aside a dismissal with prejudice as to one defendant as a renewal to set aside its previous order of denial, the order granting the second motion was tantamount to permission to renew the motion to set aside, and it was appealable. Also see Harth v. Ten Eyck, 12 Cal.2d 709, 87 P.2d 693; Imperial Beverage Co. v. Superior Court, 24 Cal.2d 627, 634, 150 P.2d 881; Beyerbach v. Juno Oil Co., 42 Cal.2d 11, 29, 265 P.2d 1; Hover v. MacKenzie, 122 Cal.App.2d 852, 857, 266 P.2d 60; Stephens v. Baker & Baker Roofing Co., 130 Cal.App.2d 765, 773, 280 P.2d 39; Dahlin v. Moon, 141 Cal.App.2d 1, 4, 296 P.2d 344. We hold the order of October 18, 1956 denying the second motion is appealable.

The question is: Did the court abuse its discretion in denying the second motion? This motion was supported by affidavits of plaintiffs. The parties stipulated that the affidavits and depositions of plaintiffs and their attorneys filed in connection with the first motion could be used and introduced in evidence and considered by the court in ruling on the second motion. The entire file, together with all affidavits and depositions, was received in evidence at the hearing.

The trial was originally set for May 7, 1956. On April 13, 1956 Mr. Morris wrote Mr. Poppler, one of plaintiffs' then attorneys, that he was unable to obtain any information concerning the litigation;

that the net estate of the decedent Thompson was nominal; that there were two alternatives facing the administrator: either the estate used up its assets in defending the action or to request a covenant not to sue from plaintiffs; and that the action could not go to trial until the administrator had been substituted. On May 4 Mr. Morris, not having heard from Mr. Poppler, telephoned him and arranged to meet him on May 5.

On May 5 Mr. Morris met with Mr. Poppler. Mr. Morris asked for a complete clearance of the estate either by a covenant not to sue or by a dismissal with prejudice. Mr. Poppler stated that for a payment of $25 a dismissal with prejudice would be entered on May 7 when the case was called for trial. Mr. Morris accepted the offer and gave Mr. Poppler $25 in cash. Mr. Poppler gave Mr. Morris a writing dated May 5, 1956 stating, "This note is to assure you that, in consideration for $25.00, I will cause to have my clients file a dismissal with prejudice as to William F. Thompson Deceased and his heirs and representatives in the case of Bice v. Stevens LBC 16190 when the same is called for trial Monday, May 7, 1956 in Dep't Long Beach A," and acknowledged receipt of the $25. Plaintiffs were not present at the meeting between Mr. Poppler and Mr. Morris.

On May 7, when the action was called for trial in Department A, in response to a question by the court as to whether it was at issue, Mr. Poppler informed the court that it was at issue and that he was dismissing as to defendant William F. Thompson and his administrator and heirs with prejudice. The motion was granted. Mr. Poppler then stated to the court that his associate advised him they should dismiss without prejudice. The court asked if there was any objection, to which one of counsel for defendants said "Yes" and that he desired to be heard. The court then stated: "You have already made the motion, Mr. Poppler, and I have granted the motion; and I can't take time now to hear anything further. All right, you are transferred to Department D."

The plaintiffs in the action are Richard J. Bice and Leila M. Bice. The attorneys for the plaintiffs were Mr. Poppler and Mr. Duke.[1] Plaintiff Leila M. Bice, in an affidavit filed in support of the motion (this affidavit was filed in connection with the first motion), stated that at the time the motion was made she was not present in the courtroom of Department A but was proceeding directly to Department D where she had been informed by counsel the trial of her case would be held; at no time whatsoever did she authorize either Mr. Poppler or Mr. Duke to dismiss as to any defendant with prejudice; at no time did she authorize either of her counsel to dismiss, compromise, or settle the action with any defendant for any sum; neither she nor Mr. Bice ever authorized the acceptance of any cash or check or draft or other negotiable instrument in settlement; neither she nor Mr. Bice at any time entertained any thought or expressed any intention or desire to compromise or settle the action in which they are justly entitled to more than $60,000, the same representing, among other things, the loss of their life savings in the form of their equity in a motel property. In a second affidavit (this affidavit was filed in connection with the second motion) Mrs. Bice stated that at no time did she or Mr. Bice receive, authorize the receipt of, or accept any consideration by way of compromise and release as to Thompson or any of the defendants; she did not on or before May 7, 1956 and still does not understand the meaning or legal effect of a dismissal with prejudice, and when Mr. Poppler endeavored to explain to her that she and Mr. Bice would have to give a covenant not to sue as to the Thompson estate and let it out of the action, she and Mr. Bice did not have any idea that anything was going to be done that would effect a surrender or loss of their substantial rights against the remaining defendants; she gave Mr. Poppler only limited authority and special instruction to do whatever was necessary to protect their long-delayed trial date and to do everything proper to enable her and Mr. Bice to proceed to trial.

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[1] Present counsel for plaintiffs was substituted after the appeal was taken.

In her deposition which was taken on July 13, 1956 by defendants Mrs. Bice testified:

> "Q. My question is did either Mr. Duke or Mr. Poppler tell you after they saw you in Department D that Judge Pierson would do nothing about changing the dismissal, in substance or effect? A. Mr. Poppler told me he had made a mistake but he didn't tell me anything about Judge Pierson.
>
> "Q. What did Mr. Poppler tell you about making a mistake? A. That he had asked for a dismissal with prejudice and didn't mean to do so.
>
> "Q. Did he say what he meant to ask for? A. No, because I didn't understand it. I didn't understand what this dismissal with prejudice meant.
>
> "Q. What did you say when Mr. Poppler told you he had made a mistake? A. I was angry.
>
> "Q. What did you say, please? A. I told him he had no authority to ask for a dismissal with prejudice.
>
> "Q. The question is now when Mr. Poppler told you he had made a mistake, what did you say? A. I said, 'You had no authority to ask for a dismissal with prejudice.'
>
> "Q. Then what did Mr. Poppler say? A. I don't remember what he said. I know he felt very badly about it.
>
> "Q. Then did you say anything further? A. Well, at no time had we ever told him to compromise or settle in any manner with any of the defendants.
>
> "Q. My question, Mrs. Bice, is did you say anything further to him regarding the subject of his mistake or correcting the mistake? A. Nothing about correcting it.
>
> "Q. Did Mr. Poppler tell you that his mistake consisted in asking for a dismissal with prejudice when he should have asked for a dismissal? A. He may have. I don't remember.
>
> "Q. Didn't Mr. Poppler tell you that the reason why he dismissed the case was that Mr. Morris was resisting any attempts to continue the action against the estate? A. He tried to explain that part to me, but I didn't understand it very well.
>
> "Q. Well, didn't you tell Mr. Poppler to do whatever he felt was necessary in order to overcome that resistance? A. Yes. * * *
>
> "Q. Now, isn't it a fact, Mrs. Bice, that prior to May 7th you did discuss with Attorney Poppler or with Mr. Duke the dismissal of the action in addition to the Covenant Not to Sue as to the estate of Thompson? A. Yes.
>
> "Q. When did that take place? A. With Mr. Poppler it was May 5th.
>
> "Q. It was May 5th with Mr. Poppler and you understood then that in addition to the Covenant Not to Sue that there would be just a plain dismissal and not a dismissal with prejudice as to the estate of Thompson? A. We didn't understand it that we were going to ask for a dismissal.
>
> "Q. Now, you told me just a moment ago that you discussed it. A. We discussed it, yes.
>
> "Q. You discussed with Mr. Poppler that in addition to the Covenant Not to Sue that you would dismiss as to the estate of Thompson? A. Well, it was my understanding that it meant about the same thing.
>
> "Q. In other words you didn't understand it but that was what was said? A. Yes. * * *

> "Q. Now, you state there that the principal reason for dismissing as to the estate and executing the Covenant Not to Sue was to prevent further delay. What is the basis of that allegation, then? A. We wanted to have him do whatever was necessary so that we could go to trial.
>
> "Q. In other words, this matter had been delayed already some seven years? A. Yes.
>
> "Q. And you left the procedure of the trial to Mr. Poppler? A. Yes.
>
> "Q. And you had confidence in his ability? A. Yes.
>
> "Q. And you told him to do what he thought was necessary so that you could go to trial? A. Yes."

An affidavit of Richard J. Bice (this affidavit was filed in connection with the first motion) stated the same facts as stated in the first affidavit of Mrs. Bice. In a second affidavit (this affidavit was filed in connection with the second motion) Mr. Bice stated that at no time prior to the afternoon of May 7 did he have any conversation with either of his attorneys relative to the covenant not to sue or relative to a dismissal as to the Thompson estate; he left the conduct of the litigation up to Mrs. Bice and was not present at the home of Mr. Poppler on May 5 at the time when, he is informed, his wife and Mr. Poppler had some conversation relating to the problem of the Thompson estate; at no time did he directly or indirectly, expressly or impliedly, authorize either of his attorneys to do anything such as to dismiss with prejudice which would effect the surrender or loss of his substantial rights or have the legal effect of abandoning his entire cause of action. In other respects the second affidavit of Mr. Bice is the same as the second affidavit of Mrs. Bice.

In his deposition taken on July 13, 1956 by defendants Mr. Bice testified:

> "Q. Well, didn't you understand from Mrs. Bice or from Mr. Duke or from Mr. Poppler that there was a problem as to whether you would be able to get to trial on Monday? A. No.
>
> "Q. Hadn't Mr. Poppler or Mrs. Bice or Mr. Duke previously told you that the Thompson estate was going to oppose the trial going on Monday because of certain technical reasons? A. Mrs. Bice talked something about that but I didn't quite understand what it was.
>
> "Q. What did Mrs. Bice tell you about that? A. Sunday, May 6th?
>
> "Q. I mean on or before May 5th, did Mrs. Bice tell you something about there being a problem or question as to whether you would be able to go on for trial on Monday because of the Thompson estate? A. Not that I remember.
>
> "Q. All right. Now, then, on Sunday did Mrs. Bice tell you something about the trial going on on May the 7th? A. She said that she thought we was going to do that, that everything was all right.
>
> "Q. What did she say about that? A. She talked about the Covenant Not To Sue and said everything was all right, that we was going to go on trial Monday. We had made arrangements to be there.
>
> "Q. That was the first time you ever heard the words 'Covenant Not To Sue', wasn't it? A. I think so.
>
> "Q. You never heard those words before? A. No.
>
> "Q. Except when Mrs. Bice told you that on Sunday? A. Yes. * *
>
> "Q. Now, it is true, isn't it, that you left the handling of this case to Mrs. Bice? A. In a way, yes.
>
> "Q. Well, what do you mean, in a way? A. Well, she done most of the talking.
>
> "Q. The decisions that had to be made were to be made by her? A. Yes.
>
> "Q. And you were willing, weren't you, that Mr. Poppler do whatever was

necessary to protect your rights? A. Yes.

"Q. And you were willing that he should do whatever he felt was necessary? A. Yes. To hold Thompson in. * * *

"Q. Did you ever tell Mr. Poppler not to dismiss this action as to Mr. Thompson or his estate or representatives? A. Yes I told my wife to tell him that day the 6th.

"Q. Did you ever tell Mr. Duke not to dismiss this action as to Mr. Thompson? A. No.

"Q. Or the estate or his heirs or representatives? A. No.

"Q. What is your answer, please? A. No. * * *

"Q. Mr. Bice, on the 5th day of May when you arrived over at the Poppler residence, you found Mrs. Bice there, did you? A. Yes.

"Q. Did Mrs. Bice at that time tell you that the matter had been settled with respect to the Thompson estate so that the case could go to trial on the 7th? A. No.

"Q. Did she tell you that on the 6th that they had made the settlement and were going to execute the Covenant Not To Sue? A. It was on the 6th.

"Q. That was on the 6th that she told you that? A. Yes.

"Q. And it was your understanding then by virtue of the settlement with the Thompson estate that the matter would be able to proceed to trial on Monday? A. Yes, with this covenant not to sue. * * *

"Q. Now, Mr. Bice, are you hard of hearing? A. A little bit, yes. * * *

"Q. I believe Mr. Miller asked you if you were willing to let Mr. Poppler do what he thought was necessary to handle your case and you answered 'Yes.' Now, were you willing to let Mr. Poppler dismiss your case entirely? A. No.

"Q. Now, I believe you also stated to Mr. Miller that you never told Mr. Poppler not to dismiss as to the Thompson estate. Did you ever tell Mr. Poppler to dismiss as to Mr. Thompson? A. No. I don't remember ever telling him that."

An affidavit of Mr. Poppler stated he made the motion to dismiss with prejudice on May 7, 1956 without any authority from his clients so to do; he did not intend to purport to accomplish a retraxit; he had tendered the return of the $25 to Mr. Morris; and his clients have never received anything by way of consideration from the estate of Thompson, the administrator thereof, or the attorney for the administrator.

An affidavit of Mr. Duke stated that at no time did he have authority from either plaintiff to settle, compromise, dismiss, or release the action; that when the case was called on May 7, to his astonishment Mr. Poppler moved to dismiss with prejudice; he immediately protested to Mr. Poppler and told him the dismissal should be without prejudice but before Mr. Poppler corrected the motion the court granted it.

[3, 4] The rule is almost universal that an attorney who is clothed with no other authority than that arising from his employment in that capacity has no implied power by virtue of his general retainer to compromise and settle his client's claim or cause of action. Annotation: 30 A.L.R. 2d 945. An attorney does not, without specific authorization, possess the power or authority to bind his client to a compromise settlement of pending litigation. Anderson v. Joseph, 146 Cal.App.2d 450, 454, 303 P.2d 1053. Without his client's free and intelligent consent, after full knowledge of all the facts and circumstances, an attorney may not surrender any substantial right of his client; nor may he impair, compromise, or destroy his client's cause of action. People v. Davis, 48 Cal.2d 241, 256, 309 P.2d 1.

"With reference to an attorney's authority to dismiss his client's action with prejudice it is said: 'An important problem is related to the distinction between voluntary dismissals or nonsuits which are without prejudice to the cause of action, and dismissals or nonsuits with prejudice, the last mentioned type being referred to in the cases by the common-law term "retraxit." It is clearly within the attorney's authority to dismiss the client's action without prejudice. However, a series of early cases held the general authority of an attorney even sufficient to empower him to effect a retraxit, amounting to a renunciation of the client's substantive right or cause of action. It is hardly possible to reconcile this rule with the established principle that the implied general authority of an attorney does not include any power or authority to dispose of the client's substantive rights, and it would therefore seem doubtful whether, or to what extent, the early cases would now be followed.' [Citation.] And further in that connection: 'In civil litigation, the attorney, as the client's agent, and in the absence of fraud, has authority to bind his client in all matters pertaining to the regular conduct of a case. * * * In the absence of such special instructions, the conduct and management of the action is entrusted to the attorney's judgment; he decides what should be contested, what points should be taken, and what should be abandoned. This authority is, however, subject to the qualification that an attorney ordinarily does not have implied authority to do an act which will effect the surrender or loss of a client's substantial rights, for the client determines "the objectives to be attended."'" Gagnon Co., Inc., v. Nevada Desert Inn, Inc., 45 Cal.2d 448, 459, 289 P.2d 466, 474.

"While procedural matters are generally within the control of the attorney, the cause of action or the subject matter of the litigation is within the control of the client, and an attorney may not impair, compromise, settle, surrender, or destroy it without his client's consent." (6 Cal.Jur. 2d 341, § 156.)

The facts in Robinson v. Hiles, 119 Cal. App.2d 666, 260 P.2d 194, were substantially the same as those at bar. The court stated (119 Cal.App.2d at page 672, 260 P.2d at page 197):

> "[I]n the instant case we have concluded that the so-called compromise was never completed. Respondent at no time signed any release or compromise, nor did she authorize anyone else so to do. Neither did respondent accept any check or money or authorize anyone else to do so in her behalf. In California it is settled law that mere employment of an attorney to represent a client in litigation does not carry with it the power to compromise that litigation. Burns v. McCain, 107 Cal. App. 291, at page 294, 290 P. 623; Jones v. Noble, 3 Cal.App.2d 316, 320, 39 P.2d 486. We have carefully examined the authorities cited by appellant in his brief with reference to the finality of a dismissal with prejudice, which is the modern name for a retraxit, and which citations give evidence of commendable diligence and research, but we are satisfied that under the facts of this proceeding, where the agreement of compromise was never completed, the cited cases are not controlling."

[5–7] We are satisfied that on the showing made the trial court abused the legal discretion vested in it by denying the motion. The law does not favor snap judgments. The policy of the law is to have every litigated case tried on its merits; and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. Berri v. Rogero, 168 Cal. 736, 740, 145 P. 95. The gist of plaintiffs' motion was that without their knowledge or consent they were deprived of their day in court to litigate their claim on the merits. The record, without conflict, supports their contention. To hold otherwise would be to erode a client's authority to control the cause of action and the subject matter of the litigation. Plaintiffs did not at any time authorize their attorneys to dismiss with prejudice and thus dispose of a $60,000 lawsuit, in which they had in the first instance been compelled to appeal, for $25 which their attorneys, without their authority, received from one who probably was not a party to the action. The fact that plaintiffs left "the procedure of the trial to Mr. Poppler" or that they were willing that Mr. Poppler do whatever was necessary to get to trial on May 7 does not indicate specific authorization to destroy plaintiffs' entire action against all defendants. It also appears evident from the record that Mr. Poppler did not intend to wipe out his clients' cause of action against the defendants other than Thompson for a mere $25.

The appeal from the order of June 26, 1956 is dismissed. The order of October 18, 1956 is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

50 Cal.2d 345

Matter of the ESTATE of Herbert Edward LAW, Deceased.

WELLS FARGO BANK, as Executor of the last will and testament of Herbert Edward Law, deceased, Appellant,

v.

Robert C. KIRKWOOD, as Controller of the State of California, Respondent.

S. F. 19672.

Supreme Court of California,
In Bank.
May 23, 1958.
Rehearing Denied June 17, 1958.

Estate proceeding. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered orders overruling executor's objections to the computation of the marital exemption, and the executor appealed. The Supreme Court, Traynor, J., held that where entire estate consisted of separate property and will left over half of estate to wife and provided that inheritance and estate taxes should be paid out of residuary estate in same manner as an expense of administration and should not be apportioned, prorated or charged against any of the devisees, legatees or beneficiaries, the statute providing that property equal in amount to clear market value of one half of decedent's separate property shall, if transferred to spouse, be exempt from inheritance tax, required the marital exemption to be computed by substracting all allowable deductions, including federal estate tax, from market value of entire estate and taking half of remainder as the marital exemption.

Orders affirmed.

Schauer and McComb, JJ., dissented.

Opinion, 318 P.2d 767, vacated.

1. Taxation ⚷875(1)

Where entire estate consisted of separate property and will left over half of estate to wife and provided that inheritance and estate taxes should be paid out of residuary estate in same manner as an expense of administration and should not be apportioned, prorated or charged against any of the devisees, legatees or beneficiaries, the statute providing that property equal in amount to clear market value of one half of decedent's separate property shall, if transferred to spouse, be exempt from inheritance tax, required the marital exemption to be computed by subtracting all allowable deductions, including federal estate tax, from market value of entire estate and taking half of remainder as the marital exemption. West's Ann.Rev. & Tax.Code, §§ 13301–14901, 13302, 13311, 13312, 13981–13990.

2. Taxation ⚷872

In statute providing that property equal in amount to clear market value of one half of decedent's separate property shall, if transferred to spouse, be exempt from inheritance tax, the subject of the sentence is "property"; the first clause "equal in amount to the clear market value of one half of the decedent's separate property" modifies "property" solely as to amount; the words "equal in amount" establish a purely quantitative limitation; the second clause "if transferred to the spouse of the deceased" is qualitative and modifies the subject "property" and not the object of the first clause "decedent's separate property." West's Ann.Rev. & Tax.Code, § 13805.

See publication Words and Phrases, for other judicial constructions and definitions of "Equal in Amount".

3. Taxation ⚷875(1)

Under statute providing that property equal in amount to clear market value of one half of decedent's separate property shall, if transferred to spouse, be exempt from inheritance tax, the exemption extends to any type of properties passing to the spouse, the amount to be limited to the clear market value of one half of the decedent's separate property. West's Ann.Rev. & Tax.Code, § 13805.

◆

Pillsbury, Madison & Sutro, Harold I. Boucher, W. J. McFarland, Claude H. Hogan, Jr., and Willis D. Hannawalt, San Francisco, for appellant.

Robert C. Harris, Donald B. Falconer, Heller, Ehrman, White & McAuliffe, Janin & Morgan and Roos, Jennings & Haid, San Francisco, amici curiæ on behalf of appellant.

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Joseph D. Lear and Charles J. Barry, Asst. Chief Inheritance Tax Attys., and Milton D. Harris, Asst. Inheritance Tax Atty., San Francisco, for respondent.

TRAYNOR, Justice.

The executor of the estate of Herbert E. Law appeals from the orders of the trial court overruling its objections and fixing the marital exemption under section 13805 of the Revenue and Taxation Code at the amount computed by the Controller.

[1] Decedent died testate on June 18, 1952. He left over half his estate to his wife, provided a legacy for an adopted daughter, and left the residue in trust for other beneficiaries. The will provided that inheritance and estate taxes should be paid "out of my residuary estate in the same manner as an expense of administration" and should not be apportioned, prorated, or charged against any of the devisees, legatees, or beneficiaries. This provision precluded proration of the federal estate tax under sections 970 to 977 of the Probate Code. The market value of decedent's estate, which consisted solely of separate property, was $2,961,436.71. The computations of the marital exemption contended for by the parties are as follows:

Controller's Computation

Market value of decedent's estate	$2,961,436.71
Less all allowable deductions including federal estate tax	491,005.67
Take half of	2,470,431.04
Marital exemption	1,235,215.52

Executor's Computation

Market value of decedent's estate	$2,961,436.71
Less all allowable deductions except federal estate tax	72,104.54
Take half of	2,889,332.17
Marital exemption	1,444,666.08

The difference in the computations arises from the fact that the Controller subtracts all allowable deductions, including the federal estate tax ($418,901.13), from the market value of the entire estate and takes half the remainder as the marital exemption, whereas the executor subtracts only deductions other than the federal estate tax from the market value of the entire estate before taking half as the marital exemption. The executor's computation increases the marital exemption as computed by the Controller by half the federal estate tax. The Legislature has the power to prescribe either computation. Stebbins v. Riley, 268 U.S. 137, 144–145, 45 S.Ct. 424, 69 L.Ed. 884; In re Estate of Watkinson, 191 Cal. 591, 596, 217 P. 1073. The question is: What computation has it prescribed?

The answer depends upon the proper construction to be given section 13805 of the Revenue and Taxation Code. The pertinent part of that section provides:

> "Property equal in amount to the clear market value of one-half of the decedent's separate property shall, if transferred to the spouse of the deceased, be exempt from the tax imposed by this part. * * *"

The marital exemption under this section, like the federal marital deduction (26 U.S.C.A. § 2056), is limited to the lesser of two amounts, the amount "transferred to the spouse" and the amount of the "clear market value of one-half of the decedent's separate property." The issue here concerns the second limitation, for the amount thereof under either the executor's or the Controller's computation is less than the amount transferred to the spouse.

The controlling words in this limitation, "clear market value," are governed by the definitions in sections 13311 and 13312, for section 13302 provides: "Except where the context otherwise requires, the definitions given in this chapter govern the construction of this part." "This part" consists of part 8 entitled "Inheritance Tax" and includes sections 13301 through 14901. Section 13311 provides: "'Market value,' in respect to property included in any transfer, means the market value of the property as of the date of the transferor's death, whether or not the transfer was made during the life time of the transferor." Section 13312 provides: "'Clear market value' means the market value of any property included in any transfer, less any deductions allowable by this part." It is obvious at the outset that had the Legislature intended that no deductions should be subtracted, it would simply have used the words "market value" instead of "clear market value." It remains therefore to determine what the allowable deductions are and from what they should be deducted.

The allowable deductions are set forth in sections 13981 to 13990 and include such items as expenses of administration, debts, expenses of funeral and last illness, attorney's fees, and *federal estate tax* (Section 13989). Since the federal estate tax is an allowable deduction, the Controller contends that in conformity with section 13312 it must be subtracted from the market value of decedent's separate property to ascertain the clear market value thereof and that half the amount so ascertained is "the clear market value of one-half of the decedent's separate property."[1]

The executor contends that the Controller's computation involves an unauthorized transposition of the words of the statute from "the clear market value of one-half of the decedent's separate property" to "one-half of the clear market value of the decedent's separate property."[2] The executor's theory apparently is that the section as worded requires taking half the market value of decedent's separate property before subtracting the allowable deductions therefrom to arrive at the *clear* market value thereof under section 13312. The executor then contends, citing 18 Administrative Code, sections 837, 848, and 849, that clear market value has meaning only with respect to particular distributees and that deductions are allowable, not to the estate of a decedent, but only to particular distributees; that since the only beneficiary concerned with the marital exemption is the wife, the allowable deductions to be subtracted in arriving at the marital exemption must be the wife's allowable deductions; and that since the wife in this case is not charged with payment of any federal estate tax because the decedent directed that it should be paid out of the residue and none of the residue went to the wife, she is not allowed any deduction therefor (§ 13981) and accordingly none of the federal estate tax should be subtracted from half the market value of decedent's separate property in arriving at the marital exemption.

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[1] If both community property and separate property were included in the estate, only a prorata share of allowable deductions would be subtracted by the Controller from the separate property to obtain the "clear market value" thereof. Since the entire estate herein consists of separate property, no prorating of allowable deductions between separate and community property is called for.

[2] As stated in the brief of amici curiae, the executor's case stands or falls on the proposition that "the clear market value of one-half of the decedent's separate property" means something different from "one-half of the clear market value of the decedent's separate property." The Controller contends that the result would be the same in either case; that "the clear market value of one-half of the decedent's separate property" means the same thing as "one-half of the clear market value of the decedent's separate property."

Section 13805 cannot reasonably be construed to support the executor's contention. In the first place it is immaterial whether the allowable deductions are taken from the total market value of decedent's separate property or from half the market value thereof so long as half the total deductions (the prorata share thereof) are subtracted from each half of the market value of decedent's separate property to arrive at the clear market value of each half. To arrive at the clear market value of each half there is no more reason to subtract all the deductions from any one half than there is to subtract all of them from the other half. The two halves of any figure are necessarily equal. Therefore, since the clear market value of either half of the decedent's separate property cannot be greater or less than the clear market value of the other half, the allowable deductions must be prorated equally to each half.

[2, 3] In the second place, section 13805 cannot reasonably be construed as providing that the allowable deductions to be subtracted in arriving at the marital exemption must be the surviving spouse's allowable deductions. That section reads, "Property equal in amount to the clear market value of one-half of the decedent's separate property shall, if transferred to the spouse of the deceased, be exempt from the tax imposed by this part. * * *" The words "equal in amount" clearly show that the relationship between the "Property" that "shall * * * be exempt" and "the clear market value of one-half of the decedent's separate property" is purely quantitative and that it is immaterial whether the property exempted is community property or separate property or whether the separate property or any part thereof does or does not pass to the surviving spouse. The Controller parses the pertinent sentence in section 13805 to demonstrate the validity of this conclusion: The subject of the sentence is "Property." Stripped of its modifying clauses it reads, "Property * * * shall * * * be exempt from the tax imposed by this part." The first clause, "equal in amount to the clear market value of one-half of the decedent's separate property," modifies "Property" solely as to amount. The words, "equal in amount," establish a purely quantitative limitation. The second clause, "if transferred to the spouse of the deceased," is qualitative and modifies the subject, "Property," and not the object of the first clause, "decedent's separate property." Under any interpretation permissible by simple rules of grammar, the exemption extends to any type of property passing to the spouse, the amount to be limited to the clear market value of one-half of the decedent's separate property.

Since the second limitation on the marital exemption is a purely quantitative one and it is immaterial whether or not the surviving spouse receives separate property, it necessarily follows that it is likewise immaterial what deductions may be allowed with respect to property the surviving spouse actually receives. There is no more reason for assuming that the deductions to be taken in determining the clear market value of one-half of the decedent's separate property are the deductions allowable to the surviving spouse than that they are the deductions allowable to other distributees.[3]

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[3] Assume that the decedent's taxable estate consists of community property (decedent's share) of a market value of $200,000 and separate property of a market value of $100,000; that the allowable deductions, including federal estate tax, total $60,000; that the will provides that the community property goes to decedent's wife, and one-half the separate property goes to son John and the other half to daughter Mary; and that the will also provides that two-thirds of the expenses and death taxes are to be paid from the wife's share and one-sixth of such expenses is to be paid from each half of the separate property. Thus $40,000 will be deductible by the wife and $10,000 will be deductible by each of the children. It is readily apparent that neither the wife's share ($200,000 of

The underlying premise of the executor's contention, stated in various ways in his briefs and the briefs of amici curiae, is that the second limitation on the marital exemption is measured by the clear market value of one-half of the decedent's separate property passing to the wife. If this premise were valid it would compel the disallowance of the marital exemption in many cases where none of the decedent's separate property passes to the surviving spouse. Thus, if the wife is to receive the decedent's share of the community property, there would be no marital exemption even though there was separate property in the estate passing to other distributees. Such a result would increase the tax burden of many surviving spouses in plain disregard of the statutory purpose to grant the marital exemption regardless of what type of property actually passes to the surviving spouse.

If, as the executor contends, the phrase "allowable deductions" has meaning only with respect to specific distributees so far as the federal estate tax deduction is concerned, it would have the same meaning so far as other deductions, such as administration expenses, are concerned. (Compare the wording of sections 13983, 13986, 13987, and 13988 with that of section 13989.) Thus, in the present case, since all expenses were paid from the residue, no deduction therefor would be allowed to the wife and none would be subtracted from the market value of half of decedent's separate property. The executor, however, does not contend that allowable deductions other than the federal estate tax should not be deducted in computing the marital exemption; indeed, it includes these other deductions in its own computation.

In the third place the executor's contention that the words "clear market value" have meaning only with respect to specific distributees is without merit. Section 13312, as noted previously, states: "'Clear market value' means the market value of any property included in any transfer, less any deductions allowable by this part." Note that this definition uses the phrase "any property included in any transfer." Transfer is defined in section 13304: "'Transfer' includes the passage of any property, or any interest therein or income therefrom, in possession or enjoyment, present or future, in trust or otherwise." The sections that provide for deductions (§§ 13981–13990) state that the particular expenses "are deductible from the appraised value of property included in any transfer subject to this part made by the decedent." It is apparent that none of these sections support the theory that "clear market value" has meaning only with respect to specific distributees. Nor do the sections of the Administrative Code (18 Cal.Admin.Code, §§ 837, 848, 849), cited by the executor, support such a theory. They merely provide that the inheritance tax is ordinarily measured by the clear market value of the distributive share of a decedent's estate to which a particular transferee is entitled and provide for such computation. In each section the word "ordinarily" is used. Under these sections the clear market value of the entire estate would be determined and the tax computed with respect to each distributee's share of the net estate where the testator directed that all expenses, including federal estate tax, were to be paid from the estate and not prorated or charged to any of the beneficiaries. In such a case, no deduction would be allowed to each distributee since the deductions would be allowed in determining the net estate (clear market value of the estate). In fact, that result occurred in the present case, for the federal estate tax was paid from the residue and, in accordance with the decedent's will, was not charged or prorated against

community property) nor the allowable deductions with respect thereto ($40,000) bear any logical relationship to "the clear market value of one-half of the decedent's separate property." It would be more reasonable to assume that the "clear market value of one-half of the decedent's separate property" was the half going to son John or to daughter Mary less his or her allowable deductions.

the individual beneficiaries, and accordingly, they were not allowed a deduction therefor. Thus, the clear market value of the property in the residue was determined and the state tax computed on each beneficiary's share of the net residue. If the executor's theory that deductions are allowable only with respect to specific distributees were correct, the Controller improperly allowed a deduction for federal estate tax against the market value of property in the residue, for there are 18 beneficiaries of that residue under the will. No deduction can be allowed to each beneficiary, for to do so would require that the expense be proratably charged to each beneficiary and a deduction allowed to each contrary to the terms of the will. The statutes do not require such a result and both reason and justice dictate otherwise. Thus, when a testator directs that an expense is not to be charged to the individual beneficiaries but is to be charged against a part of the estate, the deduction for that expense should be allowed against that part and the tax on the beneficiaries of that part should simply be computed on their net share thereof. The Legislature's use of the phrase "clear market value" in section 13805 plainly demonstrates that that phrase has meaning with respect to a certain part of the estate for it requires that the clear market value be taken of one-half of decedent's separate property, which, as demonstrated previously, need not pass to a single distributee, i. e. the wife, but may actually pass to various distributees.

The executor contends that its computation is supported by In re Estate of Cushing, 113 Cal.App.2d 319, 332–334, 248 P.2d 482, 490. That case held that in computing the "one-half of the community property which belongs and goes to the surviving wife pursuant to Section 201 of the Probate Code" free of inheritance tax under section 13551 of the Revenue and Taxation Code, the federal estate tax should not be subtracted with respect to post-1927 community property, i. e., community property acquired after the enactment of section 161a of the Civil Code. The court in that case also held, however, that as to pre-1927 community property, the allowable deduction for federal estate tax should be subtracted in computing the wife's one-half that is free from inheritance tax, citing In re Estate of Atwell, 85 Cal.App.2d 454, 457–458, 193 P.2d 519, which in turn cited and relied upon In re Estate of Coffee, 19 Cal.2d 248, 252–253, 120 P.2d 661.

In support of its contention the executor urges that part of the basis for the holding in Re Estate of Cushing is that since there was no federal estate tax on post-1927 community property, such property did not contribute to the federal tax, and, therefore, the federal estate tax was not subtracted in determining the wife's share free of inheritance tax. Because of the federal marital deduction, the executor concludes that the same is true of the separate property in this case. The contention is without merit, for the federal marital deduction was allowed with respect to the pre-1927 community property in the Cushing case just as it was allowed with respect to the separate property in this case. The executor does not deny that for federal estate tax purposes, pre-1927 community property is treated in the same manner as separate property and that a federal marital deduction is allowed with respect thereto.

The basis of the Cushing decision is stated on page 334 of 113 Cal.App.2d, on page 491 of 248 P.2d, as follows:

> "It follows from what has been said that the California statutes indicate that the widow's one-half of the post-1927 community property, since it is not part of the 'gross estate' of the husband and is not liable for the federal estate tax, should not be charged, directly or indirectly, with any portion of the federal estate tax. This reasoning does not apply to pre-1927 community property, and, as to it, In re Estate of Atwell is controlling."

That reasoning does not apply to the decedent's separate property just as it does not apply to pre-1927 community property, for both are treated alike for federal estate tax purposes and both are part of the decedent's "gross estate." Consequently, In re Estate of Cushing supports the Controller's and not the executor's contentions.

The executor contends that section 13805 is modeled after the federal marital deduction and that to subtract federal taxes in computing the state marital exemption is to reach a result contrary to that reached under the federal statute. 26 U.S.C.A. § 2056. The state statute provides for the subtraction of allowable deductions by the use of the words "clear market value" just as the federal statute provides for their subtraction by the use of the words "adjusted gross estate," i. e., the gross estate less deductions allowed by sections 2053 and 2054. 26 U.S.C.A. § 2056. The difference is that the federal statute does not allow any deduction for federal estate tax or for state inheritance tax,[4] whereas the state does allow a deduction for federal estate tax. If the federal statutes (26 U.S.C.A. §§ 2053–2054) provided for a deduction of either federal estate tax or state inheritance tax, such deductions would be made in determining the "adjusted gross estate" and would therefore enter into the computation of the federal marital deduction. Since the state statute does provide for the deduction of the federal estate tax in determining "clear market value," it must therefore enter into the computation of the state marital exemption, for that exemption is governed by the controlling words "clear market value" whose meaning is made to depend on allowable deductions. Moreover, the state provisions were not intended to have the same consequences as the federal provisions, for the state provides for a marital exemption rather than a deduction. (Compare also the terminable interest rule in 26 U.S.C.A. § 2056 with Rev. & Tax.Code, § 13805.) The difference is that the federal deduction comes off the top of the tax brackets (26 U.S.C.A. §§ 2001, 2051), whereas the state marital exemption comes off the bottom, i. e., the tax is computed on the remainder of the property at the same rates that would have been applicable had the exemption not been allowed. Rev. & Tax.Code, § 13403; cf. § 13989 as amended in 1957.

The executor contends that the Legislature intended substantial equality in the tax treatment of separate property and post-1927 community property and that such equality requires the exclusion of the federal estate tax from the allowable deductions in computing the marital exemption. The extent of such equality, however, must be determined by the statute. It is clear that full equality was not intended, for as mentioned above, section 13805 provides for an exemption rather than an exclusion and section 13312 compels the consideration of federal estate tax as an allowable deduction.

The executor contends that the Controller's interpretation of section 13805 conflicts with the policy expressed in the proration provisions. Prob.Code, §§ 970–977. The proration provisions provide, when applicable, that the federal estate tax shall be equitably prorated against those beneficiaries whose shares contributed to the creation of such tax. Section 13805, however, is concerned with the computation of the marital exemption for state inheritance tax and is not concerned with which shares shall be charged with the payment of the federal estate tax. Thus, when the proration provisions apply, only those beneficiaries whose shares contributed to the creation of the federal estate tax will be charged with the payment thereof. The proration provisions do not establish a policy that there shall be no state inheritance tax on any property qualifying for the federal marital deduction. This conclusion is obvious not only from the nature of those provisions but from the fact that the proration provisions were enacted (1943) five years before the federal marital deduction provision was enacted (1948) and seven years before the state marital exemption provision was enacted (1950).

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[4] A limited credit is allowed, however, for state inheritance tax under 26 U.S.C.A. § 2011.

Finally, amici curiae contend that the Controller's interpretation of section 13805 is absurd because the identity of other legatees may affect the amount of the marital exemption. Examples are set forth in their brief to demonstrate this alleged absurdity by showing that when there are bequests to charities, the federal estate tax will be lower and the second limitation on the marital exemption will be higher. There is nothing absurd about this result, for it necessarily follows from the deduction allowed for the federal estate tax that the higher that tax is, the lower will be the net taxable estate subject to the state inheritance tax. Thus, if the estate consisted of separate property valued at $15,000,000 and the only charge against it is a federal estate tax of $6,000,000, the net taxable estate subject to the state inheritance tax would be only $9,000,000, because a deduction is allowed for the federal estate tax just as deductions are allowed for administration expenses. Thus anything that reduces or augments the federal estate tax, whether it be the allowance or disallowance of exemptions, exclusions, charitable or other deductions, will reduce or augment the clear market value of the decedent's separate property. Moreover, the same result occurs with respect to pre-1927 community property under In re Estate of Atwell and In re Estate of Cushing, and would occur as well under the executor's theory when the wife's share is charged with the payment of all or a percentage of the federal estate tax.

The orders are affirmed.

GIBSON, C. J., and SHENK, CARTER, and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

The statute which, by its express terms, should govern this case is section 13805 of the Revenue and Taxation Code. That section declares that "Property equal in amount to the *clear market value of one-half of the decedent's separate property shall*, if transferred to the spouse of the deceased, *be exempt* from the tax imposed by this part * * *." (Italics added.) I find nothing unclear in the language chosen by the Legislature.

The computations of the executor are obedient to the statute. But the Controller, with the approval of a majority of this court, in effect amends the statute by changing the base of the exemption from the "clear market value of one-half of the decedent's separate property" to one-half of the value of such portion of the decedent's separate property as may remain *after the federal estate tax shall have been deducted* from the value of the estate.

This act, if regarded as legislative, obviously is in derogation of section 1 of article III of the California Constitution. If justification is sought on the theory that it is "judicial construction" it is equally indefensible, for the construction brings a result contrary to the interest of the taxpayer in violation of the oft reiterated principle that tax statutes are to be strictly construed in favor of the taxpayer and against the state. (County of Los Angeles v. Jones (1939), 13 Cal.2d 554, 561 [2], 90 P.2d 802, and authorities there cited; Whitmore v. Brown (1929), 207 Cal. 473, 483, 279 P. 447.)

The suggestion of the majority that the executor's theory could work adversely to the taxpayer in a totally different situation is not persuasive; it ignores the specificity of the situation which *is* before the court and assumes that in the different situation as well as in this one the court will construe the applicable statutes in favor of the state and against the taxpayer. I would follow the contrary rule and give to the taxpayer the benefit of the doubt in any case wherein the legislative language was uncertain enough to admit of construction.

It follows that the order from which the executor appeals should be reversed.

McCOMB, J., concurs.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.

50 Cal.2d 307

MANCHESTER AVENUE COMPANY (a Corporation), Plaintiff and Appellant,

v.

H. W. STEWART, as Director of Employment, etc., Defendant and Respondent.

VIRGINIA COUNTRY CLUB (a Corporation), Plaintiff and Appellant,

v.

H. W. STEWART, as Director of Employment, etc., Defendant and Respondent.

L. A. 24551.

Supreme Court of California,
In Bank.

May 16, 1958.

Actions by operators of golf courses for refund of assessments levied by Department of Employment, after Department and Unemployment Insurance Appeals Board had denied relief. The cases were consolidated for trial in the Superior Court, Los Angeles County, Donald R. Wright, J. pro tem. From a judgment for the department, the operators appealed. The Supreme Court, McComb, J., held inter alia that where there was some control over caddies by either the caddie master at one golf club or the starter at another while caddies were on the clubs' premises awaiting opportunity to caddie, but after a caddie had been engaged by a player, player had exclusive control over details of his work and no one connected with clubs had any control over services rendered by the caddie at any time, and no one connected with clubs had any right to do anything toward directing the control of the means and manner of performing the task of caddying, and caddies were not paid by club out of club funds but entirely by cash directly or indirectly by the players, clubs were not subject to assessment under Unemployment Insurance Code based upon amount caddies had been paid by players using clubs.

Reversed.

Opinion, 319 P.2d 467, vacated.

1. Social Security and Public Welfare ⚷540

The federal Social Security Act and the State Unemployment Insurance Act are designed to encourage a uniform system of unemployment compensation by the states and the establishment of federal-state plan whereby details of administration are left to the various states, and under both acts, administrative boards are empowered to promulgate rules, regulations and administrative interpretations. Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.; West's Ann.Unempl. Ins.Code, §§ 1 et seq., 101.

2. Taxation ⚷111.8

The legislative history of Unemployment Insurance Code discloses that legislature did not intend to include services performed by an individual as a golf caddie, and paid for solely by a member of a golf club, within meaning of word "employment" as used in the code. West's Ann.Unempl.Ins.Code, § 651 and note.

See publication Words and Phrases, for other judicial constructions and definitions of "Employment".

3. Taxation ⚷111.13

Where there was some control over golf caddies by either the caddie master at one golf club or the starter at another while caddies were on and around the clubs' premises awaiting opportunity to caddie, but after a caddie had been engaged by a player the player had exclusive control over details of caddie's work and no one connected with golf clubs had any control over services rendered by the caddie at any time, the control exercised by clubs over the caddies fell within principle of "control of the premises" and was to be distinguished from control which golf-playing member has over the caddie in determining whether clubs were subject to assessment under Unemployment Insurance Code based upon amount caddies were paid by golfers. West's Ann.Unempl. Ins.Code, §§ 1 et seq., 651 and note.

See publication Words and Phrases, for other judicial constructions and definitions of "Control of the Premises".

4. Master and Servant ⚷1

If rules are made only for the general control of conduct of a person while on premises of another, mere conformity to such rules does not indicate or establish that persons involved are employees of the person making the rules.

5. Taxation ⚷111.10

In determining whether golf clubs were subject to assessment under Unemployment Insurance Code based upon amount caddies had been paid by players using clubs, the mere fact that a person is allowed access to a golf course solely by sufferance of the club, so that he may become a caddie, does not create an employer-employee relationship. West's Ann. Unempl.Ins.Code, §§ 1 et seq., 651 and note.

6. Taxation ⚷111.13

Where there was some control over caddies by either the caddie master at one golf club or the starter at another while caddies were on the clubs' premises awaiting opportunity to caddie, but after a caddie had been engaged by a player, player had exclusive control over details of his work and no one connected with clubs had any control over services rendered by the caddie at any time, and no one connected with clubs had any right to do anything toward directing the control of the means and manner of performing the task of caddying, and caddies were not paid by club out of club funds but entirely by cash directly or indirectly by the players, clubs were not subject to assessment under Unemployment Insurance Code based upon amount caddies had been paid by players using clubs. West's Ann. Unempl.Ins.Code, §§ 1 et seq., 651 and note.

Clock, Waestman & Clock and John G. Clock, Long Beach, for appellants.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., and Vincent P. Lafferty, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before the court without a jury in consolidated actions to recover unemployment insurance taxes paid under protest, plaintiffs appeal from a judgment for defendant.

The facts in both cases are similar. Plaintiff Manchester Avenue Company owns and operates a golf course known as the Inglewood Country Club. Plaintiff Virginia Country Club owns and operates a golf course.

Some of the golfers on plaintiffs' courses engage caddies to carry their clubs and help look for golf balls which the players might hit into the rough. At the two courses a number of caddies are available for players who desire their services. The caddies are not told when to report but come when they want to work. The caddies are paid by the players, not by plaintiff. There is no restriction on the amount that can be paid, except that at the Inglewood course a minimum fee has been established by the club for the protection of the caddies. Neither club pays a caddie who comes in search of work but is not hired by a player.

Each player has the right to select his own caddie or to carry his own clubs if he so desires. In fact, most players carry their own clubs on golf carts. If a player desires a caddie but expresses no choice, a caddie is assigned to him on the basis of "first-come first-out" (but at the Virginia Club it is the practice to give preference to regular caddies). A caddie has the right to refuse to go with any player.

Each club maintains facilities where the caddies wait until they are called. They are required to register when they arrive and are not allowed on the practice or playing area of the course while not caddying. They are limited at such times to the area reserved for them. Caddies are not allowed to solicit employment from the players, and swearing, gambling, and the use of intoxicating liquors are prohibited. The golf pro or caddie master has the power to enforce these regulations by dismissing a caddie or by keeping him waiting while others go out.

In 1952 assessments were levied against plaintiffs for unemployment insurance taxes on the amounts the caddies had received from the players. After exhausting their administrative remedies, plaintiffs paid the taxes under protest and filed the present suits to recover the funds paid.

On the basis of the foregoing facts, the trial court found that it was not true that plaintiffs did not direct and control the manner and means of the performance of the caddies' services and made its conclusions of law to the effect that the caddies were employees of plaintiffs and that plaintiffs were therefore not entitled to recover.

Question: *Do the provisions of the Unemployment Insurance Code apply to services performed in caddying or carrying a golf player's clubs by an individual who was not in the employ of the golf club or association?*

No. The following is a brief history of the unemployment insurance tax as it relates to caddies:

i. The Federal Social Security Act was passed by Congress, effective on August 14, 1935. (49 Stat. 620 (1935), 42 U.S.C.A. § 301 et seq.) The California Legislature, anticipating the enactment of the federal statute, passed an Unemployment Insurance Act on June 25, 1935. (Stats. 1935, ch. 352, p. 1226.)

[1] The Social Security Act and the State Unemployment Insurance Act are designed to encourage a uniform system of unemployment compensation by the states and the establishment of the federal-state plan whereby the details of administration are left to the various states. (See section 2 of the state act passed in 1935.) Under both acts, administrative boards are empowered to promulgate rules, regulations, and administrative interpretations.

ii. In 1936 the Federal Social Security Board adopted a rule specifically applicable to caddies, which provided that where services are performed by caddies for members of a club and the caddies are compensated, either directly or indirectly, for such services by the club members, the club will not be required to pay the tax imposed by section 901, title IX, of the Social Security Act with respect to such payments to the caddies. This was true even though the caddies might be the club's employees. But if they performed any services for the club for which the club itself compensated them, then the club was subject to the tax. (S.S.T. 56. C.B. XV–2, 393 (1936).)

iii. On or about May 9, 1939, Prentice-Hall, Inc., published a letter addressed to it from the California Unemployment Reserves Commission (defendant's predecessor) as follows:

> "You inquire whether this Department concurs with the opinion set forth in S.S.T. 56, in which the Bureau of Internal Revenue held that:
>
> " 'Where services are performed by caddies for members of the M Club and they are compensated either directly or indirectly for such services by the club members, the club will not be required to pay the tax imposed by the Social Security Act with respect to such payments to the caddies, even though the caddies may be its employees. If, however, the caddies perform any services for the club for which the club, itself, compensates them, the club is subject to the tax.'
>
> "We concur in the above statement."

iv. On December 5, 1940, a Codified Interpretive Opinion was issued by the Department of Employment, entitled "Status Under the Unemployment Insurance Act as Employees or Independent Contractors of Golf Caddies." In this opinion the Department of Employment, under the "specific facts set forth and not to be considered applicable to dissimilar factual situations," held, in effect, that caddies are employees of the golf club although paid directly by the members.

v. On October 31, 1942, the California Employment Commission rendered a unanimous decision in the case of Midwick Country Club (Commission Tax Decision No. 29), in which it held that caddies were not employees of that club but independent contractors upon the facts relating to that club, which facts were almost exactly parallel with those in the instant cases.

vi. On August 3, 1943, the California Unemployment Commission issued another unanimous decision in the case of Presidio Golf Club (Commission Tax Decision No. 321), in which it ruled that the caddies at that club were not employees subject to the Unemployment Insurance Act upon facts almost identical to those in the instant cases.

vii. Effective as of February 25, 1944, there was incorporated in the official California Department of Employment Tax Manual, paragraph 9030.04, the following: "Caddie Fees: Former Rule 8.4 repealed effective January 1, 1938 deemed fees received by caddies from player on a public or private golf course or from the owner or operator thereof not to be a wage even though the caddie was subject to the direction and control of the caddie master. Since January 1, 1938, caddie fees have been considered a taxable wage under the act when paid to a caddie by the owner or operator of the golf course and provided he stood in an employment relationship with such owner or operator. (For caddies as employees, see Paragraph 7005.18.)"

viii. During the 1943 regular session, Assembly Bill No. 1544, as amended by the Senate May 5, 1943, was adopted by both houses of the California Legislature. It provided:

> "Sec. 1. Section 7.6 is added to the Act cited in the title hereof to read, 'The term "employment" does not include services performed by any person in either caddying or carrying a golf player's clubs.'"

ix. The 1953 session of the Legislature enacted Senate Bill 901, which added section 651 to the Unemployment Insurance Act, reading as follows: "'Employment' does not include services performed in caddying or carrying a golf player's clubs by an individual who is not in the employ of the golf club or association." (Stats.1953, ch. 1751, p. 3508.) There was also contained in Senate Bill 901 section 4, which read: "This act is declaratory of the existing law and the administrative interpretation thereof which is in conformity with the federal law, and is not intended and shall not be construed as effecting any change therein." (Stats. 1953, ch. 1751, p. 3508.)

x. Subsequent to this enactment, the California Unemployment Insurance Appeals Board handed down decisions in the cases of these two plaintiffs, upholding the assessments upon which they now claim refunds.

xi. During a 1954 session of the Legislature, the Senate enacted the following resolution:

> "Relative to usurpation of administrative powers by the Department of Employment and the California Unemployment Insurance Appeals Board.
>
> "Whereas, The Legislature enacted Senate Bill No. 901 at the 1953 Regular Session which became Chapter 1751 of the Statutes of 1953; and
>
> "Whereas, This bill added Section 651 to the Unemployment Insurance Code to provide that caddies were exempt from the taxing and benefit provisions of the unemployment insurance program; and
>
> "Whereas, The Legislature in enacting such provision expressly declared in the bill that it was its intent that such measure was declaratory of the existing law and the administrative interpretation thereof which is in conformity with the federal law; and

"Whereas, Caddies were exempt under federal law and interpretation, where the caddies are paid by the players; and

"Whereas, The existing administrative rulings of the department at the time of the enactment of Senate Bill No. 901 had not regarded caddies as in employment except under circumstances where the caddies were paid by the club or association; and

"Whereas, The Department of Employment and the Unemployment Insurance Appeals Board, since the enactment of Senate Bill No. 901, have refused to recognize the intent of the Legislature, expressed therein; now, therefore, be it

"*Resolved*, That the Senate of the State of California hereby declares that it was the intention of the Senate in initiating Senate Bill No. 901 of the 1953 Session, and of the Legislature in enacting that bill, to enact into law what it believed to be the existing administrative interpretation of the Department of Employment and what it knew to be the law with respect to the administrative interpretation of federal authorities administering the Federal Unemployment Tax Act, to the effect that caddies who are paid by the individual golf players rather than by the golf club should not be deemed to be employees of the club under the California Unemployment Insurance Act; and be it further

"*Resolved*, That the Secretary of the Senate is directed to transmit copies of this resolution to the Director of Employment, to the Deputy Director of Employment, and to each member of the California Unemployment Insurance Appeals Board.

"Resolution read, and, on motion of Senator O'Gara, unanimously adopted." (S.Res. 16, S.Jour., 1954 1st Extra Sess., p. 249.)

xii. The California Legislature during its 1957 session amended section 651 of the Unemployment Insurance Code to read as follows: "'Employment' does not include services performed by an individual as a golf caddy in caddying or carrying a golf player's clubs." (Stats.1957, ch. 595, p. 1691.)

[2] In view of the foregoing legislative history, it is clear that the Legislature did not intend to include services performed by an individual as a golf caddie, and paid for solely by a member of a golf club, within the meaning of the word "employment," as used in the Unemployment Insurance Code.

[3] The evidence in the present cases discloses that there is some control over the caddies by either the caddie master at the Virginia Country Club or the starter at the Inglewood course while the caddies are on and around the clubs' premises awaiting an opportunity to caddie. However, the evidence further shows that after a caddie has been engaged by a player, the player has exclusive control over the details of his work, and no one connected with plaintiffs has any control over the services rendered by the caddie at any time. The control exercised by plaintiffs over the caddies falls under the principle of law known as "control of the premises" and is to be distinguished from the control which the golf-playing member has over the caddie.

[4] If rules are made only for the general control of conduct of a person while on the premises of another, mere conformity to such rules does not indicate or establish that the persons involved are employees of the person making the rules.

In the Restatement of the Law of Agency (1933), sec. 220, p. 489, Comment h, it is stated: "If * * * rules are made only for the general policing of the premises * * * mere conformity to such regulations does not indicate that the workmen are servants of the person making the rules."

The relationship between plaintiffs and the caddies was similar, if not in fact identical, to the relationship between a union hiring hall and the union members. A union member looking for work goes to the hiring hall and is assigned to a job, but no one seriously contends that the union is the employer.

In the case of both plaintiffs, persons came looking for an opportunity to caddie. At the Inglewood course the caddies were assigned on a first-come first-out basis. They were not given any particular preference except when a player desired a special caddie, in which case he would be called regardless of whether he was next on the list or not. Likewise, the caddie could refuse to go with the player if he did not care to go.

At the Virginia course practically the same policy was followed except that there were a few regulars who, because they were generally there first, were given the opportunity of going out first. The first-come first-out system was employed to avoid preferments or misunderstandings among the caddies as to the order in which they were to be called. It tended toward harmony and decorum, which are essential in the maintenance of an efficient golf course with several hundred players.

The primary function of the caddie was to carry the golf player's clubs from the beginning to the finish of the player's game. All the duties performed by the caddie while pursuing that function were at the sole and exclusive direction of the player. The player alone told his caddie what he wanted him to do while carrying the clubs. No one connected with plaintiffs had a right, or ever attempted, to interfere in any way after the game started. This placed the caddie under the control of the player as to the "means and method of performing the work," and not under the control of plaintiffs.

[5] The evidence likewise fails to reveal any specific contract of hire between plaintiffs and the caddies, either express or implied. The mere fact that a person is allowed access to a golf course solely by sufferance of the club, so that he may become a caddie, does not create an employer-employee relationship. Plaintiffs merely granted permission to persons to come to the clubs and offer their services to players. They were not hired by the clubs but merely permitted to avail themselves of the facilities provided by the clubs. They were not paid by the clubs out of club funds, but entirely by cash, either directly or indirectly, by the players.

[6] An examination of the record reveals that there was a total absence of any evidence that anyone connected with either plaintiff did, or had the right to do, anything toward directing the control of the means and manner of performing the task of caddying. Therefore, the court's finding that plaintiffs did exercise such control is unsupported by any evidence, and its conclusions of law that the caddies were employees of plaintiffs and that plaintiffs were not entitled to recover are erroneous.

Claremont Country Club v. Industrial Accident Commission, 174 Cal. 395, 163 P. 209, L.R.A.1918F, 177, relied on by defendant, is not applicable to the present case for two reasons:

1. The cited case was decided in 1917 under the Workmen's Compensation Act a long time prior to the enactment of any Unemployment Insurance Act and merely held that a caddie working at the club was subject to the Workmen's Compensation Act.

2. The instant cases are factually distinguishable from the Claremont Country Club case in the following respects:

First. In the Claremont case it appeared that the caddies were required to report for duty on specific days, while in the present cases there were no rules or regulations that the caddies were required to report for duty on specific days; in fact, the evidence was directly to the contrary, since they could come and go as they pleased.

Second. In the Claremont case the caddies were graded as to their efficiency, while in the present cases there was no such grading.

Third. In the Claremont case the player could not designate the caddie whose services he desired, while in the present cases the players were permitted to call for any caddie they wanted, and the caddie could go with any player he wanted.

Fourth. In the Claremont case the club kept an accurate record of the amount paid to each caddie by the players, while in the present cases there was no record kept of the amounts that were paid to the caddies.

Fifth. In the Claremont case the club provided the caddies, while in the present cases the clubs did not provide the caddies, as the men and boys merely came to both clubs inquiring if there was any chance for them to go out on the course caddying. In the present cases the caddies who came to the clubs were not required to stay there for any particular time and were never paid if they did not get a job. There was no way of telling from one day to the next how many caddies were going to be there or how many players would want their services. Moreover, if the players wanted to, they could bring their own caddies, carry their own clubs, or use hand caddie carts.

It thus appears that the reasoning followed by the court in the Claremont case is not applicable to the facts in the present cases.

Furthermore, in the Claremont case the court felt that the club could direct the caddies to do some work while not caddying. No such relationship existed with the caddies in the present cases. There is no evidence whatever that the caddies were required to perform any services for the clubs while awaiting a chance to go out with a player. The evidence is also without conflict that the caddies were not subject to direction or control by plaintiffs, insofar as any duty or service to the golf-playing member was concerned, while actually caddying.

Unlike a waiter in a restaurant or a house servant (these being the illustrations used by the court in the Claremont case), the caddies in the instant cases could come and go as they pleased. They were not paid for coming or waiting. If they did not get a call to go out with a player, they received nothing. On the other hand, a servant or waiter is paid during the time he is on duty even if he is not serving a guest or patron.

In addition, a guest or patron cannot discharge a servant or waiter. This can be done only by the employer. In the present cases, a caddie could be relieved or discharged by a player, but not by either of the plaintiffs, at any time the player desired from the beginning to the finish of his game.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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50 Cal.2d 294

Bertille B. SMITH, as Administratrix With-Will-Annexed of the Estate of Vincent Richard Smith, sometimes also known as V. R. Smith, V. R. "Dick" Smith, and Dick Smith, Deceased, Plaintiff and Respondent,

v.

Frank BULL and Mel Roach, Defendants.

Frank Bull, Appellant.

L. A. 24510.

Supreme Court of California,
In Bank.

May 16, 1958.

Rehearing Denied June 11, 1958.

Action by administratrix of decedent's estate to recover for appropriation and conversion of assets, including good will, of dissolved partnership of which decedent had been a member. The Superior Court, Los Angeles County, Vernon M. Hunt, J. pro tem., entered judgment for administratrix and defendant appealed. The Supreme Court, Carter, J., held that evidence sustained finding that defendant partner in advertising agency, which was for all practical purposes a one account agency, during time when partnership was still in existence procured transfer of the account to new agency he was contemplating forming, and that he converted for his own benefit and profit partnership business, good will, customers and employees.

Affirmed.

McComb, J., dissented in part.

Opinion, 318 P.2d 46, vacated.

1. Partnership ⚷62

In action by administratrix of decedent's estate to recover for appropriation and conversion of assets, including good will, in dissolved partnership of which decedent had been a member, evidence sustained finding that partnership, notwithstanding defendant partner's claim that he had notified decedent of intent to liquidate business, continued until notice of dissolution was signed. West's Ann. Corp.Code, § 15029.

2. Partnership ⚷336(3)

In action by administratrix of decedent's estate to recover for appropriation and conversion of assets, including good will, of dissolved partnership of which decedent had been a member, evidence sustained finding that defendant partner during final month of partnership appropriated and converted for his own benefit and profit the partnership business, good will, customers and employees.

3. Good Will ⚷1

Although good will of a business may be result of personal skill, talent, experience, or reputation of an individual connected with the business, it may attach to and continue with the business even after separation of the individual on whom it was founded.

4. Partnership ⚷336(3)

In action by administratrix of decedent's estate to recover for appropriation and conversion of assets, including good will, of dissolved partnership of which decedent had been a member, evidence sustained finding that defendant partner in advertising agency, which was for all practical purposes a one account agency, during time when partnership was still in existence procured transfer of the account to new agency he contemplated forming, and appropriated good will of partnership.

5. Good Will ⚷2

Customers of a business are an essential part of its good will and in fact without their continued custom good will ceases to exist, since good will is the expectation of continued public patronage. West's Ann.Bus. & Prof.Code, § 14100.

6. Partnership ⚷336(3)

In action by administratrix of decedent's estate to recover for appropriation and conversion of assets, including good will, of dissolved partnership of which decedent had been a member, evidence sustained finding as to value of good will of partnership in the amount fixed by the uncontradicted testimony of expert witness, who was a certified public accountant.

7. Appeal and Error ⚷996, 1010(1)

Where there is substantial evidence or any inference to be drawn from evidence to support findings of trial court, an appellate court will not make determination of factual issues contrary to those made by the trier of fact.

◆

A. G. Ritter and H. E. Lindersmith, Los Angeles, for appellant.

Darling, Shattuck & Edmonds, Douglas L. Edmonds and Thomas F. Call, Los Angeles, for respondent.

CARTER, Justice.

Defendant Frank Bull appeals from a judgment in favor of the plaintiff, Bertille B. Smith, administratrix with-will-annexed of the estate of her husband, Vincent Richard Smith, deceased. Mel Roach was also a defendant but judgment was in his favor.

The complaint originally pleaded ten causes of action but on plaintiff's motion in open court, all causes of action, save the first were dismissed. The complaint alleged the existence of a partnership between Frank Bull and decedent, Vincent Richard Smith, and, in brief, an appropriation and conversion of the partnership assets, including good will, by defendant Bull. The court's findings, conclusions of law and judgment were based upon the first cause of action. The judgment adjudicated that plaintiff was entitled to one-half of the proceeds of four accounts, to a certain sum of money on deposit with the Citizens' National Trust & Savings Bank of Los Angeles, and "that plaintiff shall recover from defendant Frank Bull the sum of Twenty-eight Thousand Six Hundred Ninety-five and 83/100 Dollars with interest thereon from the date of entry of this final judgment until paid at the rate of 7% per annum" which sum represented one-half of the estimated value of the good will of the advertising agency known as Smith & Bull. It is from the quoted portion of the judgment that defendant Bull appeals.

The record shows that Vincent Richard Smith and Frank Bull had been associated together in the advertising business for many years. Their association began in 1936 and continued thereafter in different forms. At one time the association included others and operated as a corporation. On September 1, 1949, an oral partnership agreement was entered into between them for the purpose of conducting an advertising agency. While the agency, known as Smith & Bull, represented several accounts, the only major account was that of Seaboard Finance Company and the agency was, in effect, a "one-account" agency. The Smith & Bull agency employed some twenty-one or twenty-two employees and ran its own print shop in conjunction with the advertising business. Mel Roach, a defendant, was an employee of the agency and acted as general manager and senior account executive. His duties with the partnership centered around the Seaboard Finance account and he spent part of each day, while he was in town, at the Seaboard offices where he became very well acquainted with the executives of that company. Roach had been associated with Smith and Bull for almost the entire length of their association although his employment had not been continuous prior to the formation of the last partnership because of service with the armed forces and because he had been in business for himself at one time.

Smith was ill during the latter part of 1952 and was not as active in the partnership as he had previously been and was away from the office part of the time. The record shows that during this time Bull and Roach gradually took over the handling of the Seaboard account which Smith had previously brought into the office and had controlled. While Roach was the one who met with the Seaboard officials, the guiding force and the one to whom he reported and from whom he took orders was Smith. During the latter part of the year 1952, however, the relationship apparently changed and Roach conferred with Bull with respect to the account. Although it appears that in December, 1952, Seaboard officials had expressed dissatisfaction with the handling of its account, that matter was not brought to Smith's attention. On January 15, 1953, a letter was written by Mr. Lide, the assistant vice president of Seaboard, referring to a "conversation between Frank Bull, Mel Roach and myself the early part of December" in which the topic of conversation had been that Seaboard was not "too happy" with the service rendered to it by Smith and Bull and calling to the partners' attention the fact that notice had been served "early in December that, unless things improved, it might be necessary to make a change in agencies March 1st. However, inasmuch as I will be out of the city for approximately three weeks, I think it only fair to extend the time to April 1st." The letter concluded with the hope that a change in agencies would not be necessary and that the association between

Seaboard and Smith and Bull would continue for many years. This letter was not called to Smith's attention and, apparently only Bull, Roach and Seaboard knew of it. On February 5, 1953, Bull wrote a letter in longhand to Smith informing him that he was dissatisfied with Smith's handling of his personal affairs as well as his business plans for the future and that he believed the partnership should be "liquidated." This was the first time that Smith had learned that Bull was dissatisfied with the partnership relationship and was considering dissolution thereof.

The record contains an undated letter from Roach to Smith who had learned of the Seaboard letter of January 15th through a conversation with Mr. Lide. Although the record is not clear, this letter was probably written on, or about, February 20, 1953. The letter, which was signed "Mel," is as follows: "Overheard your [Smith's] request for a copy of the letter from Lide regarding Seaboard's ultimatum.

"She [secretary] has not seen, and knows nothing of the letter and Frank [Bull] and I grabbed the letter upon arrival to prevent anyone here seeing it. In wrong hands or with wrong interpretation, the letter could prove very embarrassing and create a new problem in the trade.

"You are very welcome to read it at any time but we don't want it moving out of the office or to have copies made. The situation is very quiet and I have just about resolved all weakness and got the complaints quieted. Frank [Bull] called upon Thompson and Appleby [executives of Seaboard] and discussed the entire situation and everything is alright. Any further discussion or re-opening of the issues can only serve to confuse and irritate all concerned there.

"Lide is in the east on business and vacation and I don't want anything to arise in his absence which will cause him to get on me again about doing things while he is away. I've put Perkel [an employee] on the account with me and we have the whole year's campaign for all medias layed out and approved and Lide and the rest like his personality and his ideas and new approach to old ideas.

"All's well so don't worry about it any more."

Roach testified that at some time early in January, 1953, he notified Seaboard of the impending dissolution of the partnership, and that early in February, 1953, Seaboard informed him that its account would be transferred to "Frank Bull & Company." Bull admitted that, early in February, he notified Seaboard that the partnership of Smith and Bull was going to be dissolved. On February 20th, Bull signed a lease on new premises located not far from the offices occupied by the partnership; on the same day he certified that he was conducting an advertising agency at the new premises under the name of "Frank Bull & Company." Bull testified that on February 20th he was notified by Seaboard that its account would be transferred to him. On February 23rd, Bull notified Smith of the lease he had taken. On February 26th, Seaboard notified Smith that it would no longer require his "personal services" and that because of the dissolution of the partnership of Smith & Bull, it would no longer place its account there. On February 27th, Smith and Bull signed and filed notices of dissolution of the partnership. At about this time Smith's attorney notified Bull's representative that Smith would hold Bull accountable for the good will of the partnership. On February 28th, Bull moved from the partnership offices to the new location taking with him the firm accounts, books, and all of the partnership employees except one. On March 1st, he commenced conducting an advertising agency known as Frank Bull & Company.

The record shows that Roach had told an employee of the partnership that he had the Seaboard account "in the palm of his hand; he could take it anywhere he wanted to. * * *" Bull admitted that he "probably did" or "might have" or "could have" told various people that Smith was "constantly off his rocker," that he was taking so much medicine that his mind was affected, that he was "erratic and eccentric." The record also shows that Bull's decision to open his own agency was dependent upon the Seaboard account.

A certified public accountant, called and qualified as an expert witness for the plaintiff, testified that there was a good will factor attached to a personal service partnership such as the one under consideration; that it was not customary to carry such an item on the books of an organization, firm, or partnership, unless the good will had been purchased originally; that by using various known and approved methods of computation, he was of the opinion that the good will factor of the partnership should be valued at $57,391.66. This testimony was uncontradicted and defendants produced no expert witness to testify concerning the value of the good will. The record shows that after the dissolution Smith had no accounts and no business; that he was in the process of trying to organize a new agency at the time of his sudden death on June 6, 1953.

The trial court found, in accord with the allegations of plaintiff's complaint, that "during its existence, the co-partnership assets consisted of accounts receivable, bank accounts, personal and real property and good will. In February, 1953, defendant Frank Bull converted and appropriated for himself alone, and for his sole benefit and profit, the co-partnership business, good will, the customers and all the company employees, with one exception. At the time of said conversion and appropriation the partnership had a good will of fifty seven thousand three hundred ninety-one and 66/100 dollars ($57,391.66)." And the court concluded that the plaintiff was entitled to "a judgment against defendant Frank Bull in the sum of twenty-eight thousand six hundred ninety-five and 83/100 dollars ($28,695.83), with interest thereon from the date of entry of the final judgment herein, until paid, at the rate of seven per cent (7%) per annum. This sum represents one-half (½) of the value of the good will of the co-partnership of Smith & Bull when converted and appropriated by defendant Frank Bull." The trial court found the date of dissolution of the partnership to be February 27, 1953.

Defendant's contentions, although inartistically phrased, appear to be that there is no evidence to support the trial court's findings that he had converted and appropriated the partnership's customers and that there was a valuable good will attached to the business. It is also argued that the question of the existence of good will is one of law, rather than fact, and that there is no good will attached to a personal service business. Defendant argues that he had the right to accept new business from Seaboard after the dissolution of the partnership without obligation to his "former" partner and without being "penalized in damages" therefor. This latter argument apparently stems from defendant's theory that a dissolution of the partnership took place when he notified Smith that he intended to "liquidate" the firm.

[1] Section 15029 of the Corporations Code provides that "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." It is obvious from the evidence heretofore set forth that the record amply supports the trial court's determination that the partnership continued until February 27, 1953, when the notice of dissolution was signed inasmuch as Bull continued on in the agency's offices until that time. The record does not show that there was any change in the business relationship between the two, or in the operation of the agency's business, prior to that time.

[2] There is also ample support for the trial court's finding that during February, 1953, Bull appropriated and con-

verted for his own benefit and profit the partnership business, good will, customers and employees. The employees occupied the same positions with Frank Bull & Company, at the same salaries, as they had with Smith & Bull. It will be recalled that Bull took with him all the partnership accounts and that the major account, Seaboard, was notified early in January of the impending dissolution of the partnership while Smith did not hear about the probable dissolution until Bull's letter to him on February 5th; that Bull and Roach knew early in February that Bull would have the Seaboard account; that Bull could not or would not have opened his own offices without the Seaboard account. On the same day (February 20th) that Bull was officially notified that he was to have the Seaboard account, he signed a lease for new offices and a certificate to do business under the name "Frank Bull & Company" although the partnership was not formally dissolved until February 27th and he did not leave the Smith & Bull offices until February 28th. Smith was not notified of Seaboard's decision to dispense with his services until February 26th.

Defendant's argument that he is being penalized in damages and prohibited from accepting Seaboard employment, *after dissolution,* is devoid of merit. The judgment heretofore set forth did not purport to award plaintiff damages because of the appropriation of the Seaboard account, or any portion of the profit made by Bull from that account, but was concerned, so far as is here pertinent, with the appropriation and value of the good will of the business.

[3, 4] There is no merit to defendant's contention that a personal service organization has no good will. The record shows that Smith and Bull had, during their long association, enjoyed a fine reputation in the advertising field and that the association had been profitable to all concerned. Although the good will of a business may be the result of the personal skill, talent, experience, or reputation of an individual connected with the business, it may attach to and continue with the business even after the separation of the individual on whom it was founded (24 Cal.Jur.2d 142; Mackay v. Clark Rig Bldg. Co., 5 Cal.App.2d 44, 42 P.2d 341). In Crutchett v. Lawton, 139 Cal.App. 411, 33 P.2d 839, it was held that a contract for the sale of a medical business and the good will thereof was valid. In Driskill v. Thompson, 141 Cal.App.2d 479, 484, 296 P.2d 834, 838 (a business involving the operation of a dance hall), the court held: "Appellant next argues that a partnership dissolvable at will can have no good will, because, so it is urged, such can exist only in a going business. * * * The continuance of that business created a good will regardless of who continued to operate it. A business, together with its good will, may continue regardless of the form of organization used to conduct it. Appellant continued to operate that business and to capitalize on the good will of that business as a going concern. This was an asset of the partnership which he was using for his own benefit." In Miller v. Hall, 65 Cal.App.2d 200, 205, 150 P.2d 287, 289, where the partnership had operated a brokerage business, the court held: "From all of these cases, and many others, it appears to be well recognized that the good will of a business may have a considerable value, that while this value may be seriously affected by the competition of a retiring partner the question of such value is one to be determined in the light of all the facts of a particular case, and that where such a value exists and is appropriated by one of the former partners for his own use and benefit he may be required to account to the other partner for his interest in any such value as may appear under the circumstances.

"In the instant case, beyond question, the good will of this business would have had a considerable value had the business been sold to a third party."

[5] Section 14100 of the Business and Professions Code defines "The 'good will' of a business [as] the expectation of continued public patronage." The record here shows that the Smith & Bull agency was in effect a "one account" agency; that the "one account" of value was the Seaboard Finance Company (and its predecessor) and that this account had been serviced satisfactorily by Smith and Bull during the existence of the partnership and for many years prior thereto. It will also be recalled that prior to opening his own agency Bull waited until he was sure that he would have the Seaboard account. As the court stated in Bergum v. Weber, 136 Cal.App. 2d 389, 392, 288 P.2d 623, 625, "The customers of a business are an essential part of its goodwill. In fact, without their continued custom goodwill ceases to exist, for goodwill is the expectation of continued public patronage. Bus. & Prof. Code, § 14100.

"When the goodwill of a business is sold, it is not the patronage of the general public which is sold, but that patronage which has become an asset of that business."

In the case under consideration, Bull continued to conduct an advertising agency under his own name in the same locality as that in which the partnership of Smith & Bull had operated and with the same personnel servicing the same accounts. The trial court after hearing the evidence summarized Bull's conduct as follows: "Why certainly he took everything that amounted to anything in the way of business. All that was left was the physical assets, which didn't amount to much but he took this big Seaboard account, which was the business—it was the biggest portion of the business—and he took that and he didn't ask him. He just simply took it, that's all."

Defendant's reliance upon the case of Heywood v. Sooy, 45 Cal.App.2d 423, 426, 427, 114 P.2d 361, 363, is misplaced. It was there said, in commenting upon the case of Little v. Caldwell, 101 Cal. 553, 36 P. 107, that "the cited case repudiates the notion that a partner is accountable *after dissolution* for any allowance for what may be termed the 'good will' of the partnership which may result in contracts of employment *after* dissolution. While the cited case did not involve the precise points presented here, we believe that it clearly indicates the line of demarcation between 'unfinished business', being business covered by contracts of employment at the time of dissolution, and other matters, not covered by contracts of employment, but which *thereafter* become the subjects of contracts of employment through the good will previously existing between the partnership and the clients. As to the 'unfinished business', a duty to perform services rests on the partnership at the time of dissolution and continues thereafter to rest on the partners or the surviving partner. As to the other matters, no duty to perform services rests on the partnership at the time of dissolution and no duty continues thereafter to rest on the partners or surviving partner. And where no duty to perform the services rests on the partnership at the time of dissolution, such services as may thereafter be performed by either of the former partners under contracts of employment *subsequently* made with former clients cannot be considered 'unfinished business' of the partnership at the time of the dissolution." (Emphasis added.) The good will with which we are here concerned does not involve the profits made from Seaboard employment subsequent to dissolution and does not concern profits made from that employment subsequent to dissolution or so far as good will is concerned any unfinished business of Smith & Bull. We are concerned with the good will of what had been a going concern whose major client was Seaboard and the fact that had the Smith & Bull agency been sold to a third person that good will, because of the Seaboard account, would have been considered a valuable asset of the partnership. In Little v. Caldwell, 101 Cal. 553, 36 P. 107, the court was concerned with an action brought by the widow of a deceased partner of a law firm. It was there held that the surviving partner must account to the estate of his deceased partner for proceeds obtained from contracts made by the firm prior to the death of the partner. In other words, the court was there concerned with "unfinished business" of the partnership entered into prior to the dissolution of the partnership. In the case at bar it is obvious from a reading of the record that Bull received the Seaboard account for himself because of the satisfactory service theretofore rendered Seaboard by Smith, Roach and himself. Bull's receipt of the Seaboard account was not a contract "subsequently" made with a former client after dissolution of the partnership. He received the account for his own benefit and profit during the continuance of the partnership and the inference is clear that both Bull and Roach worked toward that result without Smith's knowledge or consent. The inference is also very clear that any dissatisfaction Seaboard may have had with the way in which its account was handled was concealed from Smith who was informed by Roach, probably around February 20th, in an undated letter, that he had "just about resolved all weakness and got the complaints quieted" and that "everything is alright," that the "whole year's campaign for all medias [was] layed out and approved" and that "All's well so don't worry about it any more." In the same letter Smith was warned against "Any further discussion or re-opening of the issues" since to do so would "only serve to confuse and irritate all concerned" at Seaboard.

As the trial court remarked: "It is just because people who have become acquainted with the firm keep on going there and doing business there. Of course, here there is the added factor that Mr. Bull remained, and more important than that, that Mr. Roach remained. He was the guiding figure in this whole thing. In spite of his peculiar actions, some of which I don't believe, he was still the one that kept this account [Seaboard] for Mr. Bull and steered it over to him. I have no doubt about that." The court also commented that the name of Smith & Bull was not abandoned completely. "It became Bull. But here was the same man; there was never any change whatsoever in faces. Here was the same face, but the one they were dealing with was this Mr. Roach. This was a one account agency practically, for all practical purposes. They had all their eggs in one basket, and this Mr. Roach was the one who was getting into their good graces and cementing the account there and holding onto it, and he did hold onto it, and he carried it right along with Mr. Bull. There was never any change at all. They hadn't seen Smith for a long time. They weren't relying on Smith. They were relying on this firm, and Bull just simply took the whole thing over. He took it lock, stock and barrel. Believe me, that is one thing the evidence does show. He just took everything." Defendant's argument that at one of the early February meetings Smith announced that he was going to try to get the Seaboard account is directed to the weight of the evidence with which we are not here concerned. The weight of the evidence, and the credibility of the witnesses, are matters for the trier of fact. And the quoted excerpts from the remarks of the trial judge clearly show his opinions concerning both the weight of the evidence and the credibility of the witnesses.

[6] There is no merit to defendant's contention that the trial court erroneously fixed the value of the good will. Plaintiff's expert witness, a certified public accountant, testified fully as to the methods used by him in computing the value of the good will. He also testified that it was not customary to carry a good will item on the books of a firm unless it had been purchased by that firm. His testimony was not controverted in any way and is sufficient to support the determination of the trial court that the good will of the partnership had a value of $57,391.66 at the time of dissolution and that plaintiff was entitled to one-half thereof.

[7] Defendant's other arguments consist of a reiteration of testimony and evidence which might be considered favorable to him. With such evidence we are not here concerned. Whether or not defendant was guilty of appropriation and conversion of firm assets, including the good will thereof, was a question of fact; whether the business possessed a good will is also a question of fact to be determined upon the trial of the action (Mackay v. Clark Rig Bldg. Co., 5 Cal.App.2d 44, 60, 42 P.2d 341). The trial court determined the issues here involved adversely to defendant When there is substantial evidence or any inference to be drawn from the evidence to support the findings of the trial court, an appellate court will not make determinations of factual issues contrary to those made by the trier of fact. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384; Ambriz v. Petrolane, Ltd., 49 Cal.2d 470, 319 P.2d 1.

For the foregoing reasons, the judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

McCOMB, Justice (concurring and dissenting).

I would modify the judgment of the superior court by striking therefrom the following:

"3. That plaintiff shall recover from defendant Frank Bull the sum of twenty-eight thousand six hundred ninety-five and 83/100 dollars ($28,695.83), with interest thereon from the date of entry of this final judgment, until paid, at the rate of seven per cent (7%) per annum."

As so modified, I would affirm the judgment for the reasons expressed by Mr. Presiding Justice White in the opinion prepared by him for the District Court of Appeal (318 P.2d 46).

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160 Cal.App.2d 731

Peter BAGLIONE and Marie Baglione, Plaintiffs and Appellants,
v.
Jack B. LEUÉ, Donna Leué and Argus G. Brown, Defendants and Respondents.
Civ. 9411.

District Court of Appeal, Third District, California.
May 22, 1958.

Rehearing Denied June 11, 1958.

Action by property owners for mandatory injunction to compel adjoining landowners to remove eaves on building which encroached on property owners' land. The Superior Court, El Dorado County, Robert E. Roberts, J., denied mandatory injunction and property owners appealed. The District Court of Appeal, Schottky, J., held that where predecessors of adjoining landowners, due to mistake and without fault and without negligence, constructed building, the eaves of which encroached on plaintiffs' property 1.21 feet at front corner and 1.04 feet at rear corner of building, cost of removing encroachment would be $3,500, value of property was estimated at $300 per front foot and encroachment did not interfere with plaintiffs' property, hardship to adjoining owners, if injunction to compel removal of eaves were granted, would be disproportionate to hardship caused plaintiffs, injunction was properly denied, and award of damages and $300 for an easement fully compensated plaintiffs.

Affirmed.

1. Injunction 🔑128

In action by property owners against adjoining landowners to compel adjoining landowners to remove eaves on building which encroached on property owners' land, finding that property owners were aware of construction of adjoining owners' building and made no objection to it was supported by evidence.

2. Injunction 🔑130

In action by property owners against adjoining landowners for mandatory injunction to compel adjoining landowners to remove eaves on adjoining landowners' building which encroached on property owners' land, finding to effect that property owners were aware of construction of the building and made no objection to it was not necessary to support judgment denying mandatory injunction.

3. Injunction ⚷195

Where predecessors of adjoining landowners, due to mistake and without fault and without negligence, constructed building, the eaves of which encroached on property owners' property 1.21 feet at front corner and 1.04 feet at rear corner of building, cost of removing encroachment would be $3,500, value of property owners' property was estimated at $300 per front foot and encroachment did not interfere with property owners' property, hardship to adjoining owners, if injunction to compel removal of eaves were granted, would be disproportionate to hardship caused property owners, injunction was properly denied, and award of damages and $300 for an easement fully compensated property owners.

4. Injunction ⚷195

Where predecessors of adjoining landowners constructed a building, the eaves of which encroached on property owners' property due to a mistake, predecessors were without fault and not negligent in constructing building, and it would cost $3,500 to remove encroachment, court of equity had power to protect adjoining landowners in use of building by awarding damages for encroachment and granting adjoining landowners an easement.

5. Judgment ⚷361

Statement in judgment that "the court having been fully advised in the premises, and after due deliberation and careful consideration of the evidence, supplemented by the Court's own research," did not mean that court considered evidence outside record but merely meant the court engaged in legal research, and therefore judgment would not be set aside on theory that judgment was based on matters outside record.

H. D. Jerrett, Sacramento, for appellants.

Hughes, Maul & Fogerty, Placerville, for respondents.

SCHOTTKY, Justice.

Peter Baglione and Marie Baglione appeal from a judgment denying them a mandatory injunction to compel respondents to remove eaves on respondents' building which encroach on appellants' land.

Appellants and respondents own adjoining parcels of real property near Stateline in El Dorado County. The land owned by respondents is improved with a building which was erected in 1946 by predecessors in interest of respondents. This building is 18 feet in height, 28 feet wide, and 52 feet long. The exterior walls are constructed of pumice stone brick reinforced with steel and concrete. The eaves of the building are about 20 feet from the ground. As constructed, this building lies parallel to and within several inches of the boundary line of the two properties. The eaves on the side adjacent to appellants' property overhang their property 1.21 feet at the front corner of the building and 1.04 feet at the rear corner. No part of the wall encroaches on the appellants' property.

The former owners of respondents' property who constructed the building believed that the wall adjacent to the boundary line was constructed some 5 feet from the boundary. At the time they purchased the property there were monuments existing on the ground which were pointed out to them as designating the common boundary.

In 1954 appellants had a survey made and the encroachment was then discovered. Thereafter they brought an action for equitable relief. They sought a mandatory injunction to compel respondents to remove the encroachment, rents for the use and occupation of the property, and, as an alternative to the injunction, damages in the amount of $5,000.

At the trial the evidence disclosed that appellants' property is improved with a home which is located some 50 feet from the boundary line. It was also disclosed that in order to properly eliminate the overhang without damage to respondents' building would require extensive rebuilding which would cost about $3,500.

The court refused the injunction, granted an easement to respondents upon appellants' land to the extent of the encroachment during such time as the building remains on the land, ordered payment of $300 to appellants for the easement granted, and awarded appellants $30 damages.

As grounds for reversal of the judgment appellants contend (1) that the findings and judgment are contrary to the law and the evidence; (2) that the court erred in denying appellants an injunction; and (3) that the judgment appears on its face to have been based on matter outside of the record.

[1, 2] Appellants first argue that there is no evidence in the record to support the finding of the trial court that appellants were aware of the construction of the building and made no objection to it. There is no direct evidence that appellants knew when the building was erected or that they objected to it. However, the record does show that the building was constructed by respondents' predecessor in interest two years after appellants became the owners of the adjoining property and eight years before a survey revealed the fact of the encroachment of the overhanging eaves. We think it is fairly inferable that appellants knew of the construction of the building, but in any event the finding complained of is not necessary to support the judgment and may be disregarded.

[3] Appellants' second contention is that the court erred in denying an injunction ordering the removal of the encroachment. We do not agree with this contention. What was said in Ukhtomski v. Tioga Mutual Water Co., 12 Cal.App.2d 726, at page 728, 55 P.2d 1251, is quite applicable to the instant case:

> "The remedy of injunction is a drastic one, and where its issuance will work an inequitable burden upon the defendant, the court may, in the exercise of a sound discretion, refuse to grant it where the injured party may be adequately compensated in damages. Heilbron v. Fowler, etc., Canal Co., 75 Cal. 426, 17 P. 535, 7 Am.St.Rep. 183. The principle is aptly illustrated in the so-called 'encroachment cases' where one party builds his wall partly on the land of his neighbor. It being shown that the injury suffered by such encroachment is small and the harm to be suffered by compelling its removal great, the courts have uniformly refused to issue an injunction, leaving the complaining party to his action for damages. Rothaermel v. Amerige, 55 Cal.App. 273, 203 P. 833; Blackfield v. Thomas Allec Corp., 128 Cal.App. 348, 17 P.2d 165; McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134. It is true, as pointed out by appellants, that the amount of land taken in the decisions cited, supra, is considerably less than that here involved. This difference is merely one of fact, however, and does not change the legal principle involved that an injunction should not issue where its issuance would cause serious harm to the defendant and the injury caused by his inadvertence and mistake can be fully compensated by damages."

And as stated in Christensen v. Tucker, 114 Cal.App.2d 554, at page 559, 250 P.2d 660, at page 663:

> "However, the numerical weight of authority in this state recognizes the rule that where the encroachment does not irreparably injure the plaintiff, was innocently made, and where the cost of removal would be great compared to the inconvenience caused plaintiff by the continuance of the encroachment, the equity court may, in its discretion, deny the injunction and compel the plaintiff to accept damages. Of course, the practical effect of such a rule

> is to give the defendant, a private person, in certain circumstances, what is, in effect, the right of eminent domain by permitting him to occupy property owned by another. The rule is frequently justified on purely practical grounds because where expensive structures have been constructed that overhang adjoining property or trespass to a minor degree, if the injunction to remove them were granted as of right, the plaintiff would be encouraged to engage in what amounts to legal extortion."

We believe that the court properly refused to grant an injunction. The testimony disclosed that when the property was purchased by respondents' predecessors in interest who erected the building, the boundary line was pointed out to them and the building was erected some five feet from this supposedly true line. The court found, and the foregoing testimony supports the finding, that the former owners were without fault and not negligent in constructing the building. The encroachment was the result of a mistake. To remove the encroachment without imperiling the building would cost $3,500. If the eaves and their supporting rafters were merely cut back it would create a condition whereby water and snow would cause deterioration of the pumice stone blocks which would imperil the safety of the building. To properly remove the encroachment would require that the wall adjacent to the common boundary be moved back. This would require removing the old wall and putting in a new one. Appellants' property has a frontage of 100 feet. The value was estimated at $300 per front foot. The encroachment does not interfere with the present use of the property. A recital of these facts clearly shows that appellants are not suffering any damage and the hardship to respondents if the injunction were granted would be disproportionate to the hardship caused appellants by the encroachment. The award of $30 as damages and $300 for the easement fully compensates appellants for the slight injury caused them.

[4] Appellants contend also that the court had no power to grant an easement. However, it was within the power of a court of equity to protect respondents in the use of the building by awarding appellants damages for the encroachment and granting respondents an easement. The case of Ukhtomski v. Tioga Mutual Water Co., supra, was an action for damages and an injunction restraining defendants from using and maintaining a reservoir, where a portion of the reservoir was constructed upon a portion of plaintiffs' lands through inadvertence and mistake. The trial court gave judgment in favor of plaintiffs for damages sustained by the trespass in the sum of $762.41, refused to issue an injunction and gave to defendants an easement to maintain the reservoir and pipe lines on plaintiffs' land. On appeal the judgment was affirmed and a hearing was denied.

[5] Appellants' final contention is that the judgment appears to be based upon matters outside the record. This contention deserves little comment. Appellants rely on a statement in the judgment that "the court having been fully advised in the premises, after due deliberation and careful consideration of the evidence, supplemented by the Court's own research * * *." Appellants contend that this statement could mean that the court acted in excess of its authority by going outside the record in this case. It is clear that the statement merely meant that the court engaged in legal research and it certainly did not mean that the court considered evidence outside the record. Independent legal research by a court after a case is submitted is sometimes necessary and is to be commended.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

160 Cal.App.2d 397

Norman Nathan GRAND, William Samuel Grand, Petitioners and Appellants, Nellie Grand, Petitioner and Respondent,

v.

F. W. GRIESINGER, Real Estate Commissioner of the State of California, et al., Defendants, Respondents and Cross Appellants.

Civ. 22540.

District Court of Appeal, Second District, Division 2, California.
May 13, 1958.

Administrative mandamus proceedings to review determination of real estate commissioner revoking licenses of three real estate salesmen. The Superior Court of Los Angeles County, John J. Ford, J., affirmed determination as to two of salesmen and denied mandate but ordered determination revoking third salesman's license vacated. The two salesmen appealed and commissioner cross-appealed. The District Court of Appeal, Ashburn, J., held that where before third salesman was licensed, she had interviewed, filled out registration cards and accepted registration fees, salesman's license could be revoked.

Judgment affirmed as to the two salesmen and reversed as to third salesman.

1. Brokers 🔑3

Activities of a real estate rental agency require a broker's license as a condition to lawful operation. West's Ann.Bus. & Prof. Code, § 10131.

2. Brokers 🔑3

A licensed real estate salesman cannot operate a rental service on his own account; he must be employed by and act for a broker. West's Ann.Bus. & Prof.Code, § 10131.

3. Brokers 🔑3

Where real estate salesmen licensees, on appeal from determination of real estate commissioner revoking licenses, did not comply with rule on appeal providing that, in a brief, a statement of any matter in record shall be supported by appropriate reference to record, appellate court would presume that the record contained evidence to support every finding of fact. West's Ann.Rules on Appeal, rule 15(a).

4. Brokers 🔑4

Under statutes relating to licensing of real estate brokers and real estate salesmen, although differences in language are small, there is distinction in that a broker performs his specified services for another or others, meaning the public, while a salesman must be employed by a licensed real estate broker and although both act for compensation, salesman cannot be employed or accept compensation from any person other than the broker under whom he is at the time licensed. West's Ann.Bus. & Prof. Code, §§ 10131, 10132, 10137, 10177(d, f).

5. Brokers 🔑3

A real estate broker must exercise reasonable supervision over the activities of his salesmen or hazard the suspension and revocation of his own license. West's Ann.Bus. & Prof.Code, § 10177(h).

6. Brokers 🔑1

It is a misdemeanor, for anyone, whether obligor, escrow holder, or otherwise, to pay or deliver to anyone other than the real estate broker compensation for services within scope of statute with respect to real estate transactions. West's Ann.Bus. & Prof.Code, § 10138.

7. Brokers 🔑3

A real estate salesman cannot contract in his own name nor accept compensation from any person other than the broker under whom he is licensed; the entire statutory scheme required broker actively to conduct his brokerage business and to supervise the activities of his salesmen and precludes the salesmen from taking charge of or conducting a business such as a rental agency which requires a broker's license. West's Ann.Bus. & Prof.Code, §§ 10130, 10131, 10132, 10137, 10138, 10150, 10150.5, 10150.6, 10151, 10160, 10161, 10177(d, f, h), 10219; West's Ann.Rules on Appeal, rule 15(a).

8. Brokers 🔑3

In proceedings for review of real estate commissioner's determination revoking real estate salesmen's licenses, evidence established that licensees entered into agreements with various brokers under whom they were licensed, under terms of which they would act as managers of real estate rental offices and the salesman, not the broker, was in charge of the rental operation. West's Ann.Bus. & Prof.Code, §§ 10130, 10131, 10132, 10137, 10138, 10150, 10150.5, 10150.6, 10151, 10160, 10161, 10177 (d, f, h), 10219; West's Ann.Rules on Appeal, rule 15(a).

9. Brokers 🔑3

Where real estate salesmen licensees, acted as managers of real estate rental offices, and salesmen, not the broker, were in charge of rental operation and otherwise conducted themselves as brokers, without securing license as broker, notwithstanding licensees had agreements with broker to operate rental agency and fact that broker had registered the salesmen with Real Estate Commission, their salesmen's licenses were properly revoked. West's Ann.Bus. & Prof.Code, §§ 10131, 10132, 10137, 10138, 10150, 10150.5, 10150.6, 10151, 10160, 10161, 10177(d, f, h), 10219.

10. Brokers 🔑3

Where real estate commissioner revoked real estate salesmen's licenses of three licensees and Superior Court reversed determination as to one licensee and two licensees appealed and commissioner cross-appealed with respect to determination as to first licensee but first licensee did not file brief in response to commissioner's opening brief, first licensee admitted facts as stated by commissioner and in effect consented to a reversal of Superior Court's determination. West's Ann.Rules on Appeal, rule 17(b).

11. Stipulations 🔑14(10)

A finding made contrary to a deliberate stipulation cannot stand in the trial court or upon appeal.

12. Stipulations 🔑14(10)

Where stipulation indicated that real estate salesman licensee received compensation in connection with a real estate rental service prior to the time that she was licensed, real estate commissioner, on appeal from determination of Superior Court reversing commissioner's revocation of her license, was justified in relying on stipulation as proof of receipt of compensation. West's Ann.Bus. & Prof.Code, § 10131.

13. Brokers 🔑3

Where husband was licensed as real estate salesman and made contract with real estate broker to operate a rental service in connection with real estate agency and agreement provided that the sole responsibility of rental service was to be in salesman, salesman's wife could not help husband operate rental business for a net profit without a salesman's license and, even though wife later acquired license, her license could be revoked. West's Ann.Bus. & Prof.Code, § 10131.

14. Brokers 🔑3

Where real estate salesman, who had license, conducted real estate rental service but did not conduct such service in connection with a real estate broker, individual, who did not have salesman's license, could not open bank account, in which proceeds of rental business were deposited and in connection with which only salesman and individual were authorized signatories, without violating laws with respect to real estate licensing. West's Ann.Bus. & Prof. Code, § 10131.

15. Brokers 🔑3

Individual, who without obtaining any license, interviewed, filled out registration cards and accepted registration fees violated law with respect to real estate licensing, even assuming individual's husband had a broker's license, since individual's activity was not purely clerical and routine and could not be performed by one who did not hold a real estate license. West's Ann.Bus. & Prof.Code, §§ 10131, 10132.

16. Brokers ⚿3

Statute authorizing real estate commissioner to revoke real estate salesmen's licenses authorized revocation for conduct antedating application for license. West's Ann.Bus. & Prof.Code, §§ 10101, 10157, 10176, 10177 and subds. (a, d, f).

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Francis C. Jones, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., for respondents and cross appellants.

ASHBURN, Justice.

The Real Estate Commissioner, after charges made and hearing duly had, ordered revocation of the respective licenses of Norman Nathan Grand, William Samuel Grand and Nelly Grand [1] as real estate salesmen. Upon review through administrative mandamus the superior court upheld the ruling as to Norman and William and denied mandate; they appeal from the ruling. As to Nelly Grand the court held that the findings were not supported by the weight of the evidence and accordingly adjudged that the order revoking her license as real estate salesman be vacated, and that a peremptory writ be issued to that end. From this ruling the commissioner takes a cross-appeal.

Appeal of Norman Grand and William Grand

[1, 2] There is little dispute about the facts for most of them are covered by a written stipulation filed at the hearing before the commissioner. Each of the Grands had a real estate salesman's license. Norman's dated from July 1, 1952, William's from June 2, 1953, and Nelly's from March 18, 1954. None of them ever had a broker's license. Their activities concerned real estate rental agencies, which have been held to fall within the terms of § 10131, Business & Professions Code. So far as pertinent it provides: "A real estate broker * * * is a person who, for a compensation, * * * rents, or places for rent, or collects rent from real estate, or improvements thereon, for another or others." It has been held that the activities of such an agency require a broker's license as a condition to lawful operation (Dyer v. Watson, 121 Cal.App.2d 84, 89, 262 P.2d 873; 18 Op.Cal.Atty.Gen. 191). The commissioner's findings describe such activities as follows: "[T]hat the business of said rental agency consisted, generally, of procuring information from landlords about places that were available for rent and of selling service to registered clients for a fee, the service consisting of making available to the clients information concerning rental vacancies, as the information then appeared in the records of the rental agency." A salesman cannot operate such a rental service on his own account; he must be employed by and act for a broker.

Norman Grand was licensed as a salesman under William C. Banta from August 19, 1952 to March 31, 1953. He then transferred his license to Ellen L. Noy, another broker, and remained so licensed until January 28, 1954; about May 19, 1954, he became licensed as a salesman under Oscar D. Ballew, another broker.

Prior to employment by any broker Norman operated such a rental service under the name "Guaranteed Rental Service" for about three weeks in August, 1952. Having discovered that operation to be illegal he made a joint venture agreement with broker Banta whereby he acquired a two-thirds interest in Banta's business, known as "The Guaranteed Rental Service." The agreement required Grand to assume complete responsibility for the business, operational costs being shared pro rata. All proceeds of the business were to be deposited in a bank, subject to withdrawal on the signatures of both parties. Banta's name was on the window. This operation

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[1] The first name of this defendant is spelled Nelly and Nellie throughout the proceedings herein.

—from August, 1952 to April 1, 1953—led to bankruptcy of Norman.

On April 1, 1953, he made an agreement with broker Ellen L. Noy, to operate a rental service under the name of Security Realty Service, paying her 25 per cent of the net income and agreeing to protect her "from any and all added responsibilities and incurred costs of this department." Norman operated rental services for Mrs. Noy in four different localities. She testified, in part:

> "Q. Then the operation of the office was to be under your direction then, is that correct? A. At my office, but the rental department entirely under his—
>
> "Q. Didn't you intend to supervise its direction? A. It was not my job—he was there all the time.
>
> "Q. And was entirely under his contract? A. He was in complete charge of it.
>
> "Q. That's right, but you nevertheless were the directing broker that controlled the office. A. That was one of the services that I put out in my office, but he was the manager of it and separate contractor on it."

This continued from April 1, 1953 to January 16, 1954, and Mrs. Noy testified that "he was on a vacation most of the time." Late in April he went with Nelly (whose name then was Ferrera) on a visit to Mexico, which seems to have been a honeymoon trip for them. He left his father William, his mother Verna, and his brother Howard in charge of the rental service. William had no salesman's license to operate under Mrs. Noy until June of 1953, and the other two were not licensed at all.

In November, 1953, a new contract was made with Mrs. Noy. Norman and Nelly are named as "second party" therein. It provides that Mrs. Noy "will continue to permit the second party to operate a rental service under the fictitious name 'Security Realty', which name is duly licensed to the first party by the State of California Real Estate Commission;" also, "that all bills, debts, wages, rental service complaints, management, and control of above operation to be the sole responsibility of the second party, in so far as Real Estate Law of the State of California permits;" that Mrs. Noy should have ten per cent of the net profit and the second party 90 per cent thereof. Norman was in complete charge of this rental service so far as Mrs. Noy was concerned, but Nelly was helping him to operate. Norman testified that he divided the profits with William. Because of debts owing her from Norman and Nelly, Mrs. Noy took over the Whittier rental office in January, 1954. The Commissioner found in this connection: "That during said periods said respondent Norman Nathan Grand deposited funds received in the operation of the respective rental agencies into bank accounts; that these said accounts provided for withdrawals by the said respondent only; that he assumed to pay all expenses incurred in connection with these said agencies; that he had full authority and did exercise full authority to employ and discharge personnel needed to assist him in his business, to compensate such personnel and to pay all other expenses incurred in said businesses," and the trial court held the finding to be supported by the weight of the evidence.

The Commissioner also found that Norman, during the months of May to August, inclusive, of 1953, employed Verna Grand, his mother, in the business; that she in 158 specific instances "interviewed, determined their needs, filled out registration cards and accepted registration fees from prospective tenants and clients;" that she had no license whatever and the fact was known to Norman. It was also found that Nelly was employed by Norman and did the same type of work during a period when she had no license, as Norman knew.

William Grand, the father, made an agreement with broker Oscar D. Ballew in December, 1953, for operation of a rental business under the name "Select Realty," Grand to be responsible for all expenses and to handle all receipts and to pay Ballew ten per cent of the profit derived from the rental business. Ballew worked for the telephone company every day except Saturday and Sunday, and was in the office only on those days. William testified: "A. Yes, after I resigned with Mrs. Noy I did have Mr. Ballew for a couple of months—he was in the office and had desk space. I opened up the Select Realty with him as my broker in San Gabriel." The Commissioner further found that William employed Howard Grand to interview prospective renters, etc., during the period from July 15 to November 1, 1954; that Howard had no license, as William knew, and that he received compensation from William for said services; also, that William's wife Verna was employed and acted for him in the same capacity, she having no license and William being cognizant of that fact. Commissioner's finding XXIV says: "That the interviewing of prospective renters, determining their needs, completing registration cards, and accepting fees from these prospective renters for the purpose of giving them information concerning places available for rent, was and is a real estate activity requiring a real estate broker or salesman license under the provisions of Sections 10131 and 10132 of the Business and Professions Code of the State of California." By way of "determination of issues" the Commissioner further found that each of the three respondents "was and is in violation of Sections 10130, 10131, 10137, 10177(d) and 10177(f), Business and Professions Code of the State of California."

[3] Though counsel for appellants Norman and William Grand repeatedly asserts insufficiency of the evidence, his brief does not comply with the rule or the authorities governing such a claim. Rule 15(a) of the Rules on Appeal requires: "Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings need not be technical 'assignments of errors' but should be concise headings which are generally descriptive of the subject matter covered. The statement of any matter in the record shall be supported by appropriate reference to the record. * * *" Appellants have not complied with these requirements. Nor has counsel furnished adequate basis for a review of the evidence. "The rule is well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. Kruckow v. Lesser, 111 Cal.App. 2d 198, 200, 244 P.2d 19. It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. The reviewing court is not called upon to make an independent search of the record where this rule is ignored. Goldring v. Goldring, 94 Cal.App.2d 643, 645, 211 P.2d 342." McCosker v. McCosker, 122 Cal.App.2d 498, 500, 265 P.2d 21, 22. "A claim of insufficiency of the evidence to justify findings, consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration, when it is apparent, as it is here, that a substantial amount of evidence was received on behalf of the respondents. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner." In re Estate of Palmer, 145 Cal.App.2d 428, 431, 302 P.2d 629, 631. See, also, 3 Witkin California Procedure, § 149, p. 2330.

Appellants' counsel actually has shown that the claim of insufficiency of the evidence is not a substantial one, for the opening brief says: "Through oral and documentary evidence it was established that the Appellants entered into agreements either oral or written with various brokers under whom they were licensed, under the terms of which, they would act as managers of real estate offices operated under a fictitious name or otherwise which were duly registered with the Real Estate Commission, as the office of the particular broker and naming the Appellants as salesmen and naming the broker as the responsible broker. Under these agreements the Appellants were to accept the responsibility of the management of the office, the hiring and firing of employees, the banking of the receipts of the real estate office, the payment of the bills from the proceeds thereof, maintenance of bank accounts in the names of the Appellants and the placing of advertising in the various newspapers, charging the cost thereof on some occasion to the Appellants."

The gist of appellants' contention is a claim that the judgment is against law in that it is not supported by the findings. The argument runs as follows: "Appellants contend that with the registration of a licensed salesman with the Real Estate Commission by a duly licensed broker, wherein the broker names himself as the responsible broker under the Real Estate Law, as set forth in the Business and Professions Code, that thereafter the salesmen could not be charged with acting as a broker unless, his acts complained of were without the knowledge or without the consent of the broker. The mere assumption of responsibility which has been accepted by the salesman at the direction of the broker could certainly never be construed to mean that the salesman is attempting to act as a broker for the very obvious reason that a salesman accepting authority delegated to him by the broker as manager of the office would be in constant peril of the loss of his license. Under Sections 10131 and 10132 of the Business and Professions Code it will be noted that the duties and capacity of a broker and a salesman are identical excepting a salesman must be employed by a broker, therefore the salesman has the power and authority to do anything that a broker can do except that he must perform the acts as an employee of the broker." It rests upon a misconception drawn from the similarity of language used in §§ 10131 and 10132, Business and Professions Code.

[4] Section 10131, at the time pertinent to these proceedings, defined the term "Real estate broker" as follows: "A real estate broker within the meaning of this part is a person who, for a compensation, sells or offers for sale, buys, or offers to buy, lists, or solicits for prospective purchasers, or negotiates the purchase or sale or exchange of real estate, or who, for compensation, negotiates loans on real estate, leases, or offers to lease, or negotiates the sale, purchase, or exchange of leases, rents, or places for rent, or collects rent from real estate, or improvements thereon, for another or others." Section 10132 defined real estate salesman: "A real estate salesman within the meaning of this part is a natural person who for a compensation is employed by a licensed real estate broker to sell, or offer for sale, or to list, or to buy, or to offer to buy, or to negotiate the purchase or sale or exchange of real estate, or to solicit for prospective purchasers of real estate, or to negotiate a loan on real estate, or to lease, or to negotiate the sale, purchase or exchange of leases, or offer to lease, rent or place for rent, any real estate, or improvements thereon." The differences in language are small, but the divergence in import is large. A broker performs the specified services "for another or others," meaning the public, while a salesman must be "employed by a licensed real estate broker". Both act for compensation, but the salesman cannot "be employed by or accept compensation from any person other than the broker under whom he is at the time licensed." Section 10137.[2]

[5] In order to obtain a salesman's license one must present "the recommendation of the broker who is to be his employer, certifying that the applicant is honest, truthful and of good reputation." Sec. 10151. This is all he needs except

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[2] All section references herein relate to the Business and Professions Code.

to pay a small fee and pass the required examination, which is less exacting than the one given to a prospective broker. When a salesman's application is granted his license goes into possession of his broker-employer and there remains until cancelled or the salesman leaves the employ of the broker. Sec. 10160. When one of these events occurs the license goes not to the salesman, but to the Commissioner for cancellation. Sec. 10161. When the salesman makes a contact with a new broker the process is repeated. Sec. 10219. The broker must "exercise reasonable supervision over the activities of his salesmen" or hazard the suspension or revocation of his own license (§ 10177(h)). A salesman can graduate into the status of broker only after arriving at the age of 21 (10 Cal.Administrative Code § 2720); a salesman's license can issue at age 18 (10 Cal. Administrative Code § 2750); a broker must be a citizen of the United States (§ 10150.5), although this is not true of a salesman.

The applicant for broker's license must have had two years experience as a salesman, or "at least the equivalent of two years' general real estate experience or graduation from a four-year college or university course, which course included specialization in real estate." Sec. 10150.6. He must be recommended by two real estate owners of the county of his residence or business, "certifying that the applicant is honest, truthful and of good reputation, and recommending that a real estate broker's license be granted to him." Sec. 10150. He must also be approved by a committee of not less than three members of the State Real Estate Board. Sec. 10150.6.

[6, 7] It is evident that brokers and salesmen belong in distinctly different categories and that the broker, because of his superior knowledge, experience and proven stability is authorized to deal with the public, contract with its members and collect money from them; the salesman, on the other hand, is strictly the agent of the broker. He cannot contract in his own name (Tatterson v. Standard Realty Co., 81 Cal.App. 23, 29, 253 P. 770; Weber v. Tonini, 151 Cal.App.2d 168, 170–171, 311 P.2d 132; 9 Cal.Jur.2d § 70, p. 227), nor accept compensation from any person other than the broker under whom he is licensed; it is a misdemeanor for any one, whether obligor, escrow holder, or otherwise, to pay or deliver to any one other than the broker compensation for services within the scope of the act. Sec. 10138. The entire statutory scheme requires the broker actively to conduct his brokerage business and to supervise the activities of his salesmen. It precludes a salesman from taking charge of or conducting a business such as a rental agency which requires a broker's license.

[8, 9] The revocation of the licenses of Norman and William Grand was clearly justified by the facts and applicable law.

Cross-Appeal of Real Estate Commissioner.

The Commissioner appeals from the portion of the judgment in favor of Nelly Grand. The ruling seems to be based upon a finding "that the Commissioner's Findings, to the extent that they find that Nelly Grand acted as a real licensee for compensation, are not supported by the weight of the evidence; and to that extent the Real Estate Commissioner has abused his discretion to the prejudice of Nelly Grand."

[10] The brief of appellants Norman Grand and William Grand says: "As the lower court ruled in favor of Nelly Grand, and directed that the order made revoking the license of the said Nelly Grand be vacated and set aside, the entire statement of facts and argument will concern themselves only with these Appellants no further reference will be made to any evidence concerning the said Nelly Grand." No brief in response to cross-appellants' opening brief was filed on behalf of Nelly Grand. Thereby she admitted the facts to be as stated by cross-appellants, and in effect consented to a reversal. See, Rule 17(b) of Rules on Appeal; Postin v. Griggs, 66 Cal.App.2d 147, 148, 151 P.2d 887; Guardianship of Brazeal, 117 Cal.App.2d 59, 60,

254 P.2d 886; Wantz v. Union Bank & Trust Co., 137 Cal.App. 98, 102, 29 P.2d 882, 31 P.2d 826; 4 Cal.Jur.2d § 487, p. 323; 3 Witkin California Procedure, § 154, p. 2340.

The Attorney General's brief relies in part upon the claim that it was stipulated that Nelly Grand did act as a real estate licensee for compensation. The written stipulation which was filed at the Commissioner's hearing says: "[T]hat the following facts and allegations in said Amended Accusation are true and that no further proof will be required thereof." Paragraph VI of the stipulation says: "That the year in Line 16 of Paragraph VIII is changed to '1953' instead of '1954', and further, in Line 17 of the same paragraph, that the word 'respondent' may be stricken." Fairly construed this was an adoption of said paragraph VIII as corrected. Said paragraph VIII, to which reference is thus made, reads: "That during the month of April 1954 respondent Norman Nathan Grand had in his employ his brother, respondent Howard Grand, his mother, Verna Grand, and respondent Nelly Ferrera, who is now his wife and known as Nelly Grand; that each and all of said persons negotiated with prospective tenants and with landlords in said rental business and received compensation therefor from respondent Norman Grand; that each and all of said persons were not then licensed as real estate salesmen."

[11, 12] Paragraph IX of the stipulation relates to paragraph XII of the amended accusation, which paragraph does not mention the subject of compensation. Paragraph IX of the stipulation in its present condition is as follows: "As to Paragraph XII that Nellie Grand, wife of respondent Norman Grand, then known as 'Nellie Ferrera', while employed by respondent Norman Grand ~~for a compensation therefor,~~ and while not licensed by the Division of Real Estate, interviewed, filled out registration cards, and accepted registration fees from the persons and on the dates so indicated, beginning on Line 22 in said paragraph." The striking of the words "for a compensation therefor" may be explained as the correction of an inadvertence, inasmuch as paragraph XII of the accusation makes no such allegation. Had the attorneys intended to negative the receipt of compensation they normally would not have stopped with elimination of "for a compensation therefor" but would have substituted the word "without" for the word "for." They also probably would have made a change in the stipulation concerning paragraph VIII of the accusation had they been bent on saying that Nelly had acted without compensation. We conclude that the Attorney General's reliance upon the stipulation as proof of receipt of compensation by Nelly is justified. Of course, a finding made contrary to a deliberate stipulation cannot stand in the trial court or upon appeal. Capital National Bank of Sacramento v. Smith, 62 Cal.App.2d 328, 343, 144 P.2d 665; Munger & Munger v. McBratney, 131 Cal.App.2d Supp. 866, 868, 280 P.2d 232; Haese v. Heitzeg, 159 Cal. 569, 575, 114 P. 816; Steele v. Steele, 132 Cal.App.2d 301, 303, 282 P.2d 171; 23 Cal.Jur. § 12, p. 828. But the Commissioner's appeal has additional substantial basis.

[13] On November 22, 1953, Norman and Nelly made the above mentioned contract with Mrs. Noy which reduced her compensation to ten per cent of the net profit and expressly permitted Norman and Nelly to operate the rental service under the name "'Security Realty', which name is duly licensed to the first party [Noy]." The Grands were to have full management and control and were to receive 90 per cent of the net profit. They did carry on the business together. Nelly at that time had no license whatever. Obviously the business was conducted for compensation, and it was unlawfully conducted so far as Nelly was concerned because she was not licensed at all.

[14] During an earlier period of operation of "Guaranteed Rental Service" in August of 1952, when Norman was confessedly operating without the blessing of any

broker's name, Nelly opened a bank account where portions of the proceeds of the business were deposited, and the only authorized signatures were those of Norman and Nelly. This was an activity which was unlawful when conducted by her without any license.

[15] In 1953 and early 1954, before obtaining any license, Nelly "interviewed, filled out registration cards, and accepted registration fees from the persons" specified in paragraph XII of the amended accusation, 21 specific instances. It was so stipulated. This was another series of violations of the law.

In arguing the appeal of Norman and William their counsel asserts that activities such as those just mentioned are purely clerical and routine and may be performed by one who does not hold any license. The above cited ruling of the Attorney General (18 Op.Cal.Atty.Gen. 191 (1951)) quotes the Real Estate Commissioner's description of rental agencies as follows: "'(They) * * * solicit listings of vacancies for rent through classified advertisements in local newspapers, also via telephone. Upon receipt of information thus solicited, they assemble and classify it and then advertise it for sale at a fixed fee which they refer to as a "registration fee" usually in the amount of $5.00 (although it ranges up to $25.00). They apparently have no active or direct connection with bringing landlord and tenant together. It appears that they do not introduce landlords and potential tenants to each other or take part in any of the actual negotiations, such as discussions and settlement of the terms of any rental or leasehold transaction, and contend that they do not act as agents for either the owner or tenant and receive no compensation whatever except the registration fee. Their activities are apparently limited to office bookkeeping and clerical work. They do no field work, but sit in their offices, awaiting responses to classified advertisements they run in local newspapers which proclaim that they have an abundance of low-rent vacant rentals available in all sections of the city that will be furnished applicants upon payment of the required "registration or service charge fee."'" Substantially the same set of facts was held in Dyer v. Watson, supra, 121 Cal.App.2d 84, 89, 262 P.2d 873, to require a broker's license. The written stipulation at bar shows that Nelly did all of these things except soliciting listings of vacancies, assembling and classifying the information and then advertising it for sale. Her work was a part of a broker's function, and she was required under the law to have a broker's or salesman's license. If Norman had had a broker's license, that would not have been enough to cover Nelly's activities. "No real estate license gives authority to do any act specified in this chapter to any person, other than the person to whom the license is issued." Sec. 10157.

[16] Section 10177, as amended in 1953, provided that the Commissioner may suspend or revoke the license of any real estate licensee who has done any of the following: "(d) Wilfully disregarded or violated any of the provisions of the Real Estate Law or of Chapter 1 of Part 2 or of the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 of Part 2. * * * (f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license." Stats.1953, Ch. 762, § 3, p. 2027. Clearly, Nelly had violated the act prior to the issuance of a saleman's license to her in 1954, and had so conducted herself as to have warranted a denial of her application had the Commissioner been apprised of her previous conduct. The language of subdivision (f) carries an implication that it covers acts antedating the application for a license; conduct occurring after issuance thereof could not in the nature of things have brought about a denial of the application.

That the provisions of § 10177 are not confined to acts committed while holding a license appears from a comparison of that section with § 10176. The latter sets forth nine different categories of conduct which may bring about suspension or revocation of license. Prior to amendment of 1953 the right to administer such discipline under § 10176 was limited to the doing of proscribed acts "while a real estate licensee." The amendment of 1953 (Stats.1953, Ch. 762, § 2, p. 2025) made certain changes in the section, but the phrasing "while a real estate licensee" was retained therein. By way of contrast, section 10177, which specifies additional grounds for suspension or revocation, contained this general language prior to 1953: "The commissioner may suspend or revoke the license of any real estate licensee, who within three years immediately preceding has done any of the following." By that year's amendment (Stats.1953, Ch. 762, § 3, p. 2026), the three-year limitation was removed (i. e. transferred to § 10101) but the introductory language was not otherwise changed. This section did not contain the words "while a real estate licensee" either before or after 1953. The context of subdivisions (a), (d) and (f) [3] indicates, as does the introductory language, that § 10177 includes conduct violative of the act though occurring before the issuance of the license which is the subject of a particular suspension or revocation.

In Hall v. Scudder, 74 Cal.App.2d 433, at page 437, 168 P.2d 990, at page 992, the court said: "Once *the* license is issued, the licensee becomes subject to disciplinary procedure as to his acts and conduct committed while he is a real estate licensee and 'within the immediately preceding three years.'" Colonial Liquor Distributors v. O'Connell, 295 N.Y. 129, 65 N.E.2d 745, is persuasive. It dealt with revocation of a liquor license based upon conduct occurring prior to the license period and under a procedure containing the following: "'2. A license *may be* revoked for any of the following causes: * * * "(c) Violation of any provision of Chapter 478 of the Laws of 134 [sic] known as the Alcoholic Beverage Control Law."'" 65 N.E.2d at page 748. The court said in 65 N.E.2d at page 749: "The question of law presented is whether a license may be revoked for violations which occurred in a prior licensing period and were not discovered by the Authority until after the issuance of the license sought to be revoked. On can of course conceive of a situation in which a revocation for a long past offense would be an abuse of the Authority's discretion but clearly this is not such a case." And in 65 N.E.2d at page 750: "The regulation authorized by statute specifies as cause for revocation 'Violation of any provision of the Alcoholic Beverage Control Law', and we may not limit the regulation by an absolute rule that no violation occurring before issuance of a renewal license is cause for revocation thereof. In this case the violations were of such a character and were so closely identified in time and circumstance with the business under regulation that we may not say that the revocation was without authority or in any way an abuse of regulatory power."

Because of her violations of the act prior to her application for a license the Commissioner properly could have denied Nelly's application. "In these cases all that is required is that the Commissioner have reasonable grounds to conclude that the applicant does not meet the conditions set forth in the statute." Glick v. Scudder, 69 Cal.App.2d 717, 719, 160 P.2d 90, 91.

We have concluded that, for the reasons above stated, the granting of mandate as to Nelly Grand was erroneous.

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[3] Sec. 10177 (Stats.1953, Ch. 762, § 3, pp. 2026–2027):

"(a) Procured a real estate license, for himself or any salesman, by fraud, misrepresentation or deceit, or by making any material misstatement of fact in an application for a real estate license."

"(d) Wilfully disregarded or violated any of the provisions of the Real Estate Law or of Chapter 1 of Part 2 or of the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 of Part 2."

"(f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license."

The judgment is affirmed as to Norman Grand and William Grand and reversed as to Nelly Grand, who is named as Nellie Grand in the judgment herein.

FOX, P. J., and HERNDON, J., concur.

160 Cal.App.2d 700

In the Matter of Tracy Lurene GANO, a person under the age of 21 years.

Chester E. ANDERSON and Ida Minnie Anderson, Petitioners and Respondents,

v.

Donald Elmer GANO and Ila Lurene Gano, Citees and Appellants.

Civ. 22604.

District Court of Appeal, Second District, Division 1, California.

May 21, 1958.

Rehearing Denied June 16, 1958.

Hearing Denied July 16, 1958.

Aunt and uncle, in whose custody minor child had been left by parents, brought abandonment proceedings against parents to have the child declared free from custody and control of the parents so that aunt and uncle could adopt the child. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered an order denying a motion of the parents for nonsuit and entered a judgment declaring the child to be free from the custody and control of the parents, and the parents appealed from the order and judgment. The District Court of Appeal, Lillie, J., held that evidence sustained finding that there had been abandonment by parents of child within meaning of provision of Welfare and Institutions Code that a minor, who has been left in care and custody of another without any provision for his support or without communication from either or both of his parents for period of one year with intent on part of such parent or parents to abandon him, shall be deemed abandoned and be declared free from such parental control.

Attempted appeal from order dismissed, and judgment affirmed.

1. Infants 🔑16.8

In proceeding under Welfare and Institutions Code to have minor child declared free from custody and control of parents, on ground that child has been abandoned by parents, every intendment should be made in favor of maintaining natural relation of parent and child. West's Ann.Welfare & Inst.Code, § 701 (a).

2. Appeal and Error 🔑989, 994(3), 996

Reviewing court will not re-evaluate credibility of witnesses, reweigh the testimony, or draw inferences contrary to those drawn by the trial court.

3. Appeal and Error 🔑931(1)

A reviewing court must accept as true all evidence tending to establish correctness of findings of trial judge.

4. Appeal and Error 🔑931(1)

All conflicts in evidence must be resolved by reviewing court in favor of respondents, and all legitimate and reasonable inferences must be indulged in to uphold the judgment.

5. Appeal and Error 🔑989

Whenever a finding or judgment of trial court is attacked on appeal as being unsupported, power of reviewing court begins and ends with determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusions reached by trial court.

6. Appeal and Error 🔑931(1), 989, 1010(1)

All evidence which is most favorable to respondents must be accepted as true and that which is unfavorable must be discarded by reviewing court as not having sufficient verity to be accepted by the trier of fact, and if evidence, so viewed, is sufficient as a matter of law, judgment must be affirmed.

7. Infants ⚷16.15

"Abandonment" and "intent" under provision of Welfare and Institutions Code that a minor, who has been left in care and custody of another without any provision for his support or without communication from either or both of his parents for period of one year with "intent" on part of such parent or parents to "abandon" him, shall be deemed "abandoned" and be declared free from such parental control are questions of fact for trial judge. West's Ann.Welfare & Inst.Code, § 701(a).

8. Infants ⚷16.15

Reviewing court is not empowered to disturb decree adjudging that a minor is an abandoned child and that there was intent by parents to abandon child within meaning of provision of Welfare and Institutions Code that a minor, who has been left in care and custody of another without any provisions for his support or without communication from either or both of his parents for period of one year with intent on part of such parent or parents to abandon him, shall be deemed abandoned and be declared free from such parental control, if evidence is legally sufficient to support finding of fact as to the abandonment. West's Ann.Welfare & Inst.Code, § 701(a).

9. Infants ⚷16.8

Presumption under section of the Welfare and Institutions Code providing that a minor, who has been left in care and custody of another without any provisions for his support or without communication from either or both of his parents for period of one year with intent on part of such parent or parents to abandon him, shall be deemed abandoned and be declared free from parental control, and that such failure to provide or such failure to communicate for one year shall be presumptive evidence of intent to abandon, is a rebuttable presumption and may be overcome by opposing evidence. West's Ann.Welfare & Inst.Code, § 701(a).

10. Infants ⚷16.15

Question whether intent to abandon has existed for one year within meaning of provision of the Welfare and Institutions Code that a minor, who has been left in care and custody of another without any provision for his support or without communication from either or both of his parents for period of one year with intent on part of such parent or parents to abandon him, shall be deemed abandoned and be declared free from such parental control, is a question for trial judge. West's Ann.Welfare & Inst.Code, § 701 (a).

11. Infants ⚷16.1

Fact that father may have been emotionally upset when he gave custody of minor child to aunt and uncle of child did not make the father's act of relinquishing custody involuntary under the law and did not prevent operation of provision of Welfare and Institutions Code that a minor, who has been left in care and custody of another without any provision for his support or without communication from either or both of his parents for period of one year with intent on part of such parent or parents to abandon him, shall be deemed abandoned and be declared free from such parental control. West's Ann.Welfare & Inst.Code, § 701(a).

12. Infants ⚷16.1

Fact that work of father of minor child may have precluded father from personally caring for the child, the custody of which he turned over to aunt and uncle, did not constitute "coercion" or "undue influence" which would prevent operation of provision of Welfare and Institutions Code that a minor, who has been left in care and custody of another without any provision for his support or without communication from either or both of his parents for period of one year with intent one part of such parent or parents to abandon him, shall be deemed abandoned and be declared free from such parental control. West's Ann.Welfare & Inst.Code, § 701(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Coercion" and "Undue Influence".

13. Infants ⚿16.8

Evidence sustained finding that there had been abandonment by parents of minor child, who had been left with aunt and uncle within meaning of provision of Welfare and Institutions Code that a minor, who has been left in care and custody of another without any provision for his support or without communication from either or both of his parents for period of one year with intent on part of such parent or parents to abandon him, shall be deemed abandoned and be declared free from such parental control. West's Ann.Welfare & Inst.Code, § 701(a).

14. Infants ⚿16.8

Evidence sustained trial court's finding that parents of minor child, whose custody had been given to aunt and uncle, with intent to abandon child had made only token communication regarding the child within meaning of provision of the Welfare and Institutions Code that if, in opinion of court, evidence indicates that either or both parents have made only token efforts to support or communicate with child, court may declare child abandoned by such parent or parents. West's Ann.Welfare & Inst.Code, § 701(a).

15. Appeal and Error ⚿105

Order denying motion for nonsuit is not appealable, though it may be reviewed on appeal from the judgment.

◆

Frederick A. Kepka, Long Beach, for appellants.

Bentson & Blumberg, Long Beach, for respondents.

LILLIE, Justice.

This is an appeal by the natural parents, Donald Elmer Gano and Ila Lurene Gano, from a judgment declaring their minor child, Tracy Lurene Gano, to be free from their custody and control.

The respondents, Chester E. Anderson and his wife, are the brother and sister-in-law of the natural mother. They acquired the minor child on June 12, 1955, in Washington. Seeking to adopt her, respondents commenced abandonment proceedings thirteen months thereafter by filing a petition under Section 701, subdivision (a) of the Welfare and Institutions Code. It was heard on February 4, 1957. Appellants' motion for a nonsuit was denied. The trial court found that "* * * Tracy Lurene Gano, has been left in the custody of another by her parents for more than one year prior to the filing of petition herein without provision for her support or maintenance and with only token communication from her said parents with intent of said parents to abandon said person." The judgment, entered February 13, 1957, declared Tracy to be free from the custody and control of her parents. From the judgment and the order denying their motion for a nonsuit the natural parents have appealed.

Their main point on appeal is that the evidence was insufficient to justify the court's finding that the natural father and mother left their child in the custody of another for more than one year without provision for her support and with intent to abandon her. They further urge that the trial court abused its discretion in finding that the parents made only token communication regarding the child and that the evidence was insufficient to justify the finding. To be considered also is appellants' contention that as a matter of law there was no abandonment and the trial court erred in denying appellants' motion for nonsuit.

Donald Gano and his wife, Ila, appellants herein and residents of Montana, have four children including Tracy. In June, 1955, they lived in Othello, Washington, with their two children, Christine and Tracy. During an argument Donald forceably evicted Ila from the family trailer and took the children to his parents. A week later, his wife not having returned, Donald telephoned Ila's sister Florence and told her that she would have to take the children or he would give them to the welfare authorities. Florence wanted Christine but not Tracy, who was then seven months old. She contacted her brother, Chester Anderson, also a brother of Ila and asked him and his wife, respondents herein, to take her.

On June 12, 1955, three days after Donald called Florence, she and the Andersons drove to Othello to see him. After talking at length with him about Ila, Christine and Tracy, he again told them that if they did not take the children he would turn them over to the welfare authorities. Later in his father's trailer Florence and respondents told Donald they wanted to raise the children as their own on a permanent basis and would not take them under any kind of a temporary arrangement. Twice that morning Donald told Anderson that he wanted him to adopt Tracy and raise her as his own; that he didn't want her to know who her mother and father were and that although he wanted visitation privileges he didn't want to visit her for a year or two.

They then went to the office of Fred Shelton, a lawyer known to appellants but unknown to respondents, to have him prepare an agreement whereby Donald would relinquish custody of the two children for adoption. Anderson in the presence of Donald told the facts to Shelton and advised him he was leaving for Philadelphia to attend Navy school and wanted a custody agreement for the future adoption of Tracy and to protect him in case of a misunderstanding. Later in the day they returned to sign the agreement. At that time respondents took Tracy and several days later left for Philadelphia where Anderson attended Navy school for six months. During this time they lived across the river in Thorofare, New Jersey. Respondents since then have corresponded with Florence and other members of the family about once a month.

In July, 1955, respondents received a letter from Ila, the contents of which they could not recall but to which Anderson replied on July 30, 1955. Both Mr. and Mrs. Anderson testified that this was the only communication they ever received from appellants and that at no time had they received any other letters, cards or communication from them. They also denied having received any gifts or support from appellants on behalf of Tracy. In December, 1955, respondents were transferred to Long Beach where they now reside. When they moved from New Jersey they left their forwarding address.

On March 20, 1956, respondents' attorney Myron Blumberg of Long Beach directed a letter to Donald's father advising him that abandonment proceedings were about to be commenced and asked for Donald's address. To this letter they received no answer from appellants, nor did they receive any reply to Mr. Blumberg's letter to appellants dated May 3, 1956, wherein he told them of the Anderson's intention to adopt Tracy, or to the citation directed to them September 27, 1956.

Ila testified that immediately after leaving Donald she went to their lawyer Fred Shelton and asked him to draw up some papers "so I could have my kids." Ten days later she returned and was told by him that he had forgotten to prepare them and that Donald had transferred the children's custody. Shortly thereafter she and Donald reconciled and on June 18, 1955, they went to Florence's home and got Christine. Donald did not mention Tracy but Ila told Florence: "I could not give up Chrissie, but I don't want Tracy." Prior to that date Ila told Florence that Tracy had been sickly since her birth and she would like to have someone else care for her. Ila further testified that she wrote to Anderson in July, 1955, and asked for Tracy, and in December sent a package of toys, which Donald mailed. Donald at no time personally communicated with the Andersons or Tracy, either in New Jersey or Long Beach. Florence, in addition to corresponding with the Andersons, wrote to appellants once a month and saw them in her home at various times since June 18, 1955. During these visits Ila made little mention or inquiry of Tracy; Donald made none.

[1, 2] Appellants claim that there was not sufficient evidence upon which the court could base its finding that both parents left Tracy for more than one year in the custody of another without provision for her support with intent to abandon her. This court is familiar with the general rules set forth in the cases cited by appellants and more particularly with the fundamental principle that in an adversary proceeding of this kind every intendment should be made in favor of maintaining the natural relation of parent and child. However, appellants in their argument overlook the substantial evidence in the record pointing to the conduct of each parent during the period in question, reflecting their clear intention to abandon Tracy to respondents; the well-known principle of law that the reviewing court will not re-evaluate the credibility of the witnesses, reweigh the testimony, or draw inferences contrary to those drawn by the trial court; and the wealth of cases decided under Section 701(a) of the Welfare and Institutions Code holding that the matter of abandonment and intent is one of fact for the trial court to determine.

[3–6] A reviewing court must accept as true all evidence tending to establish the correctness of the findings of the trial judge. All conflicts in the evidence must be resolved in favor of the respondents and all legitimate and reasonable inferences must be indulged in to uphold the judgment. It is well settled that whenever a finding or judgment of the trial court is attacked as being unsupported, the power of the reviewing court begins and ends with the determination of whether there is any substantial evidence, contradicted or uncontradicted which will support the conclusions reached by the trial court (Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157). All evidence most favorable to respondents must be accepted as true and that which is unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed (In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384).

[7, 8] That abandonment and intent under Section 701(a) of the Welfare and Institutions Code are questions of fact for the trial judge is well established. His decision, when supported by substantial evidence, is binding upon the reviewing court. An appellate court is not empowered to disturb a decree adjudging that a minor is an abandoned child if the evidence is legally sufficient to support the finding of fact as to the abandonment (In re Welch, 108 Cal.App.2d 466, 238 P.2d 1031; In re Adoption of Ayers, 116 Cal.App.2d 55, 253 P.2d 65). This is true, also, on the question of intent. In re Jones, 131 Cal.App.2d 831, 281 P.2d 310.

Section 701(a) of the Welfare and Institutions Code in part provides that a minor who has been left in the care and custody of another without any provision for his support or without communication from either or both of his parents for a period of one year with intent on the part of such parent or parents to abandon him shall be deemed abandoned and declared free from such parental control. The section further reads that "Such failure to provide, or such failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon." (Section 701(a), Welfare and Institutions Code.)

[9, 10] The statutory presumption of intent to abandon a minor left in another's care arises from a failure of the parents to provide for or communiate with the child for a year. Although, like any other rebuttable presumption, it may be overcome by opposing evidence, the question of whether an intent to abandon has existed for one year is a question for the trial judge. In re Sanders, 88 Cal.App.2d 251, 198 P.2d 523; In re Creely, 70 Cal.App.2d 186, 160

P.2d 870; In re Peterson, 56 Cal.App.2d 791, 133 P.2d 831.

[11, 12] Referring first to the conduct of Donald, an analysis of the evidence discloses that he solicited the help of Ila's relatives; that he was gainfully employed at the time he gave the children to them; that he had adequate time in which to consider the children's future before calling Florence and signing the custody agreement; that he had the advice and counsel of his parents and family lawyer and he knew from the beginning that respondents would not take Tracy on a part time basis, but intended to adopt her. Substantial evidence points to the conclusion that Donald knew he was relinquishing Tracy for all time on a permanent basis and was satisfied with the arrangement. While the written agreement may be legally ineffective it is of course suggestive on the question of his intent. It clearly appears in writing that he was willing to permanently waive all right to the custody of the child. Although he had ample time and opportunity to express his dissatisfaction with the custody agreement before signing it, he did not do so. The fact that Donald may have been emotionally upset does not in itself make his act of relinquishing custody involuntary under the law, nor does the fact that his work may have precluded him from personally caring for the children constitute the coercion or undue influence contemplated under the cases cited by appellants. These factors may, however, be properly considered with other circumstances in determining the question of intent. It is true that his acts may have been originally motivated by his belief that he could not personally care for the children, but Donald lived in close proximity to his parents and in the general area of Ila's large family. He was employed and had access to legal advice. The trial court could have reasonably inferred that had he cared to, Donald could have arranged and paid for Tracy's care without permanently relinquishing her custody. The record is silent as to any efforts he might have made to contact the welfare authorities or anyone else to determine what could be done about caring for the children on a temporary basis. To say that his acts in handing Tracy over to the Andersons and executing the agreement were not voluntary is to ignore the entire circumstances surrounding the transaction.

Donald's subsequent behavior during the period in question is entirely consistent with his original intent to relinquish custody of Tracy permanently and during the thirteen months prior to the filing of the petition his acts and conduct point to his intention to abide by his original agreement. He showed no interest in Tracy. Knowing her whereabouts he did not personally communicate with her or the Andersons; he sent no money for her support and made no effort prior to his appearance in this case to stop adoption proceedings. Upon being notified by respondents' lawyer in March, 1956, of their intention to file abandonment proceedings he made no effort to personally communicate with them, their lawyer or the child. That he intended during the crucial period to comply with the agreement to relinquish the child is clear from the record.

Ila retrieved Christine within a few days after her reconciliation with Donald. Her intention to permit Donald's arrangement for the relinquishment of Tracy to stand is borne out by her statement to Florence that she could not part with Christine but did not want Tracy. Her general attitude concerning Tracy is reflected in her prior statement to Florence that she wanted someone else to care for her. It wasn't until July, 1955, that she communicated with respondents presumably asking for the child's return. Anderson's reply is interesting for two reasons. First, it notified the appellants that he took Tracy with the understanding he could have her permanently and intended to keep her and, second, it establishes that sometime immediately after June 12, 1955, while Tracy and the Andersons were still in Washington, he saw appellants at a cafe and he told them the same thing. This matter was not further developed in the evidence but its mention in the letter is important as indicative of appellants' general attitude toward

Tracy. Knowing at a time when the child was still available to them in Washington that Anderson intended to keep her permanently they did nothing to regain her custody. The trial court not only rejected Ila's testimony that she communicated further with the Andersons and Tracy in New Jersey and talked with juvenile authorities and a lawyer, but much of the testimony given by both appellants. However, even from appellants' own testimony it is apparent that they were not interested in taking the child at any real expense or effort to themselves. Having been advised by Anderson at the cafe and again by his letter of July 30, 1955, that he would not willingly give up Tracy, appellants made no effort to retrieve the child even though Donald was employed, was buying a home and had legal advice available to him.

Their conduct upon receipt of Mr. Blumberg's letter is further evidence of their lack of interest in Tracy. They knew from his first letter of March 20, 1956, that the child was in Long Beach and that they could have obtained information from him regarding her status and whereabouts, yet they made no reply to it or to counsel's two subsequent communications. Ila did not answer the letter of May 3, 1956, because she "didn't want to." The trial judge discarded their testimony concerning their later attempts to obtain a lawyer and their inability to hire a detective because the lawyer lost the fee they gave him.

On the issue of support it is conceded that after June 12, 1955, appellants sent no money or other property for the support of Tracy. During this time they knew her whereabouts in New Jersey and had the ability to locate her while in Long Beach through respondents' forwarding address and their counsel. Had they desired they could have sent funds for the child's support commensurate with their income which was sufficient to permit them to buy a home. Any argument that appellants satisfied the support requirement under Section 701(a) of the Welfare and Institutions Code by making arrangements with the Andersons for them to feed and clothe Tracy is wholly without merit. When Donald made the arrangement with respondents he intended to transfer her custody permanently. A custody arrangement with relatives, with or without support provisions, on a temporary basis only might under some circumstances satisfy the requirement of the code section but the agreement in the instant case was intended to be of a permanent nature and to entirely relieve the natural parents of the obligation of further support.

[13] This case is one in which the conflict of evidence rule well applies. The trial judge had the opportunity to observe the conduct and demeanor of the witnesses on the stand and in court, to listen to their testimony, to evaluate their credibility and to weigh the evidence and resolve any conflicts therein. The trial court was far better able to reconcile the conflicts and discrepancies in the testimony of the parties than we. The trial judge's conclusion that when Donald gave Tracy to the Andersons on June 12, 1955, he intended to permanently abandon her to them, and since then during the crucial period has done nothing to show a contrary intention, is a fair and reasonable one supported by substantial evidence in the record. As well supported is his further conclusion that Ila's conduct constituted much more than mere acquiescence to Donald's arrangement and that for the period in question her acts and omissions reflected her intent to abandon the child to respondents by leaving her where she was. In our opinion the statutory presumption and the evidence, including the reasonable inferences therefrom, sustain the finding that an abandonment by both parents did in fact take place.

The next point raised by appellants concerns the judge's exercise of the discretion afforded to the trial court under the 1955 amendment to Section 701(a) of the Welfare and Institutions Code. The amendment provides: "If in the opinion of the court the evidence indicates that either or both parents have made only token efforts to support or communicate with the child the court may declare the child abandoned by such parent or parents."

Appellants urged that the trial court abused its discretion in finding that with intent to abandon her they made only token communication regarding the child and that the evidence was insufficient to justify such a finding.

Prior to 1955 the Supreme Court held that if either parent made any communication with the child during the year preceding commencement of the action the court would have no right to declare him to be free from the custody and control of the parents (In re Edwards, 208 Cal. 725, 284 P. 916). To avoid situations in which only a token communication would preclude a finding of abandonment our Legislature, in amending Section 701(a), gave the trial court a broad discretion in the matter if in its opinion the evidence indicates that either or both parties have made only token efforts to support or communicate with the child. However, before the court may exercise its discretion it must make a determination from the facts whether the support or communication is of a token nature. There is here no issue of token support because the trial court made a finding supported by substantial evidence that the parents made no provision for the support of the child. The problem here is whether the court's finding that the parents made only token communication regarding the child was justified by the evidence. In so finding, the court no doubt had in mind the letter written by Ila to Anderson in July, 1955, in which she told him she "wanted Tracy back." The judge clearly declined to accept appellants' testimony regarding other purported communication concerning, and efforts to locate, the child. This the court had a right to do and it further had a right to construe Ila's letter in the light of the appellants' prior and subsequent conduct. Whereas the letter standing alone might be construed as having been written with the purpose of actually regaining the custody of the child, there is little if anything in the record to show that this was in fact Ila's true intention. The acts and omissions of both parties subsequent to June 12, 1955, reasonably justify the inference that in writing the letter Ila made only a gesture, a token demand, with no real intention of following it up to regain custody of the child if Anderson would not voluntarily return her and if it required any money or effort on appellants' part to regain Tracy.

Is is obvious from the record that after receiving Anderson's communication of July 30, 1955, they were satisfied to leave her where she was under the original agreement. The trial court was not impressed with the appellants' good faith in sending the letter. Implicit in the court's finding is the conclusion of the trier of the fact that the letter actually was not what it purported to be on its face and at most was only a gesture with no other implication if the Andersons would not return the child.

[14] The amendment to Section 701(a) of the Welfare and Institutions Code makes it clear that no longer is the court precluded from a finding of abandonment if a communication by either parent has been received during the crucial period. If in the trial court's opinion the communication in question was of a token nature only, then the court may exercise its discretion in the matter of declaring the child abandoned. There is substantial evidence here to justify such a finding and no abuse of the court's discretion is manifest in the record.

[15] Returning to appellants' first contention arising out of the trial court's order denying their motion for nonsuit, it is well settled that an order denying a motion for nonsuit is not appealable although it may be reviewed on the appeal from the judgment (Leavens v. Pinkham & McKevitt, 164 Cal. 242, 128 P. 399).

What we have said in reviewing the appeal from the judgment sufficiently disposes of the point made in connection with the denial of motion for nonsuit. The attempted appeal from this order is dismissed.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

160 Cal.App.2d 435

In re ESTATE of Edith Louise JARMAN, etc., Deceased.

John H. MACHADO and Walter Ward, Appellants,

v.

Glenn ALLEN and Arnold Grasmoen, Individually and as Executors of the Will of Edith Louise Jarman, Deceased, Eleanor North Jarman, Charles Zwall, Fanny Zwall and American Association of University Women, Respondents.

Civ. 17824.

District Court of Appeal, First District, Division 2, California.

May 14, 1958.

Rehearing Denied June 13, 1958.

Proceedings on petition in probate court for instructions concerning payment for legal services and for investigative services. The Superior Court, County of Santa Clara, Byrl R. Salsman, J., entered order with respect to payment and recipient of payments appealed. The District Court of Appeal, Brazil, J. pro tem., held that where order concerning payment for legal services provided that an additional requirement or condition of allowance of fee would be that it had to be accepted in writing or by filed acceptance in files of case within 15 days from date of order, otherwise the order would be null, void and of no effect, and no written acceptance was ever made or filed by recipient of fee, order was conditional and not appealable and order became ineffective by its own terms and therefore appeal from order would be dismissed.

Appeal dismissed.

1. Appeal and Error 🔑80(2)

Where order concerning payment of legal services provided that condition of allowance of fee would be that it had to be accepted in writing or by filed acceptance in files of case within 15 days from date of order, otherwise order would be null, void and of no effect, and no written acceptance was ever made or filed by recipient of fee, order was conditional and not appealable and order became ineffective by its own terms and therefore recipient's appeal from order would be dismissed. West's Ann.Prob.Code, § 588.

2. Appeal and Error 🔑80(2)

A conditional order is not appealable.

Daniel M. Feeley, San Jose, for appellant Walter Ward.

James W. Foley, San Jose, for appellant John H. Machado.

John H. Machado, San Jose, in pro. per.

Preston, Braucht & George, Merced, for respondent Allen & Grasmoen.

Burnett, Burnett & Somers, San Jose, for respondent Eleanor North Jarman.

BRAZIL, Justice pro tem.

The executors of the will of Edith Louise Jarman, deceased, filed a petition in the probate court, pursuant to the provisions of Section 588 of the Probate Code, for instructions concerning the payment for legal services by appellant Machado and for investigative services by appellant Ward. The appellants had performed services for the estate in connection with a protracted law suit tried in the Superior Court, wherein Eleanor North Jarman successfully maintained that about all of the assets of the estate were actually held by the executors in trust for her.

[1] Upon completion of a long and involved hearing, the probate court made the following order:

> "Thereupon, the matter being presented and submitted, the court makes its order as follows: 'It is evident that everyone isn't going to get what they want in the way of fees and compensation in this case. In the first place, I think that Mr. Machado is entitled to a fee and that it should be paid out of the estate, which, of course, means that Mr. Burnett's client is the one that is going to pay it, I suppose.
>
> "The fee that the court is going to allow will include all compensation that is payable to Mr. Ward. In otherwords, Mr. Machado will be, it will be his burden to settle with Mr. Ward. I am not unmindful of the letters that are in the evidence respecting Mr. Ward's employment and the statements in them that, if the litigation is unsuccessful, his fee may have to be a little bit less than if it were successful.
>
> "The court is not going to decide at this time the amount of fees that are due Mr. Griswolt and Mr. Braught but will leave that to a later time.
>
> "Also, in as much as Mr. Burnett's client are the ones that have to pay the fee, it is only equitable, just and fair that all inference with her rights in connection with this Merced property should be dispensed with. In other words, that case should be dismissed insofar as it relates to Mrs. Jarman or her vendee or anyone connected with her; and that will be a condition attached to the allowance of the fee.
>
> "Another condition attached to the allowance of the fee will be the dismissal of the appeal which can easily be accomplished by cooperation between the executors and counsel.
>
> "And a further condition attached to the allowance of the fee will be the dismissal with prejudice of the case that is brought by Ward, because that interferes with the executors in the discharge of their ordinary duties and in the closing of the estate.
>
> "And further, an additional requirement or condition attached to the allowance of the fee will be that on Mr. Machado's part it has to be accepted in writing or by filed acceptance in the files of the case within fifteen days from the date of the making of the order, which is today, now, otherwise the order will be null, void and of no effect, and the executors will be directed to petition the Court for other instructions or further instructions in connection with the allowance of the fee.
>
> "Now, the fee allowed will be $13,500."

No written acceptance, as required by the order, was ever made or filed by Mr. Machado, and before the expiration of fifteen days, notice of appeal was filed by the two appellants. It is apparent from a reading of the order that the rights of the interested parties would be the same whether the order was affirmed or reversed. In either event a further order of instructions is needed, because, the acceptance not having been filed, the order became ineffective by its own terms.

[2] The order, from which the appeal is taken, is obviously conditional. Such an order is not appealable. Hayes v. Pierce, 18 Cal.App.2d 531, 64 P.2d 728. The order was self-executing in that further action by the court was not required if the condition were complied with, but until that time it remained conditional.

The appeal must necessarily be, and it is hereby dismissed.

KAUFMAN, P. J., and DRAPER, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Vera ODMANN and Stanley Odmann, Defendants and Appellants.

Cr. 3436.

District Court of Appeal, First District, Division 2, California.

May 21, 1958.

Rehearing Denied June 20, 1958.

Hearing Denied July 16, 1958.

Prosecutions of defendants, who were husband and wife, for murder and for employment of an instrument with intent to procure abortion. The Superior Court, City & County of San Francisco, Walter Carpeneti, J., entered judgments of conviction and defendants appealed. The District Court of Appeal, Draper, J., held that where husband's direct examination by counsel, who acted jointly on behalf of both husband and wife, impliedy denied wife's participation in the abortions, it was within scope of proper examination to show joint performance of all abortions by husband and wife, and evidence sustained convictions.

Affirmed.

1. Witnesses ⚷76(3)

Where husband and wife were jointly prosecuted for commission of crime and husband was called and questioned by counsel who acted jointly for husband and wife, consent to direct examination was given by both defendants. West's Ann. Pen.Code, § 1322.

2. Witnesses ⚷76(3)

One who consents to direct examination of her spouse by their joint counsel cannot rely upon her privilege to bar all cross-examination. West's Ann.Pen. Code, § 1322.

3. Witnesses ⚷76(3)

Where husband and wife are jointly prosecuted for crime and husband is directly examined by counsel who acts jointly for husband and wife, wife has waived right to object to spouse's incompetency on direct examination and waiver extends to neither more nor less than the cross-examination which would be permitted if no issue of privilege existed. West's Ann. Pen.Code, § 1322.

4. Witnesses ⚷277(4)

A defendant cannot, by testifying to a state of things contrary to and inconsistent with evidence of prosecution, thus indirectly denying testimony against him but without testifying expressly with relation to the same facts, limit cross-examination to precise facts concerning which he testifies.

5. Witnesses ⚷277(4)

In prosecutions of defendants, who were husband and wife, for murder and for employment of instrument with intent to procure abortion, where husband's direct examination by counsel who acted jointly in behalf of both husband and wife, impliedly denied wife's participation in abortions contrary to prosecution evidence, it was within scope of proper cross-examination to show unvarying practice of joint performance of all abortions by husband and wife and to cross-examine husband relative to wife's knowledge of his abortion business generally and as to his aiding of wife in performance of an abortion by method he could not perform himself.

6. Abortion ⚷11

Evidence was sufficient to corroborate testimony of victim as to one of the defendant's participation in abortion. West's Ann.Pen.Code, § 1108.

7. Criminal Law ⚷508(9)

Testimony of an accomplice can be looked to for corroboration of that of victim. West's Ann.Pen.Code, § 1108.

8. Abortion ⚷11
Homicide ⚷250

In prosecutions of defendants, who were husband and wife, for murder and for using instrument with intent to procure an abortion, evidence sustained convictions.

9. Criminal Law ⚷1159(6)

Question of whether evidence which was largely circumstantial warranted inference of guilt was for the jury and not for reviewing court.

10. Criminal Law ⚿486

In prosecutions for murder and using instrument with intent to procure an abortion, where physician of deceased victim testified that such victim had given him a history of the performance of an abortion upon her, action of court in admitting testimony not to prove truth thereof but only as basis of opinion formed by physician, did not constitute error.

◆

Edward T. Mancuso, Public Defender, Waldo F. Postel, Jr., Deputy Public Defender, City and County of San Francisco, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

Defendants, husband and wife, were tried under an indictment in three counts, charging (1) the murder of Estelle Bach, (2) employment of an instrument with intent to procure the abortion of Lois Moore, and (3) a like offense upon Estelle Bach. The murder charge was based upon evidence that Mrs. Bach died as the result of an abortion performed upon her after that charged in Count 3. Jury verdict found each defendant guilty of all three charges, and fixed the murder as of the second degree. Defendants appeal from the ensuing judgment, and from denial of their motions for new trial.

A principal contention of appellants arises from the cross-examination of Mr. Odmann. Mrs. Odmann did not take the stand. After the prosecution rested, counsel for defendants stated: "* * * as to Count 2 of the indictment, charging the defendants with violation * * * as to Lois Moore, the defense will rest; and, proceeding on Counts 1 and 3, I will call Mr. Odmann." Defendant husband testified, on direct, that he had performed two attempted abortions on Mrs. Bach, each by insertion of a catheter. As to each of these events, and his meetings with Mrs. Bach in connection therewith, he carefully limited his recital of activities to the first person singular, thus impliedly, although not directly, negativing the testimony of the accomplice Anderson implicating Mrs. Odmann in the Bach abortions. Odmann also testified that when he and his wife met Mrs. Bach in her apartment, after the first or second abortion, Mrs. Odmann did not know of the abortions. He testified that on this occasion appellants were introduced as "Mr. and Mrs. Collins," thus contradicting the testimony of the witness Gudelj, who had testified that the wife was introduced as "Dr. Collins." Odmann denied performing a third abortion upon Mrs. Bach, and denied being present at any time when a curettement was performed upon her. His testimony on direct did not deal at all with the Moore abortions.

It is apparent that the purpose and effect of his testimony was to absolve his wife of all connection with the Bach abortions, to negative the corroborating evidence which tended to establish her guilty knowledge of them, and, as to himself, to deny participation in the abortion which caused Mrs. Bach's death. On cross-examination, he testified that his wife is a registered nurse and an anesthetist. He denied that he acquired his knowledge of the performance of abortions through observation of such operations performed by his wife, denied that she performed abortions upon Lois Moore and a girl from Sonoma. He denied the testimony of another witness that Mrs. Odmann was the woman with whom he registered at the motel where one of the two abortions of Lois Moore was performed, on the date of that abortion, and that she was the person whom he had registered as his wife at other motels where abortions had been performed. He admitted that he could not perform an abortion by curettement. All this cross-examination was over objection on the part of Mrs. Odmann that it was in violation of the privilege of a spouse, and the further objection, apparently of both parties, that it was outside the scope of the direct examination.

[1-3] "Neither husband nor wife is a competent witness for or against the other in a criminal action * * * to which one or both are parties, except with the consent of both * * *". Pen.Code, § 1322. Failure to raise the objection of a spouse's incompetency amounts to consent to his testimony. People v. Singh, 182 Cal. 457, 483, 188 P. 987; People v. Van Skander, 20 Cal.App.2d 248, 254, 66 P.2d 1228. Here there was no objection by defendant wife to the calling or the direct examination of her husband. He, of course, did not object to being questioned by his own attorney. In view of the fact that the husband was called and questioned by counsel who acted jointly for husband and wife, there is no question that consent to the direct examination was given by both defendants. It is obvious that one who consents to direct examination of her spouse by their joint counsel cannot rely upon her privilege to bar all cross-examination. 8 Wigmore on Evidence, 266–267. We find no California decision defining the extent of this waiver. Reason and fairness, however, dictate that the waiver extend to neither more nor less than the cross-examination which would be permitted if no issue of privilege existed. Any lesser standard of waiver would permit a spouse the full benefit of the privileged testimony, but would deny the opposing party the right to test its accuracy. The issue before us, then, is the scope of cross-examination permissible upon the husband's testimony on direct.

[4, 5] Both appellants assert that the cross-examination was wholly beyond the scope of the direct, to the prejudice of each. "A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies." People v. Teshara, 141 Cal. 633, 638, 75 P. 338, 340. As to Mrs. Odmann, her husband's testimony on direct amounted at the least to an "indirect" denial of her participation in each and all of the Bach abortions. The husband's direct examination had contained at least an implied admission that he was in the "business" of abortion, and a direct admission that he had performed two abortions upon Mrs. Bach. It thus was within the scope of proper cross-examination to attempt to show an unvarying practice of joint performance of all abortions by husband and wife. Also, since the direct examination had negatived knowledge by Mrs. Odmann of her husband's performance of two abortions upon Mrs. Bach, it was relevant to ask him about her knowledge of his "abortion business" generally. He denied that she ever knew anything about his performing abortions. In the light of this denial, it was proper to ask him about one of the Moore abortions, which the victim had testified was performed by Mrs. Odmann with her husband's assistance. Similarly, it was proper, in view of his denial of participation in a curettage performed upon Mrs. Bach, to ask whether he was able to perform such an operation and, upon his denial, to inquire about his aiding his wife in such an operation upon Mrs. Moore, as to which evidence had been introduced in the prosecution's case. It is true that the cross-examination was not conducted in the order here stated. However, there is no indication that the witness was in any way misled or tricked, by the order in which the questions were asked, into answers which are here relied upon to show admissibility of the evidence. We conclude that the cross-examination was within proper bounds as to both defendants. People v. Zerillo, 36 Cal.2d 222, 223 P.2d 223. Since it was within the permissable scope of cross-examination, it did not infringe upon the privilege of Mrs. Odmann.

[6, 7] Appellant wife contends that the evidence is insufficient to corroborate the testimony of Lois Moore as to Count 2. Such corroboration is required. Pen.Code, § 1108. The complainant testified that two such operations were performed upon her, each in a motel room. As to the first, the motel manager identified defendant husband as the man who had registered under an assumed name on the same date for the same

room, with his wife, who was identified by the manager as Mrs. Odmann. He also testified that after they left he looked into the room and saw a dark-haired woman in bed, and had a conversation with her. Lois Moore also had testified to this conversation. As to the second operation, the wife of the owner corroborated the victim's description of the room, and the registration card to "J. Burns and wife" was shown to be in the handwriting of Odmann. Additionally, a kit of medical instruments of the type used in abortions was in appellants' possession when they were arrested, and they made admissions or evasive statements to the police. Like facts have been held to have corroborative value. People v. Reimringer, 116 Cal.App.2d 332, 253 P.2d 756; People v. Morris, 110 Cal.App.2d 469, 243 P.2d 66; People v. Malone, 82 Cal.App.2d 54, 185 P.2d 870. The testimony of the husband, although he is an accomplice, also can be looked to for corroboration of that of the victim. People v. Wilson, 25 Cal.2d 341, 153 P.2d 720. There being substantial corroborative evidence, the question whether, by itself, it is as compatible with innocence as with guilt is a question for the jury. People v. Berger, 128 Cal.App.2d 509, 513, 275 P.2d 799.

[8, 9] Appellants attack the sufficiency of the evidence to support their conviction of the murder of Mrs. Bach. It is conceded that three abortions were performed upon Mrs. Bach. Appellant husband admitted performing the first two abortions, by catheter, one February 2 or 3, 1955 and one February 18. Inferences as to Mrs. Odmann's participation, although it was denied by the husband, could be drawn from these admissions. The evidence shows that Mrs. Bach died of the effects of an abortion performed by curettement shortly before March 18, and that this abortion could not have been self-induced. One Anderson, who arranged for the first abortion upon Mrs. Bach, testified that appellant husband agreed to perform it, that payment to him was made in the presence of appellant wife, that Anderson took Mrs. Bach to an automobile occupied by both appellants on the evening of the first abortion, that he arranged with appellant husband for performance of the second, and that after March 8 he was present at a conversation between Mrs. Bach and appellant husband, in which Mrs. Bach said that she was still pregnant. Immediately thereafter, Odmann told Anderson, when the latter complained of the treatment, that "something will be done" and that "he would take care of everything." Although circumstantial, this evidence supports the inference that appellants performed the third and final operation. Of course, Anderson is an accomplice and his testimony, to support the conviction, must be corroborated. The witness Gudelj testified that he went to see Mrs. Bach at her apartment, by appointment, at a date which the jury could find to be after the second, and before the third, abortion. When he knocked, he heard Mrs. Bach say that he was a good friend, "You don't have to be afraid." When he entered, both appellants were present. Appellant wife was introduced as "Dr. Collins," and appellant husband was introduced by an assumed name. In a statement to police, appellant husband admitted having investigated the cause of Mrs. Bach's death before he was arrested. When appellants were arrested, medical instruments identified as of the type used to perform the operation which caused Mrs. Bach's death were in their possession. Under the rules governing corroboration, previously discussed, the conviction of both appellants finds support in the record. The evidence is largely circumstantial, but the question whether it warrants the inference of guilt is for the jury, and not for the reviewing court. People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

Appellants complain of the admission in evidence of statements made by them to police shortly after they were arrested. We have examined these statements in detail, and find them properly admitted. Similarly, we find appellants' assertions of misconduct of the prosecuting attorney to be without merit.

[10] The physician who treated Mrs. Bach in her last illness testified, over ob-

jection, that she gave him a history in which she said that an abortion by instrument was performed upon her two or three days before she entered the hospital. Upon overruling the objection, the court admonished the jury that the evidence of Mrs. Bach's statement to the doctor was not admitted for the truth of the statements, but only as one of the bases of the opinion formed by the doctor. This was not error. People v. Brown, 49 Cal.2d 577, 320 P.2d 5.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

160 Cal.App.2d 845

In re Darrell L. GRAHAM on Habeas Corpus.

Cr. 2812.

District Court of Appeal, Third District, California.

May 27, 1958.

Habeas corpus proceedings for purpose of having court determine whether judgment sentencing petitioner was void. The District Court of Appeal, Schottky, J., held that where petitioner was originally sentenced on two counts of armed robbery for terms to run concurrently and judgment was entered in the judgment book and defendant placed in restraint, subsequent action of court in setting aside original sentence and reimposing sentence for terms to run consecutively was void, and petitioner was entitled to have prison records changed to show that his detention was under the original sentence pronounced.

Writ denied.

1. Criminal Law ⚷996(2), 998

If sentence has been entered in minutes of court, or if defendant has been restrained by sentence imposed, then court is without jurisdiction to vacate, add to, or in any way modify sentence originally pronounced.

2. Criminal Law ⚷998

Prisons ⚷12

Where prisoner was originally sentenced on two counts of armed robbery for terms to run consecutively, and judgment was entered in the judgment book and prisoner placed in restraint on basis of sentence, court was without jurisdiction to vacate original sentence and reimpose sentence for terms to run consecutively, and petitioner was entitled to have prison records changed to show his detention was under the original sentence.

Michael Jarboe and Louis A. Boli, III, Sacramento, for petitioner.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and J. M. Sanderson, Deputies Attys. Gen., for respondent.

SCHOTTKY, Justice.

Petitioner, Darrell L. Graham, seeks a writ of habeas corpus for the purpose of having this court determine whether a judgment entered against him on April 9, 1951, is void. By the judgment petitioner was sentenced to prison for the term prescribed by law on two counts of armed robbery. The counts were ordered to run consecutively.

Petitioner was charged by information with two counts of robbery. He entered a plea of guilty as to the two counts and the trial court found that he was armed with a deadly weapon at the time of the commission of the offenses. Judgment was entered on April 2, 1951. It provided that the counts were to run concurrently. The judgment was entered in Judgment Book No. 86 at page 370, on April 2, 1951, of the Santa Monica Department of the Los Angeles Superior Court. Petitioner was remanded to the custody of the sheriff to be delivered by him to the Director of Corrections at San Quentin. On April 9, 1951, and while he was still in the sheriff's custody, petitioner was brought before the superior court for resentencing. The judgment entered on April 2, 1951, was set aside, sentence reimposed on the two counts of armed robbery, but this time the terms were ordered to run consecutively.

[1] The Attorney General concedes that petitioner is entitled to relief. The court had no power to set aside the judgment entered April 2, 1951. The rule is: "If the sentence has been entered in the minutes of the court, or if the defendant * * * has been restrained by the sentence imposed, then the court is without jurisdiction to vacate, add to, or in any manner modify the sentence originally pronounced." People v. McAllister, 15 Cal.2d 519, 102 P.2d 1072, 1075. The exhibits provided by the Attorney General show that the sentence was entered in the minutes of the court, and also that restraint under the sentence had begun, so the rule of the McAllister case is applicable.

[2] Under the circumstances, as shown by the record in the instant case, when the court had sentenced petitioner and ordered in said judgment that the terms of the two counts should run concurrently, its orders having been entered in the court minutes and restraint thereunder having begun, the court could not thereafter set said judgment aside and order that the terms run consecutively. The later proceedings were void as beyond the jurisdiction of the court, and petitioner was confined, and is still confined, under the first sentence.

It follows that petitioner is entitled to have the prison records changed to show his detention is under the sentence pronounced April 2, 1951, whereunder the terms will run concurrently instead of consecutively. It is so ordered.

Petitioner, in a supplementary petition for habeas corpus concedes that he is lawfully imprisoned under the judgment of April 2, 1951, and states that he is not seeking relief from confinement but only from the purported judgment of April 9, 1951, which orders that the two terms run consecutively. The correction of the prison records will afford petitioner all of the relief to which he is entitled, See In re Carkeek, 155 Cal.App.2d 238, 317 P.2d 1015.

The order to show cause heretofore issued is discharged. The petition for a writ of habeas corpus is denied.

VAN DYKE, P. J., and PEEK, J., concur.

160 Cal.App.2d 535

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Buel GIBSON, Defendant and Appellant.
Cr. 1236.

District Court of Appeal, Fourth District,
California.
May 15, 1958.

Hearing Denied July 9, 1958.

Prosecution resulting in conviction of armed robbery and of assault with deadly weapon. The Superior Court of Fresno County, George M. DeWolf, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Griffin, J., held that trial court did not err in failing to admit in evidence a newspaper clipping, which was offered for impeachment purposes and which allegedly refuted complaining witness' testimony that he did not furnish a newspaper reporter or anyone a description of defendant the night of robbery, on ground clipping was hearsay evidence.

Judgment affirmed.

1. Criminal Law ⟹1120(3)

Where defendant, who was convicted of armed robbery and of assault with deadly weapon, appealed on theory trial court should have admitted a newspaper clipping offered for impeachment purposes but failed to produce clipping before District Court of Appeal, District Court of Appeal should not consider newspaper clipping. West's Ann.Pen.Code, §§ 211a, 217; West's Ann.Const. art. 6, § 4½; West's Ann.Code Civ.Proc. § 2051.

2. Criminal Law ⚷419(12)

In prosecution resulting in conviction of armed robbery and of assault with deadly weapon, trial court did not err in failing to admit in evidence a newspaper clipping, which was offered for impeachment purposes and which allegedly refuted complaining witness' testimony that he did not furnish newspaper reporter or anyone a description of defendant the night of robbery, on ground clipping was hearsay evidence. West's Ann.Pen.Code, §§ 211a, 217; West's Ann.Const. art. 6, § 4½; West's Ann.Code Civ.Proc. § 2051.

3. Witnesses ⚷331½

Any evidence offered by way of impeachment must be competent and cannot be based on hearsay. West's Ann.Code Civ.Proc. § 2051; West's Ann.Const. art. 6, § 4½.

◆

J. Montgomery Carter, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Joe J. Yasaki, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant-appellant was convicted by a jury of armed robbery (violation of Section 211a of the Penal Code) and of assault with a deadly weapon, a lesser offense included in the charge of assault with the intent to commit murder (violation of Section 217 of the Penal Code). He admitted one prior felony conviction (robbery, second degree). He was sentenced to State's prison on the first charge and appeals from the judgment. The only question raised is the admissibility of a newspaper clipping offered for impeachment purposes.

The complaining witness testified that defendant assaulted him with a revolver on the evening of January 7, 1957, at about 7:30 p. m., while he was alone attending his small grocery store. He testified defendant came in, went to the rear of the store, removed a small carton of beer, returned it to the cash register where he was standing; that defendant was immediately in front of him across the counter (about 18 inches away) and was bareheaded; that they stared at each other for some time; that defendant then pulled a gun from his jacket, shot twice, struck the complaining witness in the hand and hip and took money from the cash drawer; that when he started chasing defendant he left without the money but took the beer with him; that the police and reporters arrived and he was taken to the hospital; that he was not in condition to talk because he had tubes in his nostrils; that he gave no description of the assailant to anyone until the next day; that two or three days later pictures were brought from the police station on several occasions; that he looked at them and identified defendant from one of these pictures; and that he then, for the first time, described his assailant.

He testified at the trial that defendant's hair was brown, the same color it appeared to be in the courtroom, and that he still had a wave in it; that he noticed no scars on his face although he did make careful note of his features; that he, the complaining witness, was about 5 ft. 11 in. tall; that he was standing on a rubber mat and defendant's eyes were about on a level with his as he stood there; that he estimated defendant's age between 30 and 35 years, his weight at approximately 185 pounds, and said that when one is looking down the "barrel of a 38 you aren't too good at weights and heights"; that he later, from a lineup of prisoners, identified defendant as the man who assaulted him, and that the defendant, seated in the courtroom, was the same man.

Defendant, who was apprehended on February 18th, testified, after admitting he had been convicted of two felonies, that he was 6 ft. 3 in. tall, weighed 223–240 pounds, had several scars on his face, his eyes were blue, and that he had black hair on the day of the robbery but that was not its present color, which was dark brown; that once before he had bleached it blonde, and since then he had dyed it black on several occasions. He said at the trial the natural color of his hair had been restored (brown) due to his confinement in jail. He then testified on the night of the robbery he was in company with one Hamilton riding around; that they stopped at the "Mug" about 7 p. m. and then went to their apartment and went to bed. He denied being at the Ober store or participating in the robbery. He attempted to corroborate his story by other witnesses. When he was apprehended he was wearing a button type jacket. The complaining witness testified he believed that was the jacket he wore on that night. Another witness testified in rebuttal that defendant's hair was dark brown on the night of February 17th when defendant held him up and that when defendant was apprehended two days later it was dyed black.

Defendant concedes the testimony in reference to identification was sufficient upon which to base the verdict but claims the complaining witness' testimony that he did not furnish a newspaper reporter or anyone with a description of the defendant the night of the robbery would be impeached if the trial court had properly allowed a newspaper clipping of the Fresno Bee published February 8th to be received in evidence, citing People v. Turner, 118 Cal. 324, 50 P. 537; and Art. VI, Sec. 4½, California Constitution.

[1–3] Defendant has not produced the proffered exhibit as a record before this court. Therefore it should not be considered. We are not aware of its contents except the statement of counsel that it contains the headline: Bandit Wounded Fresno Grocer—Flees with Beer", and that there was a description of the assailant in the story which varied in some respect to that given at the trial. The offer was qualified as not bearing on the truth of the description nor the truth of the story but as evidence of former statements made by Ober not in accordance with his present testimony. The objection was that it was hearsay. No foundation was laid for its admission and there was no testimony offered by anyone that Ober made the statements or furnished the description therein appearing. It was hearsay evidence and was clearly inadmissible for the purpose of impeachment without further foundation. People v. Glaze, 139 Cal. 154, 72 P. 965; Carpenter v. Ashley, 148 Cal. 422, 426, 83 P. 444. Any evidence offered by way of impeachment must be competent and cannot be based on hearsay. Sec. 2051, Code Civ.Proc.; 27 Cal. Jur. p. 146, sec. 122.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

William R. WARD and Bert W. Martin,
Plaintiffs and Respondents,
v.
Marshall W. TAGGART and H. M. Jordan,
Defendants and Appellants.*
Civ. 22884.

District Court of Appeal, Second District,
Division 2, California.
May 19, 1958.

Rehearing Granted June 16, 1958.

Action to recover profits allegedly wrongfully acquired by defendants. The Superior Court of Los Angeles County, Joe Raycraft, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Fox, P. J., held that licensed broker (defendant), who procured purchase offer from plaintiffs by misrepresenting that he was owner's agent and who thereafter purchased such property for himself for lesser sum and sold it to plaintiffs at a profit, was an involuntary trustee accountable to plaintiffs for profit so acquired; but held that such broker's employee (the other defendant), who had turned over to her employer all that she had received, could not be held liable as an involuntary trustee.

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* Opinion vacated 329 P.2d 320.

Judgment against one defendant reversed and judgment against the other modified and affirmed.

Ashburn, J., dissented in part.

1. Brokers 🔑100

As a licensee, a broker is in a privileged class and enjoys a monopoly to engage in profitable business, and his duty to deal honestly and speak truthfully in his real estate dealings extends to general public as well as to his own clients. West's Ann. Civ.Code, §§ 2224, 3517; West's Ann. Bus. & Prof.Code, §§ 10150, 10176.

2. Brokers 🔑100

Those dealing with a licensed broker may naturally assume that he possesses requisites of an honest, ethical man. West's Ann.Civ.Code, § 2224, 3517; West's Ann.Bus. & Prof.Code, §§ 10150, 10176.

3. Trusts 🔑101

When a broker violates his statutory duty and thereby obtains a profit to which he is not entitled, he becomes an involuntary trustee and holds his ill-gotten gain for benefit of those who would otherwise have had it. West's Ann.Civ.Code, § 2224.

4. Trusts 🔑95

Licensed broker, who procured purchase offer by misrepresenting that he was owner's agent and who thereafter purchased such property for himself for lesser sum and sold it to offeror at a profit, was an involuntary trustee accountable to offeror for profit so acquired. West's Ann. Civ.Code, § 2224.

5. Principal and Agent 🔑48

A gratuitous agent cannot be compelled to enter on performance of any agency nor be mulcted in damages for his failure to do so, but if he does enter on such performance, he is bound to exercise utmost good faith in dealing with his principal; and a gratuitous agent has no greater license to indulge in misrepresentations, concealments, or other breaches of good faith than an agent for hire.

6. Principal and Agent 🔑69(2)

A gratuitous agent cannot, while acting for his principal, make any secret profits for himself out of transaction being conducted by him, without being accountable to principal.

7. Trusts 🔑101

Employee who had turned over all that she had received to her employer could not be held liable as an involuntary trustee. West's Ann.Civ.Code, § 2224.

8. Appeal and Error 🔑1170(10)

Lack of support for finding that a confidential or fiduciary relationship existed between plaintiffs and defendant would not require a reversal of judgment where facts found by trial court would adequately support judgment on theory of involuntary trust. West's Ann.Const. art. 6, § 4½; West's Ann.Civ.Code, § 2275.

9. Trusts 🔑236

Where expenses which involuntary trustee had incurred were a direct result of his fraudulent acts, judgment would not be reduced in that amount. West's Ann.Civ.Code, § 2275.

10. Trusts 🔑95

To prevent unjust enrichment, law will impose upon wrongdoer an involuntary or constructive trust.

11. Money Received 🔑2

Where property wrongfully acquired is money, law implies a promise to repay.

12. Action 🔑28

Damages 🔑89(1)

In effect, complaint, to recover profit which a licensed broker had allegedly wrongfully realized when he procured purchase offer by misrepresenting that property was listed with him and thereafter purchased such property from owners thereof for a lesser sum and sold it to offerors waived broker's tort and relied upon quasi-contractual obligation which law imposed upon him, and offerors were not entitled to recover exemplary damages.

◆

James C. Blackstock and Felix H. McGinnis, Los Angeles, for appellants.

Chandler P. Ward, Los Angeles, for respondents.

FOX, Presiding Justice.

This is an appeal by the defendants from a money judgment in favor of the plaintiffs growing out of a real estate transaction. Plaintiffs, William R. Ward and Bert W. Martin, are purchasers of certain real property; defendants are a real estate broker and his employee, both of whom were instrumental in effecting a sale of the property to plaintiffs.

The essential facts alleged in the complaint and proved at the trial are as follows:

Prior to the transaction in question plaintiff Ward had asked Leroy Thomsen, a real estate broker, to look for properties which Ward might be interested in purchasing. In February, 1955, Thomsen visited defendant Taggart concerning unrelated matters and during the conversation Taggart informed Thomsen that as exclusive agent for the owner, Sunset Oil Company, he had for sale several acres of real property in Los Angeles County. A general discussion concerning the location and nature of the property ensued, Thomsen stating that he had a client who might be interested in acquiring the property. Thomsen mentioned to Taggart that a broker named Dawson had a "for sale" sign on the property; Taggart replied that Sunset had taken the listing away from Dawson.

Thereafter, Thomsen submitted an offer on behalf of Ward to Taggart relating to seven acres in the tract. Taggart promised to submit the offer to Sunset. Taggart later reported that such offer was rejected by Sunset because of a large blanket mortgage. Ward then directed Thomsen to make an offer of $4,000 per acre for the entire property. Thomsen submitted this offer to Taggart, who promised to take it up with Sunset and report back. Taggart later told Thomsen that Sunset had refused the offer and that the least it would take for the property was $5,000 per acre, one-half in cash. Thomsen conveyed the information to Ward and Ward told Thomsen to make an offer on that basis. Thomsen submitted this offer in writing, accompanied by Ward's check for $2,000, to Taggart on March 18, 1955. At Taggart's direction, Thomsen inserted in the written offer provision for payment by Sunset of a ten per cent commission which Taggart and Thomsen agreed to divide equally. On the following day Thomsen advised Ward of the commission arrangement and he was agreeable.

Thomsen contacted Taggart respecting the $5,000 per acre offer three or four times during the following two weeks. On March 31 Taggart informed Thomsen that Sunset had accepted Ward's offer. Thomsen met with Taggart and the latter presented proposed escrow instructions in which defendant Jordan was named as seller acting for Taggart, who was designated as the real principal in the transaction. Taggart then informed Thomsen that he was to be the principal to enable him to "clear up the Dawson exclusive listing" as well as certain blanket mortgages on the property. Thomsen told Ward of this when he submitted the escrow instructions to him. Ward asked why Jordan was to be the payee of the notes and beneficiary of the trust deeds. Thomsen related that Taggart had said that such was necessary because of certain tax and other problems of Sunset, and that the trust deeds would be turned back to Sunset after the escrow. The property conveyed to plaintiffs consisted of 72.-

0492 acres. The full purchase price which plaintiffs paid for the property was $360,246.

It was not until after they had purchased the property that plaintiffs learned the following facts: Taggart had never been given a listing by Sunset on the property in question. Taggart never presented to Sunset, and never intended to present, plaintiffs' offers of $4,000 per acre and $5,000 per acre. Instead Taggart presented to Sunset his own offer of $4,000 per acre, half in cash, and it was accepted. Taggart misrepresented to plaintiffs that the least Sunset would take for the property was $5,000 per acre; he intended to purchase the property from Sunset himself and resell it to plaintiffs at a profit of $1,000 per acre. All of Taggart's statements to Thomsen concerning Sunset's reason for handling the sale in so unusual a manner were fabrications. Taggart never disclosed to Sunset that he had an offer from Ward until after the escrow papers had been signed. All of the moneys used by Taggart to pay Sunset the purchase price were derived wholly from the Ward escrow.

Plaintiffs commenced this action on August 25, 1955. The case was tried without a jury, and the court rendered judgment against both defendants for $72,049.20 compensatory damages, and awarded exemplary damages of $36,000 against defendant Taggart individually. The judgment also enjoined defendants from transferring certain notes and trust deeds which plaintiffs had given them, and ordered defendants to discharge said notes and trust deeds, thereby reducing the amount of the judgment. Defendants have appealed.

Defendants' contentions are as follows: (1) the complaint fails to state a cause of action; (2) the evidence is insufficient to support the findings that there was a fiduciary relationship between either defendant and either plaintiff, and that a secret profit resulted to either defendant; (3) that the lack of any fiduciary relationship was established as a matter of law; (4) that the findings do not support the judgment in respect to the existence of a fiduciary relationship; and (5) that both the compensatory and exemplary damages are excessive.

[1–3] Defendant Taggart's contention that the complaint fails to state a cause of action is without merit. Plaintiffs did not allege and the court did not find that Taggart was in fact their agent. But this is not the sole basis upon which he may be held liable. In circumstances such as here presented the public policy of this state is clear. Section 3517 of the Civil Code provides: "No one can take advantage of his own wrong." And section 2224 provides: "One who gains a thing by fraud * * * or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." It must be borne in mind at the outset that Taggart was a licensed real estate broker. In order to qualify as such, one must be "honest, truthful and of good reputation." Bus. & Prof.Code, § 10150. A real estate broker's license may be revoked if he is guilty of "making any substantial misrepresentation" or "making any false promises of a character likely to influence, persuade or induce." Bus. & Prof.Code § 10176. Thus it is a broker's duty to deal honestly and to speak truthfully in his real estate dealings. As a licensee, a broker is in a privileged class and enjoys a monopoly to engage in a profitable business. By virtue of his license he is in an advantageous position in his real estate dealings with the public at large. His duty to deal honestly and speak truthfully in such matters therefore extends to the general public as well as to his own clients. "Those dealing with a licensed broker may naturally assume that he possesses the requisites of an honest, ethical man." Zichlin v. Dill, 157 Fla. 96, 25 So.2d 4, 5. This principle is recognized in the Code of Ethics adopted by the California Real Estate Association. Article 21, in the part entitled "Relations to Customers and the Public," provides: "It is the duty of every realtor to protect the public against fraud, misrepresentation, or unethical practices in connection with real estate transactions." When a broker violates this duty and thereby obtains a profit to which he is not entitled, he becomes an involuntary trustee and holds his ill-gotten gain for the benefit of those who would otherwise have had it. Civ.Code, § 2224; Harper v. Adametz, 142 Conn. 218, 113 A.2d 136, 55 A.L.R.2d 334.

[4] Applying these principles, it is clear that the complaint alleges facts sufficient to show defendant Taggart's liability as an involuntary trustee. The alleged facts (which the court found to be true) clearly show that Taggart set out to perpetrate a fraud upon plaintiffs and that he succeeded. Even though Taggart was not the agent of either plaintiff, he nevertheless occupied a peculiarly advantageous position by reason of his being a licensed real estate broker and his asserted representation of the owner of the property in question. Plaintiffs reasonably relied upon Taggart's statements. Because of his licensed status he was under a duty to speak truthfully. By his fraudulent conduct and misrepresentations he violated this duty and acquired a profit of $1,000 per acre to which he was not entitled. Therefore, he is an involuntary trustee of the profit so acquired. Civ. Code, § 2224; see Estrada v. Garcia, 132 Cal.App.2d 545, 552, 282 P.2d 547; Rankin v. Satir, 75 Cal.App.2d 691, 695, 171 P.2d 78.

Our conclusion finds support in a Florida case, Zichlin v. Dill, supra. In that case the plaintiff answered an advertisement for the sale of certain real property. The defendant broker quoted her a selling price of $5,500. The plaintiff was thereafter shown the property by the owner, who mentioned a figure of $4,500, whereupon plaintiff stated her understanding that the price was $5,500. The owner then told her that all arrangements, including the price, were in the control of the broker. The plaintiff returned to the broker and stated that she desired to purchase the property but would like to obtain it for $4,500. The broker represented to her that he would ascertain whether the property could be purchased for $4,500. Later the broker notified the plaintiff that the property could not be purchased for less than $5,500, which she then agreed to pay. He induced her not to engage an attorney to represent her in closing the transaction, stating that he would attend to all details and record the deed. It was not until after the deed was recorded that the plaintiff learned that the broker had, with her money, purchased the property for himself from the owner for $4,500 and sold it to her for $5,500. She thereafter instituted an action to recover the $1,000 profit which the broker had wrongfully obtained. A dismissal of the action was reversed on appeal. The court's remarks (25 So.2d at pages 4–5) were strikingly applicable to the case at bar. "Ultimately we must determine just what duty the broker owed appellant. Did he owe a duty to anyone except the owner who had listed the property? Evidently the chancellor was of the view that he owed no duty to the buyer. In this he was in error. Generally speaking an agent is responsible only to his principal. This, however, is different. The broker in Florida occupies a status under the law with recognized privileges and responsibilities. The broker in this state belongs to a privileged class and enjoys a monopoly to engage in a lucrative business. (Citation.) The statute requires that * * * 'applicants * * * be competent, honest, truthful, trustworthy, of good character, and bear a reputation for fair dealing * * *.' The state, therefore, has prescribed a high standard of qualifications and by the same law granted a form of monopoly and in so doing the old rule of caveat emptor is cast aside." See, also, Annotation, 55 A.L.R.2d 342, 353–354.

A similar result was reached in Harper v. Adametz, supra. A real estate agent advertised certain property in a newspaper. Plaintiff answered the advertisement and was shown the property (an 80 acre farm). Plaintiff then offered the agent $7,000 for the entire farm. The agent promised to convey the offer to his principal, but he did not do so. Instead he told the owner that he had received a $6,500 offer and informed the plaintiff that his $7,000 offer had been rejected. The real estate agent then induced plaintiff to make an offer on the buildings and part of the land (17 acres). Plaintiff offered $6,000. The agent accepted this offer and, through the use of a "dummy," puchased the entire property for $6,500. The net result was that the agent obtained 63 acres of the farm for himself at a price of $500 and at the same time collected a commission of $325 for the sale. Plaintiff brought an action against the real estate agent for damages and equitable relief based upon the fraud. The trial court ruled in favor of the defendant, and the plaintiff appealed. The Connecticut Supreme Court held that even though defendant was not the agent of plaintiff, he breached a duty owed to plaintiff by not submitting the $7,000 offer to the owner. The court concluded that plaintiff should have the benefit which defendant wrongfully acquired, and ordered defendant to convey the 63 acres to plaintiff upon the latter's payment into court of $1,000 (the difference between plaintiff's original offer for the entire property and the amount he paid for a portion thereof). The court reasoned (113 A.2d at page 139): "The plaintiff had a clear right to have his offer for the farm transmitted to Tesar. Having been invited by Jere's advertisement to bid for the property, he had a right to assume that Jere would deal honestly with him and be faithful to his principal. Instead, Jere withheld the offer, later lied to the plaintiff about it and, by using the plaintiff's willingness to accept seventeen acres, acquired the farm for himself for less than the plaintiff had offered for it. He induced the plaintiff to make an offer and then used that offer, and the plaintiff's money, to make a secret profit. By his fraudulent misrepresentations, he deprived the plaintiff of his bargain and obtained for himself some of the land which the plaintiff had offered to buy. 'If one acquires property by means of a fraudulent misrepresentation of a material fact, equity will assist the defrauded person by fastening a constructive trust on the property.' [Citations.]"

[5, 6] Taggart's position in the instant case is somewhat analogous to that of a gratuitous agent, in regard to whose conduct the law is clear. "While a gratuitous agent cannot be compelled to enter upon the performance of any agency nor be mulcted in damages for his failure to do so, when he does enter upon such performance, he is, in common with all other agents, bound to exercise the utmost good faith in dealing with his principal. A gratuitous agent has no greater license to indulge in misrepresentations, concealments, or other breaches of good faith than an agent for hire. Thus, a gratuitous agent cannot, while acting for his principal, make any secret profit for himself out of the transaction being conducted by him, without being accountable to the principal." Ramey v. Myers, 111 Cal.App.2d 679, 685, 245 P.2d 360, 364.

"An agent for hire is bound to exercise a greater degree of care and diligence than an agent acting gratuitously, but the latter has no greater license to indulge in misrepresentations, concealment, or other breaches of good faith than the former. It is a maxim of jurisprudence that no person will be permitted to take advantage of his own wrong, and this general rule is subject to no exception favoring those who voluntarily and gratuitously undertake the performance of service for another. No man can be compelled to don the yoke of special, unremunerated duty to another, but when that yoke is voluntarily assumed, the wearer will not be permitted to lay down his burden when profit to himself furnishes an inducement, and that profit results from detriment suffered by the other party. The primary object of human law is to curb human selfishness manifested in the various forms of passion, and the numerous guises avarice and greed may assume. Its most wholesome rules frown upon deceit, chicanery, bad faith and other forms of fraud, actual and constructive, and are designed to compel the exercise of good faith, candor, honesty, and fairness in dealings between men. It would be a reproach to a system having these objects in view to say that the rules referred to do not apply to one who has officiously and voluntarily undertaken and entered upon the performance of gratuitous service for another." Kevane v. Miller, 4 Cal.App. 598, 603, 88 P. 643, 645.

Taggart relies on the connected cases of Hickson v. Gray, 91 Cal.App.2d 684, 205 P.2d 420, and Denmead v. Gray, 91 Cal.App. 2d 687, 205 P.2d 426. Those cases arose out of the same factual situation: defendant Gray acted as broker for Hickson in selling the latter's property. Gray secretly sold to herself at one price and then resold the property to Denmead at a higher price. Hickson sued and recovered secret profits based on the breach of a fiduciary relationship. Denmead also sued for secret profits and was denied recovery because no fiduciary relationship existed between her and Gray. Taggart argues that plaintiffs in the case at bar are in the same position as plaintiff Denmead in the cases cited, and therefore cannot recover. He is mistaken. Here Taggart was not the agent of Sunset as was Gray the agent of Hickson. In those cases Hickson was defrauded. The only fraud in this case was perpetrated on plaintiffs; Taggart dealt at arm's length with Sunset in purchasing the property, even though he did not disclose the fact of his offer from plaintiffs. An agent of Sunset testified that he was well acquainted with Taggart's occupation and knew that Taggart intended to resell the property once he acquired it. Sunset would not be permitted to recover if it brought an action for secret profits against Taggart because, as between Sunset and Taggart, no agency existed and no fraud was perpetrated. It is therefore clear that the Hickson and Denmead cases do not sustain Taggart's position.

From the foregoing it is clear that the complaint states a cause of action as to defendant Taggart.

[7] At this point we may dispose of the question of defendant Jordan's liability. Even though Jordan willingly allowed her name to be used in the dual escrows, she did not share in the illicit profit which Taggart obtained. In each escrow transaction it was indicated that Jordan was merely acting for Taggart, who was designated as the real principal. The evidence establishes that Jordan turned over all that she received to Taggart, her employer. Under these circumstances it is clear that defendant Jordan cannot be held liable as an involuntary trustee. One cannot be deemed an involuntary trustee of something which he has not acquired. Civil Code section 2224 applies only to those who have made the wrongful acquisition. Since it was Taggart alone who obtained the illicit profit, he alone can be required to hold that profit as an involuntary trustee for the benefit of plaintiffs. Therefore, the judgment must be reversed as to defendant Jordan.

[8] Taggart's next three contentions, having to do with the sufficiency of the evidence to establish the existence of a fiduciary relationship, may be considered concomitantly. It is true that the evidence does not establish an agency relationship between plaintiffs and Taggart. Nor does it in fact disclose a fiduciary relationship between the parties. But this does not mean that Taggart was not under a duty to plaintiffs to speak truthfully and act honestly by reason of his status as a licensed broker. Taggart's fraud and misrepresentation constituted a breach of such duty, through which breach he obtained an illicit profit. The evidence unmistakably supports this conclusion and the court found the allegations of the complaint to be true. While the finding of fact and the conclusion of law that Taggart assumed a confidential or fiduciary relationship toward plaintiffs are technically incorrect, the duty he did in fact owe plaintiffs and which he violated is so closely akin to that of a fiduciary that he could not be prejudiced by such error. The result would be the same since the facts found by the court clearly

support the judgment on the theory of an involuntary trust. Therefore, there is no reversible error. Calif.Const. art. VI, § 4½.

[9] Taggart's final contention is that the damages are excessive. One ground for this contention is that Taggart was forced to spend in excess of $25,000 in order to obtain his unlawful profit. It was Taggart who actually paid Thomsen's commission; Taggart had misrepresented that Sunset would pay that commission. Moreover, Taggart had to carry the cost of "buying off" Dawson, the broker who had held a listing on the property. And Taggart had to pay various escrow charges. He urges that all these items should be deducted from his profit so as to reduce the amount of the judgment. His contention is without merit. In Kinert v. Wright, 81 Cal.App.2d 919, at page 927, 185 P.2d 364, at page 369, this court held: "An involuntary trustee who becomes such through his own fault is not entitled to reimbursement." This is in accord with the principle embodied in Civil Code, section 2275. To the same effect, see McArthur v. Goodwin, 173 Cal. 499, 504–505, 160 P. 679; Title Insurance & Trust Co. v. California Dev. Co., 171 Cal. 173, 220, 152 P. 542. Such a wrongdoer "has none of the rights ordinarily existing in favor of a trustee." McArthur v. Goodwin, supra, 173 Cal. at page 505, 160 P. at page 682. The expenses which Taggart incurred were a direct result of his fraudulent acts; if he had acted properly, they would not have accrued to him. "No equity is acquired through fraud." Marsh v. Smith, 46 Cal.App. 692, 700, 189 P. 1037. It is therefore clear that the judgment should not be reduced by reason of the expenses which Taggart incurred in obtaining his illicit profit. Schwarting v. Artel, 40 Cal.App.2d 433, 105 P.2d 380, relied upon by Taggart, is not applicable to the instant situation. In that case an agent who had obtained secret profits was permitted to be reimbursed for the value of a bungalow which he had contributed as part of the purchase price of property he had acquired on behalf of his principal. He was entitled to such reimbursement because in effect he had advanced a portion of the purchase money. That is far different from reimbursement for expenses which are incurred in obtaining the illicit profit but which are not a part of the purchase price of the property nor necessary to its protection and conservation.

[10–12] Although Taggart has not specifically raised the point, we are constrained to examine the propriety of awarding exemplary damages. Instead of bringing an action for damages for Taggart's fraud, plaintiffs have elected to sue for the recovery of the illicit profit which Taggart wrongfully acquired. The legal theory underlying this action is that of unjust enrichment. To prevent such enrichment the law imposes upon the wrongdoer an involuntary or constructive trust. Restatement, Restitution § 160. Where the property wrongfully acquired is money, the law implies a promise to repay. Philpott v. Superior Court, 1 Cal.2d 512, 518 et seq., 36 P.2d 635, 95 A.L.R. 990; McCall v. Superior Court, 1 Cal.2d 527, 530–533, 36 P.2d 642, 95 A.L.R. 1019. Plaintiffs' complaint in effect waives Taggart's tort and relies upon the quasi-contractual obligation which the law imposes upon him. Under these circumstances the plaintiffs are not entitled to recover any exemplary damages. Crogan v. Metz, 47 Cal.2d 398, 303 P.2d 1029; is decisive on this point. The court there stated (47 Cal.2d at page 404, 303 P.2d at page 1033): "Count II is in the nature of a common count for money had and received. By such a pleading the principal waives the tort of the agent and asserts a right to recover any secret profits made by him out of his agency." The court then struck the exemplary damages award, stating (47 Cal.2d at page 405, 303 P.2d at page 1033): "The cause of action stated in Count II is supported by the general finding and the judgment for compensatory damages, but does not entitle the plaintiff to punitive damages. Such an award may not be granted in an action based on a breach of contract even though the defendant's breach was wilful or fraudulent. [Citations.]" See, also, Chelini v. Nieri, 32 Cal.2d 480, 196 P.2d 915.

The judgment against defendant Jordan is reversed. The judgment against defendant Taggart is modified by striking therefrom that portion in which plaintiffs are awarded $36,000 as exemplary damages, and as so modified the judgment as to him is affirmed. No party shall recover costs on appeal.

HERNDON, J., concurs

ASHBURN, Justice (concurring and dissenting).

I concur in the judgment except as to the amount of same. However, my reasoning is somewhat different from that of the majority opinion.

The proof of defendant Taggart's fraud upon plaintiffs is clear. Indeed, appellant's opening brief concedes this: "Defendants admit that the record will support the determination that Taggart made various fraudulent misrepresentations to the plaintiffs relative to this transaction. Defendants admit that the record will support the determination that those misrepresentations were relied upon by the plaintiffs and induced the plaintiffs to conclude the transaction." The fact that defendant is a real estate broker adds nothing to the obligation to deal honestly in any business transaction. Every man engaged in such a deal is obligated to tell the truth when he speaks, to assert nothing as fact which he does not believe to be true, not to assert positively as a fact an untruth which he believes to be true where the statement is not warranted by the information possessed by him, not to conceal a material fact which, if disclosed, would influence the conduct of the other party to the deal. Civ.Code, § 1572; 23 Cal.Jur.2d § 4, p. 8; § 45, p. 106; § 46, p. 113. This duty of fair dealing rests upon a broker (with or without a license) as upon every man, no more and no less. In my opinion reliance upon Zichlin v. Dill, 157 Fla. 96, 25 So.2d 4, 5, injects a false element into an uncomplicated problem.

Taggart was not the agent of Sunset Oil Company, the owner of the land. So far as appears, he did not defraud that company. Any secret profit obtained by him did not belong to Sunset. It was plaintiffs who were defrauded and entitled to any appropriate remedy therefor. They elected not to sue for damages on the theory of recovery under § 3343, Civil Code, i. e., the difference between the price paid and the value of the land received for it. They have not advanced the claim at any stage of the case that the land was worth less than they paid for it. Their complaint and their briefs on appeal rest upon the theory that Taggart's working a fraud upon plaintiffs *created* a confidential relationship between them and entitled plaintiffs to damages for violation of the obligation of a fiduciary. Of course, the making of successful false representations to a buyer does not *create* a fiduciary relationship; but its result may be, at the election of the defrauded party, the imposition upon the wrongdoer of the obligations of a constructive trustee (Civ.Code § 2224). This is the result of the fraud; it does not antedate its accomplishment. The Restatement of the Law of Restitution, § 160, comment a, page 641, says: "The term 'constructive trust' is not altogether a felicitous one. It might be thought to suggest the idea that it is a fiduciary relation similar to an express trust, whereas it is in fact something quite different from an express trust. An express trust and a constructive trust are not divisions of the same fundamental concept. They are not species of the same genus. They are distinct concepts. A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment. A constructive trust, unlike an express trust, is not a fiduciary relation, although the circumstances which give rise to a constructive trust may or may not involve a fiduciary relation."

Through fraud defendant received money belonging to plaintiffs (not Sunset Oil

Company) and plaintiffs have elected to recover in an action which we hold to be based upon a contract or trust implied in law, not in fact,—one which rests ultimately upon the doctrine of unjust enrichment. The tort is thereby waived; the action proceeds on contract. Crogan v. Metz, 47 Cal.2d 398, 404, 303 P.2d 1029.

McCall v. Superior Court, 1 Cal.2d 527, 532, 36 P.2d 642, 645, 95 A.L.R. 1019: "But in *assumpsit,* where the tort is waived, the sum sued for is the benefit unjustly retained by the defendant; not the damage to the plaintiff, usually more uncertain in amount."

French v. Robbins, 172 Cal. 670, 679, 158 P. 188, 191: "The foundation of the action of *assumpsit,* where property of the plaintiff has been wrongfully taken and sold by the defendant, is the unjust enrichment of the wrongdoer. Keener on Quasi Contracts, p. 160. It is well settled that in order to recover in such an action the plaintiff must show that a definite sum, to which he is justly entitled, has been received by the defendant. 'As the amount of the plaintiff's recovery is limited to the proceeds received by the defendant, it will be fatal to this form of action that the amount is not ascertainable.' "

As the majority have held, these principles rule out the recovery of exemplary damages. That is the holding of Crogan v. Metz, supra, 47 Cal.2d 398, 405, 303 P.2d 1029. See, also, Steiner v. Rowley, 35 Cal.2d 713, 720, 221 P.2d 9; Squire's Department Store, Inc., v. Dudum, 115 Cal.App.2d 320, 325, 252 P.2d 418; Fordson Coal Co. v. Kentucky River Coal Corporation, 6 Cir., 68 F.2d 131; Hilderbrand v. Anderson, Mo. App., 270 S.W.2d 406, 410.

My dissent relates to that phase of the ruling which allows defendant only the sum of $4,000 an acre (a total of $288,196.72) as the basis for measuring his liability for restitution of unjust enrichment. Restatement of the Law of Restitution, § 160, comment d, page 643: *"Unjust enrichment and unjust deprivation.* In most cases where a constructive trust is imposed the result is to restore to the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant; in other words the effect is to prevent a loss to the plaintiff and a corresponding gain to the defendant, and to put each of them in the position in which he was before the defendant acquired the property."

As indicated by the quotations from French v. Robbins, supra, and McCall v. Superior Court, supra, the plaintiff who sues in assumpsit growing out of fraud or other tort recovers only such sum or property as belongs to him in equity and good conscience; at this point the fraud has spent its force and the idea of punishment is out. The rule is thus stated in 58 C.J.S. Money Received § 33, p. 947: "In an action for money had and received the plaintiff is entitled to recover such sum, and only such sum, as in equity belongs to him, in no event exceeding the sum actually received for his use by the defendant or the amount sued for, with interest."

Basically this rule is recognized in the majority opinion which holds defendant liable for $1,000 an acre instead of $5,000. He is given credit for the $4,000 he paid for the land and charged with the difference between that and the amount he received from the plaintiffs. It seems to me that the cases cited in the majority opinion do not sustain the disallowance of all credits claimed by appellant. I think the line of demarcation should be this: That defendant is entitled to a deduction of the entire cost to him of the transaction except those items which were incurred as a means of accomplishing his fraud.

In the latter category is the commission of $5,900 paid to Harvey Nelson, former vice president and land manager of Sunset Oil Company. It appears to have been paid as an aid (so far as defendant was concerned) to the accomplishment of the fraud upon plaintiffs. I agree that it should be disallowed as part of the cost of the property.

There were two escrows, one which channeled title from Sunset to Jordan (Taggart's dummy) at a cost of $171.85. The other passed title from Jordan to plaintiffs at a cost of $444.15. The expense of the first escrow should be disallowed, in my opinion, as an expense directed primarily to the accomplishment of the fraud, one which would not have been necessary to a legitimate transaction. On the other hand, the second item of $444.15 was an expense which would have been incurred in the absence of a fraud, and in my judgment should be added to the $4,000 an acre in computing the amount of restitution to be made.

One Dawson had an exclusive agency on the property to sell same, or part of it, at $11,000 an acre. In order to effect a sale of the entire property to plaintiffs it was necessary to get rid of Dawson's contract; this was done at a cost of $4,034.88. This expense would have been necessary had there been no fraud and regardless of whether the land sold for $4,000 or $5,000 an acre. It should be added to the $4,000 acreage price in computing the cost of the land to defendant.

With plaintiff Ward's knowledge and consent his own broker, Thomsen, was paid a commission of $15,012.30. There is nothing to suggest that this was not a legitimate item or that it was an instrumentality of accomplishing the fraud. I think this item should be added to the cost.

Plaintiffs paid to Sunset $288,196.72; to this should be added the following items: Cost of second escrow, $444.15; payment to Dawson, $4,034.88; commission to Thomsen, $15,012.30. This makes a total of $307,688.05. Deducting this amount from the price paid by plaintiffs, $360,246.00 leaves $52,557.95, to which amount the judgment should be reduced.

That the foregoing reasoning is sound is supported by the authorities, in my opinion. Schwarting v. Artel, 40 Cal.App.2d 433, 105 P.2d 380, was decided by this court and hearing denied. It was an action to recover a secret profit made by plaintiff's agent. Artel, the agent, had included in an exchange of properties between his principal, Schwarting, and one Hartman, an Inglewood bungalow belonging to himself and thereby had reaped a secret profit. At page 441, of 40 Cal.App.2d, at page 384 of 105 P.2d the court said: "In those cases where an agent has secretly profited, as a matter of course, to the end that equity be done to all parties he is entitled to be reimbursed for any portion of the purchase money advanced by him and for all expense necessarily incurred by him in protecting and conserving the property of his principal. 3 C.J.S. Agency p. 14, sec. 140. Under this hypothesis, Artel is entitled to be reimbursed in the amount of $2,000, the value of his said Inglewood bungalow, which he utilized in effectuating said exchange for Schwarting."

In Kinert v. Wright, 81 Cal.App.2d 919, 185 P.2d 364, also decided by this division, it was said concerning the measure of recovery in a secret profit case: "Respondent received $1,200 from appellants, asserting that the small tract selected by them could be purchased for that sum and falsely representing that it was free and clear of encumbrances. He paid $500 for the large parcel of land. The finding is that in his accounting he claimed to have paid $120 as commission. There is no finding that the commission was not paid, the evidence is not before us, and appellants do not dispute the claim. Allowing respondent his full due he is entitled to credit for $620 and appellants should recover the difference between that sum and the amount entrusted to him amounting to $580." (81 Cal.App.2d at pages 927–928, 185 P.2d at page 369.) In the same case the agent was disallowed an item of $160 which had been incurred for costs and attorney fees in an action concerning delinquent taxes upon property purchased by him for his principal because "the expenditures made by him were in pursuance of his 'scheme to obtain a secret profit' at appellants' expense." (81 Cal.App.2d at page 923, 185 P.2d at page 367.) At page 926 of 81 Cal.App.2d at page 367 of 185 P.2d: "Though respondent was appellants' agent when their relationship began he became their trustee when he took title to the property in his own name, using their money with which to make the purchase." At 927 of 81 Cal.App.2d, at page 369 of 185 P.2d: "The fraud and deception of respondent deprive him of the right to repayment of his expenditures for attorney's fees in the tax suit and for other purposes in connection with the property. Section 2273 of the Civil Code provides that a trustee is entitled to reimbursement out of the trust property of all expenses actually and properly incurred by him in the performance of his trust. This rule is applicable only when the trustee has conducted the affairs of the trust honestly, has dealt fairly with his beneficiary, and has not attempted to make a secret profit for himself out of the trust property or otherwise to deceive and defraud those who entrusted him with their business. An involuntary trustee who becomes such through his own fault is not entitled to reimbursement. Civ.Code, sec. 2275; Title Insurance & Trust Co. v. California Dev. Co., 171 Cal. 173, 220, 152 P. 542; Marsh v. Smith, 46 Cal.App. 692, 699, 189 P. 1037. The beneficiary 'is under absolutely no obligation to repay these outlays.' McArthur v. Goodwin, 173 Cal. 499, 505, 160 P. 679, 682." This case seems to recognize an important distinction here applicable, namely, that legitimate expenses incurred in acquiring the property for the principal are credited to the agent, but those concerned with its maintenance or protection which are incurred after the constructive trust has arisen are not allowed. The cases of McArthur v. Goodwin, 173 Cal. 499, 504, 160 P. 679, and Title Insurance & Trust Co. v. California Dev. Co., 171 Cal. 173, 220, 152 P. 542, fall within the purview of § 2275, Civil Code: "An involuntary trustee, who becomes such through his own fault, has none of the rights mentioned in this Article." In other words, they have to do with expenses of management or protection of property which has already become the subject of a constructive trust in the hands of defendant. Both cases apply Civil Code, § 2275, and to my mind they are not controlling here.

I concur in the reversal of the judgment against defendant Jordan. As to defendant Taggart the judgment should be reduced to $52,557.95, and affirmed as modified.

160 Cal.App.2d 824

John Carl OWENS, Plaintiff and Appellant,
v.
PARACO, Inc., a corporation, Defendant and Respondent.
Civ. 9287.

District Court of Appeal, Third District, California.
May 26, 1958.

Action under Fair Labor Standards Act to recover overtime compensation wherein plaintiff alleged that he was employed by corporate defendant in Sacramento County and that the place for payment of his wages was in Sacramento County, and that the place where overtime should have been paid was Sacramento County. The corporate defendant moved for change of venue from Sacramento County to Fresno County, the corporation's principal place of business. The Superior Court, Sacramento County, James J. Oakley, J., rendered judgment granting change of venue, and the plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that corporate defendant was not entitled to change of venue in absence of any showing by corporation that any excess time in any week was put in in Fresno County.

Reversed.

1. Corporations ⚷503(3)

Corporate defendant moving for change of venue must show not only the place of its residence or principal place of business, but also that the contract was not made, that it was not to be performed, that the obligation or liability did not arise and that the breach did not occur in the county wherein the venue is originally placed by the filing of plaintiff's complaint. West's Ann.Const. art. 12, § 16.

2. Corporations ⚷503(3)

In action under Fair Labor Standards Act to recover overtime compensation, where plaintiff alleged that he was employed in Sacramento County and that the place for payment of his wages was in Sacramento County and that the place where overtime should have been paid was Sacramento County, corporate defendant was not entitled to change of venue from Sacramento County to Fresno County, the corporation's principal place of business, in absence of any showing by corporation that any excess time in any week was put in in Fresno County. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; West's Ann.Const. art. 12, § 16.

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Rowland & Paras, Sacramento, for appellant.

Rowell, Lamberson & Thomas, Fresno, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order granting a change of venue from the County of Sacramento to the County of Fresno where the corporate respondent has its principal place of business.

Appellant, in this action, seeks to recover compensation for overtime allegedly worked between 1954 and 1956. In support of its motion for change of venue, respondent filed an affidavit, wherein it averred the following: That the principal place of business of the respondent was at all pertinent times in the County of Fresno; that on June 25, 1951, the appellant was employed by respondent by an oral agreement made at respondent's principal place of business; that appellant's duties were those of a route driver on routes maintained by respondent for picking up waste lubricating oil and that respondent picked up oil for delivery either to respondent's principal place of business in Fresno County or to temporary storgae tanks located at various points in the state for the convenience of route drivers; that from the time of appellant's original employment until January 21, 1953, appellant was assigned to the general area bounded on the north by the City of Stockton, and on the south by the City of Bakersfield; that on January 21, 1953, appellant was assigned one of respondent's pick-up routes in the general area bounded by the City of Stockton on the south, the Oregon border on the north, the Coast Range mountains on the west, and Reno to the east; that thereupon appellant moved his residence to the County of Sacramento; that the greater part of appellant's time thereafter was taken in collecting oil in the counties north of Sacramento County; that for the most part he deposited the oil in temporary storage tanks in Sacramento, lesser amounts being deposited in Stockton and at times appellant transported the oil to Fresno County; that at all times respondent paid appellant by checks issued in Fresno County, drawn on a bank in Fresno County; that after moving to Sacramento appellant came to respondent's principal place of business about once every six to seven weeks with oil he had collected and at such times his pay check was delivered to him personally in Fresno County; that at other times respondent mailed appellant's pay check to him in Sacramento County where appellant resided.

Appellant filed no counter-affidavit, but relies in part on certain allegations in his pleading. They are that from 1952 to June of 1956, when he terminated employment with respondent, he was employed by respondent in Sacramento County; that the place for payment of his wages was in Sacramento County; that he was employed on a basis whereby he was paid weekly; that he sues for time worked weekly in excess of 40 hours under the provisions of the "Fair Labor Standards Act of 1938" (29 U.S.C.A. § 201, et seq.); that the place where overtime should have been paid was Sacramento County; that the place for payment of wages pursuant to his contract of employment was Sacramento County.

[1] Respondent attacks the foregoing allegations of the appellant's complaint as being no more than legal conclusions which must be disregarded in passing upon the propriety of the order changing venue. We think it unnecessary to discuss this contention. Taken as admitted in all of its parts, the affidavit of respondent will not support the order changing venue. A corporation may be sued in the county where the contract is made or is to be performed, or where the obligation of liability arises, or the breach occurs, or in the county where the principal place of business of the corporation is situated. Art. XII, sec. 16, Calif.Const. It is incumbent upon the moving party to show not only the place of its residence or principal place of business, but also that the contract was not made, that it was not to be performed, that the obligation or liability did not arise and that the breach did not occur in the county wherein the venue is originally placed by the filing of plaintiff's complaint. Union Oil Co. of California v. Basalt Rock Co., Inc., 30 Cal.App.2d 317, 86 P.2d 139, citing Gas Appliance Sales Co. v. W. B. Bastian Mfg. Co., 87 Cal.App. 301, 262 P. 452; Lakeside Ditch Co. v. Packwood Canal Co., 50 Cal.App. 296, 195 P. 284; Rowe v. Policy Holders Life Ins. Ass'n, 131 Cal.App. 339, 21 P.2d 443. See, also, Killam v. Riley, 125 Cal.App.2d 394, 270 P.2d 544.

We quote the following from Konig v. Associated Almond Growers, 37 Cal.App. 2d 360, 364–365, 99 P.2d 678, 681:

> "* * * [E]ven if we assume that in the instant case the only venue laid in the complaint is in the title thereof, 'the burden is not on the plaintiff to show that such an action was brought in the proper county or that he comes within an exception to any general rule, but the burden is on a corporation defendant to show that the place of filing such an action as this is not the proper county of trial, which may not be done by a showing of residence alone'."

[2] Turning now to the affidavit of respondent's president to test its sufficiency to support the order appealed from, we find the following: Appellant's suit is based on a federal statutory liability which requires the payment of additional compensation to an employee whenever the employee is required to work in excess of 40 hours per week. There is no liability to pay the overtime compensation except as and when an excess of 40 hours' labor per week is performed. Upon such performance the statutory obligation to pay overtime instantaneously arises. There is not the slightest reference in the affidavit of respondent's president to the effect that any excess time in any week was put in in Fresno County. Presumptively, therefore, the obligation sued on arose in the county where the suit was filed.

The judgment is reversed.

SCHOTTKY, J., and WARNE, Justice pro tem., concur.

160 Cal.App.2d 827

EMBREE URANIUM COMPANY, a limited partnership, Plaintiff and Respondent,

v.

Frank LIEBEL, Virgil Liebel, Everet Beatty, Alberta Beatty, Louis Mannatt and Bonnie Mannatt, Defendants and Appellants,

John C. Reaves, Intervener and Respondent.

Civ. 5668.

District Court of Appeal, Fourth District, California.

May 26, 1958.

Action to recover purchase price paid for mining property. The Superior Court of Kern County, W. L. Bradshaw, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Mussell, J., held that oral permission to prospect property, given by landowner, was terminated when landowner agreed to lease the property to one who had purchased it from prospectors, and hence such purchaser received its possessory rights from landowners and not from prospectors, and was not required to give notice of rescission or offer to restore anything to prospectors as a prerequisite to filing action against prospectors to recover purchase price.

Affirmed.

1. Mines and Minerals ⚷54(3)

In action to recover purchase price paid for mining property, evidence supported findings favorable to plaintiff and findings supported judgment for plaintiff.

2. Mines and Minerals ⚷54(3), 84

Oral permission to prospect property, given by landowner, was terminated when landowner agreed to lease the property to one who had purchased it from prospectors, and hence such purchaser received its possessory rights from landowners and not from prospectors, and was not required to give notice of rescission or offer to restore anything to prospectors as a prerequisite to filing action against prospectors to recover purchase price.

Mack, Bianco, King & Eyherabide, Bakersfield, for appellants.

Di Giorgio & Davis, Bakersfield, for plaintiff and respondent.

Philip M. Wagy, Bakersfield, for intervener and respondent.

MUSSELL, Justice.

This is an action to recover the purchase price paid by plaintiff partnership for mining property in Kern county. Plaintiff alleged a common count for money had and received in the sum of $40,000 and the case was tried on that cause of action. Defendants appeal from the judgment rendered in favor of plaintiff and contend that plaintiff failed to comply with the applicable rules of law relating to rescission so as to furnish the foundation for the common count of moneys had and received.

In the summer of 1950 the defendants asked for and obtained permission from Mr. and Mrs. Flood to prospect on real property owned by the Floods in Kern county. Defendants then commenced prospecting, drilling, blasting and mining on the property, and on July 2, 1951, filed a notice of location of the "Unip Mine", most of which was located on the Flood property. Defendants shipped ore from the premises with the knowledge and consent of the Floods and without any claim being made by them for royalties or to any of the proceeds received by the defendants for such ore.

In July, 1954, L. G. Embree, one of the members of plaintiff partnership, became interested in the mine and commenced negotiations for its purchase. These negotiations resulted in an assignment by defendants to plaintiff of the Unip mine and four other adjacent claims, on November 29, 1954, for a total consideration of $40,000. Upon defendants' instruction and pursuant to prior negotiations all of the $40,000 consideration was paid for the Unip mine and no, or nominal, consideration was paid for the other claims, Unip Nos. 2, 3, 4 and 5, which were not on the Flood property and were located on or about August 10, 1954. There was testimony to the effect that these other claims were "thrown in for good measure" and that no development work was performed on them.

Two separate assignments were executed by defendants on November 29, 1954, one describing the Unip mine and the other Unip mining claims Nos. 2, 3, 4 and 5. Each assignment contains, in part, the following language:

> "Assignors hereby covenant with Assignee that said mining claim is free from all encumbrances, and do hereby agree to warrant and defend the same to said Assignee against the claims and demands of all persons whomsoever."

Immediately after having purchased and paid for the Unip mine, members of plaintiff partnership went to see Mrs. Flood and obtained from her a written agreement, dated December 17, 1954, in which, after reciting that she owned the surface rights, she agreed to execute a lease to plaintiff on approximately ten acres for a period of five years, at a total rental of $500, the land to be used for a millsite and mining operations. This agreement further provides as follows:

> "The lease will provide for additional five year extensions as long as the lessees require the property at same rental. In addition the lessees are to be given an option to purchase the said land at an agreed price in the event I sell the remaining land adjacent to the land covered by the lease."

After securing this agreement, plaintiff partnership commenced mining operations on the Unip claims and continued their operations until about August 10, 1955, when they "ran out of money" and "production was not paying." During this period plaintiff spent approximately $100,000 in mining and developing the claim, installing equipment thereon consisting in part of a hoist, a mill, balance mill, screens, crusher, concentrating tables, power plant and compressor. Plaintiff shipped and sold approximately $29,000 worth of ore from the Unip mine without any objection from the Floods and no demand for payment of royalties was made by them.

In late August or early September, 1955, the attorney for Mrs. Flood orally informed plaintiff's attorney that plaintiff was trespassing on her land and on September 7, 1955, she gave plaintiff a written one-month's notice to quit in which she stated that defendants were occupying the property without authority of the owner; that they entered the property under a so-called option dated December 17, 1954; that said option was without consideration and was terminated May 5, 1955, and that defendants have since occupied the premises under a tenancy at will.

On or about October 10, 1955, plaintiff entered into negotiations for a sale of the mine and an agreement of sale and purchase was obtained. However, plaintiff was informed by a title company that it did not own the mine and the sale was never accomplished. In this connection a land title examiner testified that he examined the title to the Unip claim and found it be vested in Mary Flood, and that the title to the other claims was vested in the United States of America.

Upon ascertaining that it did not own the Unip claim and mine, plaintiff entered into negotiations with the owner, Mary Flood, to settle her claim of paramount title and possession of the property. These negotiations resulted in a settlement in which plaintiff quitclaimed all of its interest in the mining claim to Mrs. Flood and she executed a lease of the property to plaintiff.

Plaintiff filed the instant action on March 7, 1956, without giving notice of rescission or offering to restore the consideration.

[1] The trial court found, among other things, that when the defendants agreed to sell the Unip mine to plaintiff the mine was located on the fee land of Mary Flood; that defendants did not own the mine; that it was agreed that the full consideration of $40,000 would pass as the price of said mine; that defendants on November 2, 1954, represented and warranted in writing that they were the owners of said Unip mine and that the same was free and clear of the claims of any other persons whomsoever;

that in reliance on the representations and warranty of defendants, plaintiff paid to defendants the sum of $40,000; and that the Unip mining claims Nos. 2, 3, 4 and 5 were of no value. These findings are supported by substantial evidence and are sufficient to support the judgment.

[2] Appellants concede that the plaintiff had the right to rescind the contract to purchase but contend that plaintiff cannot recover because no notice of rescission was given and no offer to restore everything of value received was made. We are not in accord with this contention.

In 12 California Jurisprudence 2d, section 195, pages 412–413, it is said that

> "Compliance with the requirement to rescind promptly implies some notice to the other party of the determination to extinguish the contract. No specific form of notice is required, and it is not necessary that the notice be formal and explicit. It is sufficient if it gives the other party a clear indication of the intention to consider the contract at an end.
>
> "Where there is a total failure of consideration, notice of rescission is not essential to the maintenance of an action to recover payments made under the contract. In such a case the initiation of the action itself would seem to be sufficient notice."

In San Diego Construction Co. v. Mannix, 175 Cal. 548, 558, 166 P. 325, 329, the court said:

> "That no formal demand for a rescission, other than the bringing of the action for the purchase money paid, is necessary, where the vendor has refused to convey on demand, after full payment of the price, and that no offer to restore was required where there was nothing to restore, as is the case here, are well settled propositions. Chatfield v. Williams, 85 Cal. [518] 521, 24 P. 839; Thomas v. Pacific, etc. Co., 115 Cal. [136] 142, 46 P. 899; Carter v. Fox, 11 Cal.App. [67] 71, 103 P. 910."

In 12 California Jurisprudence 2d, section 197, page 415, it is said:

> "While it is the general rule that restoration of the parties to statu quo is a prerequisite to the rescission of a contract, the rule has no application and there is nothing to restore if the rescinding party has received nothing, or has received nothing of value. Nor is a person seeking to rescind a contract obliged to return things not received under the contract and which he is entitled to retain in any event.
>
> "A positive refusal by a party to return the property which he has received relieves the other party from the necessity of offering to return the consideration received by him. And the duty of a rescinding party to restore the other to statu quo does not extend to undoing acts performed by the other party."

In the instant case defendants sold a mining claim which they did not own and plaintiff received nothing from them for the $40,000 paid.

Appellants argue that the possessory rights secured by plaintiff were valuable and that plaintiff was required to restore these rights to them in order to maintain the present action. However, the record shows that before plaintiff entered upon the premises and commenced mining operations thereon it secured a written agreement to lease from the owner, Mrs. Flood. While oral permission to prospect the property was given appellants by her, that permission was terminated when she agreed to lease the property to plaintiff. The surface rights as well as the Unip mine were at all times the property of the Floods. The plaintiff received its possessory rights from the Floods and not from the defendants. It follows that no offer of restoration was required as a prerequisite to the filing of the instant action.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

160 Cal.App.2d 464

**PEOPLE of the State of California,
Plaintiff and Respondent,
v.
HARTER PACKING COMPANY, a corporation; Howard Harter, Chauncey Harter, Orlin Harter and Leonard Harter, Defendants,**

Harter Packing Company, a corporation, Appellant.

Civ. 9308.

District Court of Appeal, Third District, California.
May 14, 1958.

Hearing Denied July 9, 1958.

Action to impose a civil penalty for violation of an agricultural marketing order and for other relief. The Superior Court, Sutter County, Arthur Coates, J., entered judgment for the state and defendant appealed. The District Court of Appeal, Schottky, J., held that where Marketing Act provided that violation of any marketing order was a misdemeanor and provided a civil penalty for violation of such an order, director of agriculture could not enlarge upon such provisions and provide a different penalty for violation of a marketing order such as a penalty based in part on number of tons of peaches which processor failed to divert in accordance with such order.

Judgment reversed.

Van Dyke, J., dissented.

1. Administrative Law and Procedure 🔑305

An administrative agency is a creature of statute and only possesses such powers as may be conferred upon it.

2. Administrative Law and Procedure 🔑387

If the act under which an administrative agency gets its power provides no sanctions or penalties for failure to comply, the agency may not by rule promulgate them.

3. Administrative Law and Procedure 🔑387

A ministerial officer under the guise of a rule or regulation may not vary the terms or conditions of a legislative enactment.

4. Administrative Law and Procedure 🔑387
Agriculture 🔑2

Where Marketing Act provided that violation of any marketing order was a misdemeanor and provided a civil penalty for violation of such an order, director of agriculture could not enlarge upon such provisions and provide a different penalty for violation of a marketing order such as a penalty based in part on number of tons of peaches which a processor failed to divert in accordance with such order. West's Ann.Agric.Code, §§ 1300.10 to 1300.29, 1300.19.

5. Estoppel 🔑62(2)

Estoppel could not be invoked where an order issued by director of agriculture was not authorized by act under which he was purporting to act, and where such order was contrary to penalty specifically provided in such act. West's Ann.Agric. Code, §§ 1300.10 to 1300.29, 1300.19.

◆

Weis & Weis, Yuba City, and Steel & Arostegui, Marysville, for appellants.

Edmund G. Brown, Atty. Gen., by Paul M. Joseph and John E. Fourt, Deputies Attys. Gen., for respondent.

SCHOTTKY, Justice.

Harter Packing Company, a processor of cling peaches, appeals from a judgment in the amount of $5,093, entered against it because of its failure to comply with the provisions of a Marketing Order for Canning and Freezing Cling Peaches issued by the Director of Agriculture. By the terms of the order, producers of cling peaches were paid by a processor only for cling peaches certified as Number 1. The processor in turn was required to divert, dump, or dispose of, other than by canning, an amount of peaches received by the processor equal to the aggregate amount of peaches delivered by producers which were not certified Number 1. The market order provided further that:

> "For any quantity of cling peaches which any processor has failed to divert pursuant to the provisions of this Section such processor shall make payment for such peaches by paying to the Board a sum based upon the number of tons of cling peaches which said processor failed to so divert and computed at the rate per ton represented by the price paid by such processor to producers for Number 1 Cling Peaches.
>
> "Failure to divert the proper quantity of cling peaches as required in this Section shall subject any such processor to the applicable legal procedures and penalties of the Act. For the purpose of establishing a proper basis for determining the number of violations in each case in which any processor fails to divert cling peaches in the quantity required pursuant to the provisions of this Section, each five (5) tons, or portion thereof, of cling peaches owed by any processor to the Board for diversion purposes and remaining undiverted at the close of a processing season shall be considered to represent a single diversion obligation and a separate violation of the diversion requirements of this Marketing Order."

During the canning season of 1954 Harter received some 280 tons of off-grade peaches and failed to divert some 92.6 tons, as required by the order, prior to the completion of his processing season for cling peaches. An action was brought by the people of the state of California against Harter to impose in count one the civil penalty of $500 provided by section 1300.19, subdivision (b), of the Agricultural Code for Harter's failure to divert the required tons of peaches; to impose in count two liability in the amount of $5,093 in accordance with the provisions of the marketing order, and to enjoin Harter from violations in the third count. Judgment was given in favor of Harter as to counts one and three and judgment against it was given on count two. No appeal was taken by plaintiff from the court's judgment in favor of Harter on the first and third causes of action, and this appeal is concerned only with the judgment rendered against Harter on count two.

Appellant, Harter, challenges the validity of the marketing order insofar as it required processors to pay a sum equal to the number of tons of peaches not diverted. It is admitted that Harter agreed to the order prior to the time it became effective, and it is also admitted that Harter was a processor of cling peaches and subject to the market order in question here. No attack is made on the authority of the Director to make marketing orders or the validity of any provision of the order other than the one in question.

The California Marketing Act of 1937 (sections 1300.10 to 1300.29, inclusive, of the Agricultural Code) provides a method for the marketing of agricultural products in such a manner as to promote the agricultural industry of this state. Section 1300.15 sets forth the permissible provisions which a marketing order may contain. It reads in part (subdivision (b)): "Subject to the legislative restrictions and limitations set forth herein any marketing order issued by the director pursuant to this chapter may contain any or all of the following provisions for regulating or providing methods for regulating producer marketing or the handling or any of the operations of processing or distributing by handlers of any agricultural commodity within this State, *but no others.*" (Emphasis added.) These include provisions for the control of surplus including the creation of a stabilization fund; provisions for limiting the total quantity of any agricultural commodity which may be marketed; provisions for allotting the quantity which each handler may purchase; provisions for allotting the quantity which may be processed; provisions for regulating the period during which a commodity may be processed; provisions for the establishment of surplus, stabilization, or surplus by-product pools; provisions for the establishment of uniform grading and inspection; provisions relating to the prohibition of unfair trade practices (reading in part: "the director is hereby authorized to include in any marketing order * * * provisions designed to correct any trade practice affecting the processing, distributing or handling of any agricultural commodity * * * which the director finds, after a hearing thereupon in which all interested persons are given an opportunity to be heard, is unfair and detrimental to the effectuation of the declared purposes of this chapter."); provisions for advertising and sales promotion, and provisions for research studies. It does not include any provision for payment of funds for failure to comply with a marketing order.

Section 1300.19 provides for the administration and enforcement of the act. It reads in part:

> "The following penalties, remedies, procedures and actions shall apply in instances of violations * * * of the provisions of this chapter or of any marketing order * * * issued by the director. * * *
>
> "(a) Every person who violates * * any provision of any marketing order * * * shall be guilty of a misdemeanor. * * *
>
> "(b) Any person who violates * * * any marketing order * * * shall be liable civilly for a penalty in an amount not to exceed a sum of five hundred dollars ($500) for each and every violation thereof. * * *
>
> "(h) Upon compliance with section 527 of the Code of Civil Procedure * * * if judgment be in favor of plaintiff, the court shall permanently enjoin defendant from further violations. * * *
>
> "(m) The penalties and remedies prescribed in this section with respect to any violation mentioned in this section shall be concurrent and alternative and neither singly nor combined shall the same be exclusive and either singly or combined the same shall be cumulative with any and all other civil, criminal or administrative rights, remedies, forfeitures or penalties provided or allowed by law with respect to any such violation."

[1-3] We do not believe that the California Marketing Act of 1937 authorized the director to insert in any marketing order a provision such as the one here under attack. The provision is a sanction or penalty not authorized by the Act. An administrative agency is a creature of statute and only possesses such powers as may be conferred upon it. If the act under which the administrative agency gets its powers provides no sanctions or penalties for failure to comply, the agency may not by rule promulgate them. Gardner v. Ewing, D.C., 88 F.Supp. 315, affirmed, 6 Cir., 185 F.2d 781, reversed in part on other grounds 341 U.S. 321, 71 S.Ct. 684, 95 L.Ed. 968. See also Columbus Wine Co. v. Sheffield, 83 Ga. App. 593, 64 S.E.2d 356. In the absence of authority an agency may not impose sanctions for failure to comply with its order. It is well settled that a ministerial officer under the guise of a rule or regulation may not vary the terms or conditions of a legislative enactment. Knudsen Creamery v. Brock, 37 Cal.2d 485, 234 P.2d 26; Cullinan v. McColgan, 80 Cal.App.2d 976, 980, 183 P.2d 115.

[4] Section 1300.19 of the Act, as hereinbefore set forth, enumerates the penalties for violation of the Act and of "any marketing order duly issued by the director." Violation of any marketing order is declared a misdemeanor and the Act also provides that as a civil penalty a person violating any marketing order "shall be liable * * * in an amount not to exceed the sum of five hundred dollars ($500) for each and every violation."

We do not believe that the director could enlarge upon these provisions and provide a different penalty for a violation of the marketing order. In the instant case the marketing order provided as a penalty that the processor should pay to the Board for the number of tons diverted at the price of Number 1 cling peaches, which was a different civil penalty from the one authorized by the Act, and the court rendered judgment in accordance with said provision of the marketing order.

Respondent State of California contends that the section providing for the imposition of damages for a failure to divert peaches constitutes a reasonable and valid regulation intended to prevent the processor from unjustly enriching himself at the producer's expense. We are not here concerned with the asserted reasonableness of the order but with the authority of the director to make it, and that authority must come from the Act. We believe that such authority is lacking. Furthermore, the Act would prevent any unjust enrichment of the processor because a civil penalty of not to exceed $500 is provided for each violation of a marketing order, and the order provides that the diversion of each five tons of peaches or portion thereof constitutes a separate violation. Applying the provisions of the Act to the instant case the 92.6 tons would make 19 separate violations of the marketing order and could subject appellant to a civil penalty of as much as $9,500.

Respondent contends further that the appellant, by accepting the benefits of the marketing order, is estopped to deny its validity. The trial court found that the appellant Harter Packing Company, having assented to the terms and conditions of the marketing order, and having accepted its benefits for the years 1954, 1955, and 1956, had waived its right to attack the validity of the marketing order and was estopped to question its validity.

[5] We do not believe that estoppel may be invoked in a case such as this where the order issued by the directors was not authorized by the Act and where it was contrary to the penalty specifically provided in the Act. What was said in Del Mar Canning Co. v. Payne, 29 Cal.2d 380, at page 384, 175 P.2d 231, 233, is apposite:

> "Respondents further urge that petioner is estopped to attack the rule because he did not object to its formulation, because in his application for a permit he agreed to abide and be bound by the rules, and because others but for the rule might have placed themselves in a position to obtain similar permits for multiple units. What others may have done is no concern of the petitioner. It was equally open to all to question the constitutionality of the rule if they saw fit to do so. Petitioner's agreement to abide by the rules in his application may be assumed to have been forced on him by the respondents as a condition required of all applicants for permits and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission. No authority is cited to the point that the failure to object to the promulgation of an unconstitutional rule raises an estoppel to attack it afterwards and we are satisfied that the commission has no legal power to place the burden of objecting to a rule at the time of its formulation upon those engaged in the industry under pain of thereafter being estopped to attack its validity."

Our conclusion is that the provision of the marketing order here under attack and upon which the judgment in favor of respondent on count two of the complaint is based was not authorized by the Act and is invalid. This requires a reversal of the judgment.

The judgment is reversed.

PEEK, J., concurs.

VAN DYKE, Justice.

I dissent from that portion of the majority opinion which holds invalid the provisions of the marketing order requiring that a processor who fails to divert shall pay for the peaches he unlawfully processes and sells by paying to the board a sum based upon the number of tons of peaches which he failed to divert, computed at the rate per ton represented by the price paid by the processor to producers for Number 1 Cling Peaches.

The majority hold that this provision is invalid because it is a penalty beyond the power of the board to declare and because it is not within the legislative permission of what a marketing order may provide. In my view, it is neither a penalty nor without the legislative permission. Section 1300.15 of the Agricultural Code provides that any marketing order issued by the director may contain, among other things, provisions for "equalizing the burden of such surplus elimination or control among the producers, processors, distributors or other handlers affected." I believe the provisions of the marketing order under attack come squarely within the legislative permission thus granted. It is part and parcel of the entire scheme for controlling the amount of any agricultural commodity which shall reach the market and it may well have been considered by the director, and those in the industry who approved it, as the most effective means of protecting the industry from the unlawful marketing of surpluses. Under the provisions of the Marketing Act, the cost of eliminating surpluses and off-grade produce is borne by the industry being regulated. Assessments are levied upon producers and processors and the funds so obtained are paid into an administrative fund to defray the cost of enforcing the provisions of the act and of the marketing orders adopted thereunder. In the instant case the provision attacked provides an additional source of funds for such enforcement which, when collected and placed in the administrative fund, redounds to the benefit of the industry as a whole, just as do the assessments and any other funds collected for that purpose. A processor who violates the provisions of the order forbidding the canning and disposal into the market of off-grade peaches has paid nothing for the fruit he thus illegally commits to the market. He cannot pay the producers from whom he obtained the off-grade fruit and it is, therefore, in no sense a penalty that he be compelled, if he violates the order and processes and sells off-grade fruit, to pay into the administrative fund for the benefit of the industry he has thus injured the same price per ton as all other processors have had to pay for the fruit they lawfully processed and marketed. The offending processor has received full consideration for the fund he is required to pay. He is in no sense penalized. Such payment directly tends to equalize the burden of surplus elimination and control in the industry. I think that we have here nothing that smacks of penalty; that we have a provision coming squarely within the legislative authorization which permits the order to contain provisions which equalize the burden of control.

I agree with what the majority say concerning the lack of estoppel, but I would affirm the judgment for the reasons hereinbefore stated.

Hearing denied; TRAYNOR, J., dissenting.

160 Cal.App.2d 545

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Helen Florence PRESTON, Defendant and Appellant.

Cr. 6070.

District Court of Appeal, Second District, Division 3, California.

May 16, 1958.

Defendant was convicted of occupying an apartment with paraphernalia for purpose of recording bets on horse races and with recording bets on horse races. The Superior Court of Los Angeles County, Fred Miller, J., rendered judgment, and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained conviction and that where police officer received information from informer that bookmaking was being carried on in defendant's apartment, officer called defendant's telephone number, named horses in races, and person on phone said "O.K.", and another officer forced entry into defendant's apartment when she did not open door after he stated he was an officer and that defendant was under arrest for bookmaking, there was probable cause to justify entry into apartment, arrest was not unlawful, search of apartment was an incident to lawful arrest, and articles obtained as result of search were admissible in evidence, even though officers did not have a warrant.

Judgment and order denying motion for new trial affirmed.

1. Arrest ⚿63(4)

"Probable cause" is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of guilty of the accused.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

2. Arrest ⚿63(4), 71
Criminal Law ⚿394.4(9)

Where police officer received information from informer from whom officer had previously received reliable information that bookmaking was being carried on in defendant's apartment, officer called defendant's telephone number, named horses and races, and person on phone said "O. K.", and another officer forced entry into defendant's apartment when she did not open door after he stated he was an officer and that defendant was under arrest for bookmaking and told her to open door, there was probable cause to justify entry into apartment, arrest was not unlawful, search of apartment was an incident to lawful arrest, and articles obtained as result of search were admissible in evidence, even though officers did not have a warrant. West's Ann.Pen.Code, §§ 337a, subds. 2, 4, 836.

3. Gaming ⚿98(3, 5)

Evidence sustained conviction for occupying an apartment with paraphernalia for purpose of recording bets on horse races, and with recording bets on horse races. West's Ann.Pen.Code, § 337a, subds. 2, 4.

4. Criminal Law ⚿385, 419(1)

In prosecution for occupying an apartment with paraphernalia for purpose of recording bets on horse races, and with recording bets on horse races, striking of defendant's statement that papers found in her apartment at time of her arrest were "I.O.U." papers for money borrowed from her husband at his bar on ground that statement was hearsay and sustaining of objection to question put to defendant by her attorney as to whether she had seen similar papers made were not improper where defendant testified that she did not see anyone write on the papers and there was no testimony as to method of recording acts or events in regular course of business at the bar. West's Ann.Pen.Code, § 337a, subds. 2, 4.

5. Criminal Law ⚿939(4)

In prosecution for occupying an apartment with paraphernalia for the purpose of recording bets on horse races, and with recording bets on horse races, denial of defendant's motion for new trial requested so that defendant would get an opportunity to introduce competent evidence to explain papers found in her apartment at time of her arrest was not improper where there was no request during the trial for continuance in order to obtain other testimony regarding those papers and, at hearing of the motion, counsel for defendant said, with reference to the papers, that he wasn't able to get in touch with the other people. West's Ann.Pen.Code, § 337a, subds. 2, 4.

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Virgil V. Becker, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was convicted, in a nonjury trial, of violating subdivision 2 of section 337a of the Penal Code (occupying an apartment with paraphernalia for the purpose of recording bets on horse races) and was convicted of violating subdivision 4 of said section (recording bets on horse races). Proceedings were suspended and probation was granted. Defendant appeals from "the judgment" and the order denying her motion for a new trial. Since proceedings were suspended and judgment was not pronounced, it will be assumed that "the judgment" referred to in the notice of appeal is the order granting probation.

Appellant contends: (1) the search of her home and the seizure of articles therein were unlawful and that the articles so taken should not have been received in evidence; (2) the evidence was insufficient to justify the conviction; and (3) the court erred in sustaining an objection to testimony of appellant purporting to explain the meaning of writing which was on certain pieces of paper (People's Exhibit 2).

On March 13, 1957, about 4 p. m., five police officers went to the vicinity of 215 West Opp Street in Los Angeles for the purpose of making an investigation at that address. Officer Schubach had received information regarding that place, about two weeks previously, from a confidential informer. He had received information, in the past, from that informer and the information had been reliable.

Officer Schubach testified that he went to a street corner, one block from said address, and after receiving a prearranged signal from Officer Sawyer, he went to a telephone booth at that corner and called telephone number Terminal 5–4961; the number had been given to him by the informer, and he (officer) had checked the number through the intelligence division of the police department; the number was registered to Mrs. Frankie Preston, 215 West Opp Street; a woman's voice answered the telephone call; the officer said, "Banker Vic in the seventh, Allman in the eighth, two and two parlay"; the voice said, "Who for?"; the officer said, "Chuck for Bob"; the voice said, "O.K."; after making that call, the officer signaled Officer Sawyer, who signaled Officer Jameson; then Officer Schubach (witness) went to said address and at that time Officers Jameson and Gendreau were in the house.

Officer Gendreau testified that while he was standing outside the front door of said address he received a signal from Officer Jameson, and then he (witness) knocked on the door and stated, "I am a police officer. You are under arrest for bookmaking. Open the door."; after standing a few moments and receiving no response, he forced entry into the house; upon entering the house he noticed a strong odor of smoke and he heard the toilet being flushed in the washroom; he banged on the door of the washroom, and receiving no response he forced the door open; he saw defendant in the washroom; there was a very strong odor of smoke in that room; he saw a telephone on the floor, about the center of the living room, and about 15 feet from the washroom; the number of the telephone was Terminal 5–4961; the telephone cord had been cut at the base of the telephone; scissors were on the floor next to the telephone; he took the base off the telephone and spliced the cord, and then about nine calls were received in the next 10 minutes; defendant was the only person in the apartment when he entered; he asked her (in the presence of Officers Jameson and Schubach) who cut the telephone line; she said that her grandson had cut it that morning (the grandson was about 16 months old); later she said that playmates of the grandson had cut it; she said she did not know the names of the playmates, or their ages, or whether they were boys or girls; before entering the apartment, he (witness) had the house under observation about 10 minutes, and he did not see anyone enter or leave the apartment during that time but he did hear the telephone ring twice—the last ring was about 50 seconds before he entered; there was only one entrance to the apartment; he found two scratch pads (about 3 inches by 5 inches in size—Exhibit 5) on a card table in the living room; he found six other similar pads (Exhibit 6) in a drawer of a desk; he found seven scratch sheets, with writing on them (Exhibit 2), in a file box in a desk which was near the living room.

Exhibit 1 is a blank scratch sheet which was the top sheet of a pad that was on the card table. There were certain imprints (pencil or pen impressions) on that exhibit. Photographs of those impressions were made and were received in evidence as Exhibits 4, 7, and 8. The photographs show that the marks or impressions on the paper (toward the top) were: "62" "10" and "XX"; and (below those marks) were "75" "22" "85" and "Chuck."

Exhibit 3 is a National Daily Reporter scratch sheet, dated March 13, 1957. That exhibit was not found in the apartment—the officers had it before the arrest.

Officer Gendreau, who was an expert in bookmaking, testified further that in his opinion the figures on Exhibit 4 (one of the photographs) indicate the names of horses in a race, the bet that was made, and the name of the bettor, Chuck; that after referring to the National Daily Reporter, he was of the opinion that the figures "62" indicate the name of a horse, "Bart's Rock," running in the 6th race, in second position, at Bay Meadows, on that day; the figures "75" indicate the name of a horse, "Banker Vic," in the 7th race, in fifth position; the figures "22," across from the "75," indicate a bet of two to win and two to place; the figures "85" indicate the name of a horse, "Allman," in the 8th race, in fifth position. He testified further that the figures "75 22," with "85" below those figures, indicate that there was a parlay. He also testified that in his opinion the seven scratch sheets with writing on them (Exhibit 2) were owe sheets.

Defendant testified that when the officers entered the apartment she was in the bathroom and was talking on the telephone, and she had been talking on the telephone about 5 minutes; the officers accused her of cutting the telephone; she said she did not cut it and that it was working when they came in; the officers broke the bathroom door; she did not recognize Exhibit 1 (the scratch sheet with impressions on it); her handwriting was not on any of the scratch pads; prior to the arrival of the officers she did not receive a telephone call from a person by the name of Chuck or from anyone who purported to make a bet or wager with her; she was not engaged in bookmaking or accepting wagers; when the officers came in she was not burning anything, but she was smoking; she does not print when she makes notations, but she writes. On cross-examination she testified that the telephone was not in the living room when the officers came in; her scissors were on the floor in the living room; she did not see that the telephone cord was cut when the officers picked up the telephone; the cord was about 25 feet long; there was only one telephone in the apartment; she was talking on the telephone to her daughter when the officers came in; she printed notations in a certain book (which was exhibited to her), but she printed the notations therein because her knitting teacher told her to print them; she did not tell the officers that her grandchild or that other children cut the cord, but she said the other children broke the telephone (broke a part of the receiver).

Appellant's daughter testified that she lived in the same apartment building in which the appellant lived; on said March 13, about 4 p. m., she was having a telephone conversation with appellant and, after the conversation had continued about 5 or 10 minutes, it was cut off; Officer Schubach came to the apartment of the witness and used her telephone and told her not to call her mother's telephone number; he did not tell her that she was jamming the telephone in her mother's apartment.

Officer Schubach testified, on rebuttal, to the effect that when he went to the apartment of the daughter the telephone receiver was off the hook and was lying beside the telephone; he told the daughter that she was jamming the telephone in her mother's apartment and that she should leave the receiver on the hook and stop dialing the number of her mother's telephone.

[1, 2] As above stated, appellant contends that the search of the apartment and the seizure of articles therein were unlawful and that the articles so taken were not admissible in evidence. Her argument is that the officers did not have sufficient grounds to justify them in entering the apartment without a warrant. A peace officer may, without a warrant, arrest a person when a felony has been committed and the officer has reasonable cause for believing the person arrested to have committed it. Pen.Code, § 836. "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P.2d 250, 254. A violation of section 337a of the Penal Code is a felony. In People v. Hudak, 149 Cal.App.2d 88, 307 P.2d 942, 944, a deputy sheriff received information from an informer regarding the defendant therein and also received from him the telephone number of the defendant. The deputy therein, after checking the number with the telephone company went with another deputy sheriff to an apartment, near defendant's apartment, and called the telephone number and placed a bet with the man who answered the call. Then those deputies went to the door of defendant's apartment, and one of the deputies said, "This is the Sheriff's office, you are under arrest for bookmaking. Open the door." The door was not opened and, after waiting about a minute, the officers entered by breaking the door. It was held therein (149 Cal.App.2d at page 92, 307 P.2d at page 945) that there was probable cause and that the entry was not unlawful. In the present case there was probable cause to justify the officers in entering the apartment. The arrest was not unlawful. The search of the apartment was an incident to a lawful arrest. The articles obtained as a result of the search were admissible in evidence.

[3] Appellant contends further that the evidence was insufficient to justify the conviction. Consciousness of guilt could be inferred from the conflicting statements of defendant. The trial judge said that he did not believe the defendant. The evidence we have stated was sufficient to support the conviction.

[4] Appellant contends further that the court erred in sustaining an objection to certain testimony offered by her. Her attorney showed Exhibit 2 (seven pieces of paper with figures and names on them) to her and asked what they were. She said they were "I.O.U." papers for money borrowed from her husband at his bar. The answer was stricken out on the ground that it was hearsay. Her attorney asked her if she saw anyone write on those papers. She replied, "No." Her attorney asked if she had seen similar papers made. The deputy district attorney objected to the question on the ground that it was immaterial. The objection was sustained. Appellant argues to the effect that she was entitled to explain the "character and purpose of these papers," and that since she had worked with her husband in his bar she was a qualified witness to identify the papers as records made in the ordinary course of business at the bar. According to her testimony, she did not see anyone write on the papers. Also, there was no testimony by anyone as to the method of recording acts or events in the regular course of business at the bar. In ruling upon the objection the judge stated: "You would have to have somebody to testify as to how these papers were made * * *." The court did not err in sustaining the objection, or in striking out the answer.

[5] Appellant asserts further that the court abused its discretion in denying her motion for a new trial. She states that one purpose in asking for a new trial was to get an opportunity to introduce competent evidence to explain the papers,

known as Exhibit 2. There was no request, during the trial, for a continuance in order to obtain other testimony regarding those papers. Furthermore, at the hearing of the motion, counsel for defendant said (with reference to Exhibit 2) that he "wasn't able to get in touch with the other people." The court did not err in denying the motion.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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160 Cal.App.2d 603

PEOPLE of the State of California, Plaintiff-Respondent,

v.

Lonnie KHANS, also known as Lonnie Conners, Defendant-Appellant.

Cr. 3403.

District Court of Appeal, First District, Division 2, California.

May 19, 1958.

Prosecution on indictment charging defendant with murder and two prior murder convictions. The Superior Court, County of Marin, N. Charles Brusatori, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that where defendant entered a plea of guilty, specifying that he pleaded guilty to murder of first degree, trial court was not required to resort to evidence to fix degree of crime and therefore, defendant could not complain, on appeal, of various tape recordings which reflected statements made voluntarily by defendant but which allegedly excluded other statements made by defendant.

Affirmed.

Criminal Law ⚷980(1)

Where defendant entered a plea of guilty, specifying that he pleaded guilty to murder of first degree, trial court was not required to resort to evidence to fix degree of crime and therefore defendant could not complain, on appeal, of various tape recordings which reflected statements made voluntarily by defendant but which allegedly excluded other statements made by defendant. West's Ann.Pen.Code, § 1192.

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Lonnie Khans, Represa, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn. Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

The appellant, Lonnie Khans was charged by indictment with the murder of Mattie Cagler. Two prior murder convictions were also charged. The public defender was appointed to represent the appellant. On December 3, 1956, appellant entered a plea of not guilty and not guilty by reason of insanity, and admitted the prior convictions. The psychiatrists appointed to examine the appellant, concluded that he was sane at the time of the commission of the crime and at the time of the trial on February 25, 1957. On February 25, 1957, appellant moved to withdraw his prior plea and to enter a plea of guilty, as the District Attorney stated that on such a plea he would request a sentence of life imprisonment rather than the death penalty. Appellant stated that he understood the motion made by his counsel and the fact that the court was not bound by the recommendation of the District Attorney. Thereupon, the motion was granted, and a plea of guilty of murder in the first degree was entered.

The court, in order to determine the degree of the offense and fix the punishment, in accordance with Penal Code, section 1192, conducted a hearing. On March 18, 1957, appellant was sentenced to life imprisonment. In this appeal taken from the judgment of conviction, appellant urges that at this hearing the trial court admitted illegally obtained evidence and committed various other errors which deprived him of due process. There is no merit in any of the appellant's contentions.

Defendant entered a plea of guilty, specifying that he pleaded guilty to murder of the first degree. In such situation, the court is not required to resort to evidence to fix the degree of the crime. People v. Selz, 138 Cal.App.2d 205, 291 P.2d 186; People v. Mendietta, 101 Cal.App.2d 788, 226 P.2d 34. In this case the evidence to which the appellant takes exception consists of a series of tape recorded statements made by him after his arrest. The court heard the tape recordings in the presence of the appellant and his counsel. Appellant stated that the statements reflected by the recordings were voluntarily made and that all the statements were true, but indicated that he had said more than appeared on the tape. The appellant then testified as to the matter supposedly excluded from the tape which related to an argument with the deceased just before her death. In the course of this argument, the deceased used foul language in reference to the appellant which so enraged him that he began to choke her. The fact that the court considered this evidence as a mitigating circumstance is indicated by the record and by the lesser sentence given to the appellant.

In People v. Thomas, 37 Cal.2d 74, at page 76, 230 P.2d 351, at page 352, it was held: "A hearing for the determination of the degree of an offense and the punishment therefor is not a trial in the full technical sense, and is not governed by the same strict rules of procedure as a trial." As pointed out in People v. Williams, 14 Cal.2d 532, 95 P.2d 456, it is simply a statutory hearing by which the court considers evidence in aggravation or in mitigation of the offense. In considering evidence for such purpose the court may consider many matters not admissible on the issue of guilt or innocence. People v. Gilbert, 22 Cal.2d 522, 140 P.2d 9.

After a careful scrutiny of the record we conclude that there is no merit to any of the appellant's numerous allegations of error. We think that the trial court is to be commended for its fairness in dealing with so difficult a case.

In view of the foregoing we find no prejudicial error in the record before us and accordingly the judgment must be affirmed.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

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160 Cal.App.2d 652

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Theodore Pete WHITSETT, Defendant and Appellant.

Cr. 6146.

District Court of Appeal, Second District, Division 2, California.

May 20, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, Herbert V. Walker, J., of failure to perform statutory duties after automobile accident, and he appealed. The District Court of Appeal, Fox, P. J., held that evidence sustained conviction.

Affirmed.

1. Automobiles 🔑355(8)

Evidence sustained conviction of failure to perform statutory duties after automobile accident. West's Ann.Vehicle Code, § 480.

2. Criminal Law 🔑317

While failure to testify will not supply a lacuna in prosecution's proof, it may be considered as tending to indicate truth of evidence presented against defendant and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to defendant are more probable.

3. Criminal Law ⚿414

Proof of corpus delicti does not require identification of defendant, as basis for admitting evidence of defendant's statement to police officer.

4. Criminal Law ⚿414

Proof that pedestrian was struck and injured by automobile, and that no one performed statutory duties of driver in such circumstances, sufficiently established corpus delicti of failure to perform statutory duties, as basis for admitting evidence of defendant's statements to police officer.

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H. Clay Jacke, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Joe J. Yasaki, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was charged with violating Vehicle Code section 480, in that on May 18, 1957, he drove an automobile which was involved in an accident resulting in injury to Mack J. Rhodes, all of which defendant well knew; and that the defendant wilfully and feloniously failed, neglected and refused to give to said Mack J. Rhodes his name, address, vehicle registration number, and the name of the owner of the vehicle, to exhibit his operator's license, and to render all reasonable assistance to said Mack J. Rhodes, who was then in need of assistance by reason of said accident.

A jury having been duly waived, the court found the defendant guilty as charged, and granted him probation. Defendant has appealed from the order[1] of October 31, 1957, by which probation was granted.

Since defendant's principal argument for reversal is that the evidence is insufficient to support the judgment of conviction, it is necessary to state the facts in some detail.

At approximately 9:30 on the evening of May 18, 1957, Rhodes, who lived at 1726 West 37th Place, in the city of Los Angeles, started to walk across Western Avenue at its intersection with 37th Place. Rhodes was in the crosswalk going from east to west. As he left the east curb of Western Avenue he looked to his left, then proceeded into the street. When he was about two feet from the center line he looked to his right. At that time he was struck on the left thigh—"right close up to the hip"—by a north-bound automobile. Prior to the accident Rhodes did not hear any car or see any automobile lights. When struck he momentarily "blacked out." As a result of the accident Rhodes was injured and bleeding. Immediately after the impact defendant was standing over Rhodes. Defendant said to him, "Get up from there you * * * you ain't hit, you ain't hurt." About this time another man, who was crossing Western Avenue, approached Rhodes. He reached down to take Rhodes by the right arm to help him up. At that point defendant went to Rhodes' left side and assisted in getting him up and onto the sidewalk, where he rested on a chain post in front of a store. As Rhodes was being helped to the sidewalk he observed the license number—MYT 338—of a parked 1957 Chevrolet, which he later wrote down.

Rhodes asked defendant to show him his driver's license. Defendant refused, stating, 'I will not show it. I won't give you nothing." He also said to Rhodes, "Call the * * * damn cops. Go on, call the * * * damn cops. I won't give them nothing." He further stated that Rhodes "had no business out in the street."

Rhodes searched his pockets for a dime to call the police but discovered that a fifty cent piece was the smallest coin he had. He thereupon requested the pedestrian who had helped him to the sidewalk to call the police. Defendant, however, interrupted and said to Rhodes, "No, you call them." Defendant then drove off in the 1957 Chevrolet, the license number of which Rhodes had written down. Rhodes estimated that about three or four minutes elapsed from the time of the impact to the time defendant drove off.

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[1] Such an order is deemed a final judgment for purposes of appeal. Pen.Code, sec. 1237.

Rhodes arrived home about five minutes later, called the police, reported the accident, and gave them the license number. He also called his physician, who examined him the next morning and treated his injuries.

Officer Linebaugh, of the Los Angeles Police Department, investigated the case. He found that the 1957 Chevrolet (license number MYT 338) was registered to Evelyn Hoover Whitsett. Officer Linebaugh made an inspection of the car. There was a dent "that appeared to be fresh" on the left front of the hood near where it curves from horizontal to vertical, immediately above the Chevrolet emblem; he also testified that "there was a disturbance in the dust on the chrome grill that ran horizontally across the hood, immediately below the dent, that appeared as though something had brushed against it." The officer, however, could not determine whether this disturbance of the dust on the grill had been made by a person's clothes.

At approximately 3:15 on the afternoon following the accident Officer Linebaugh had a conversation with defendant at the police station. The officer asked defendant who was the last person to drive the car on the day before. Defendant stated that he was. He further stated that he parked the car in front of his home between 7:00 and 8:00 p. m. on the previous evening; that he then went into the house, and that "his wife had called him at about 9:30 and he had been home." He also told the officer that "he did not remember where he was nor what he had been doing between the time he parked the car and the time his wife called him"; that "he did not remember having any accident," that he "did not remember loaning the car," and "did not remember whether or not he locked the car when he parked it." The officer further testified that he asked defendant how the dent came to be in the hood, and that he replied that "he could not explain it."

Defendant bases his contention that the evidence is insufficient to sustain the conviction on the theory that there was no proof that he was the driver of the automobile that struck and injured Rhodes. In deciding a like question in People v. Ross, 139 Cal.App.2d 706 at page 709, 294 P.2d 174, at page 176, a hit and run case, this court stated: "In passing on the sufficiency of the evidence to sustain a conviction it should be borne in mind that before a reversal may be had, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. [Citations.] We must assume in support of the judgment the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts 'justify the inference of guilt.'" The identity of the driver may be proved by circumstantial evidence. People v. Abila, 137 Cal.App. 26, 27–28, 29 P.2d 796; People v. Leutholtz, 102 Cal.App. 493, 495–496, 283 P. 292; People v. Houston, 24 Cal.App.2d 167, 169, 74 P.2d 515.

[1] Applying these principles, it is clear that the evidence and the inferences reasonably to be drawn therefrom amply support the conviction. Defendant was positively identified by Rhodes as having been present at the scene of the accident when the latter regained consciousness shortly after the impact. Since defendant entered and drove away in a 1957 Chevrolet, license number MYT 338, it may be inferred that he drove the same automobile to that location.

Implicit in Rhodes' request to see defendant's operator's license was an accusation that the defendant was the driver of the automobile which struck him; that is, that Rhodes asked to see defendant's license because he believed that the defendant was the driver of the car that had hit and injured him. Defendant's refusal to exhibit it, and his comment about calling "the cops," and his statement that he would give them nothing, do not constitute a denial of the implied accusation. They are indicative rather of a consciousness of guilt and tend to support an inference that defendant was the driver of the automobile that struck Rhodes.

Defendant's insistence that Rhodes and not the pedestrian who helped assist him to the sidewalk should call the police suggests that defendant was more deeply involved in the accident than as a mere pedestrian or witness. The same is true of defendant's remarks to Rhodes at the time the latter was lying in the street and when they reached the sidewalk.

[2] In addition, defendant admitted that he was the last person to drive the Chevrolet with the license number MYT 338 on the day of the accident. The automobile was registered in the name of a woman who had the same surname as the surname of the defendant. Defendant did not deny that he was involved in an accident—he merely stated that he did not remember having an accident. In this regard it is to be noted that defendant's statement to the investigating officer that he was at home at the time of the accident was controverted by Rhodes, who testified that he saw and talked to defendant at the scene of the accident. The day following the accident the investigating officer found a dent that appeared to be freshly made in the front portion of the hood of the car and a disturbance of the dust on that portion of the chrome grill immediately below the dent. Defendant, however, was unable to explain the dent. In this connection it should be remembered that the defendant did not take the witness stand. While "the failure to testify will not supply a lacuna in the prosecution's proof" (People v. Ashley, 42 Cal.2d 246, 268, 267 P.2d 271, 285), a defendant's failure to take the stand "to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 3, 9. It is thus apparent that the trial judge was abundantly justified in impliedly finding that defendant was the driver of the car that struck Rhodes.

[3] Defendant's second contention seems to be that the court erred in admitting into the evidence the conversation he had with Officer Linebaugh. His theory is that the corpus delicti had not been sufficiently shown because the identity of the driver had not been established. It is settled that proof of the corpus delicti does not require identification of the defendant. People v. Ward, 134 Cal. 301, 66 P. 372; People v. Jones, 123 Cal. 65, 68, 55 P. 698. In the Ward case the court, 134 Cal. at page 306, 66 P. at page 374, stated: "Proof of the corpus delicti does not necessarily involve or require proof that the crime was committed by the defendant or person charged with having committed it."

[4] The testimony of Rhodes establishes that he was struck and injured by an automobile while he was crossing Western Avenue in the pedestrian crosswalk. It is, of course, obvious that someone was driving the car. It is also clear from Rhodes' testimony that no one identified himself to Rhodes as the driver of the vehicle involved, or exhibited his operator's license, or furnished the information required by the Vehicle Code, or rendered reasonable assistance for the securing of medical treatment. Thus, the corpus delicti of the offense charged was adequately established. The statements of the defendant to the officer were clearly admissible. People v. Jones, supra.

The order is affirmed.

ASHBURN and HERNDON, JJ., concur.

Russell S. MUNRO, Director of the Department of Alcoholic Beverage Control, State of California, Petitioner and Respondent,
v.
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF the State of CALIFORNIA and Helen M. Richards, Respondent,

Helen M. Richards, Appellant.
Civ. 9385.

District Court of Appeal, Third District, California.
May 14, 1958.

Rehearing Granted June 10, 1958.

Proceeding for writ of mandate to compel the Alcoholic Beverage Control Appeals Board to reverse its decision and reinstate that of Department of Alcoholic Beverage Control. From a judgment of the Superior Court, Sacramento County, Gordon A. Fleury, J., the applicant for the license appealed. The District Court of Appeal, Warne, J. pro tem., held, inter alia, that on application for on-sale beer license for small restaurant, findings of Department of Alcoholic Beverage Control that premises of applicant were in residential area, that there were inadequate off-the-highway parking facilities, and that issuance of license would be contrary to public welfare and morals were not supported by substantial evidence in light of the whole record.

Reversed.

1. Intoxicating Liquors ⚿72

The Department of Alcoholic Beverage Control is an agency upon which the constitution has conferred limited judicial powers and its decisions on factual matters must be affirmed if there is substantial evidence to support them. West's Ann.Const. art. 20, § 22.

2. Mandamus ⚿172

In mandamus proceeding to which Department of Alcoholic Beverage Control was a party, superior court could not exercise an independent judgment of the facts but was required to give to the board's factual determinations the same deference that an appellate court gives to findings of a trial court.

3. Intoxicating Liquors ⚿75(7)

On appeal from decision of Department of Alcoholic Beverage Control that application for on-sale beer license for small restaurant should be denied the Appeals Board was simply called upon to determine whether findings of department were supported by substantial evidence in light of the whole record, and board was not permitted to exercise an independent judgment on the facts. West's Ann.Bus. & Prof.Code, § 23084; West's Ann.Const. art. 20, § 22.

4. Intoxicating Liquors ⚿75(7)

The decisions of Department of Alcoholic Beverage Control are final, except that they are subject to review for excess of jurisdiction, error of law, abuse of discretion and insufficiency of evidence. West's Ann.Bus. & Prof.Code, § 23084; West's Ann.Const. art. 20, § 22.

5. Intoxicating Liquors ⚿75(7)

When jurisdiction of Department of Alcoholic Beverage Control to grant an on-sale beer license for small restaurant depends upon establishment of public welfare and morals by reason of applicant's premises being in residential district and inadequacy of off-the-highway parking facilities, reviewing court may examine the evidence upon which findings of department to that effect are based, and if findings are contrary to the evidence, read as a whole, or without meritorious support in the evidence, findings of department, and decision based thereon, may be set aside. West's Ann.Bus & Prof.Code, § 23084; West's Ann.Const. art. 20, § 22.

6. Intoxicating Liquors ⚿69

While under constitution Department of Alcoholic Beverage Control may deny or revoke in its discretion any specific liquor license if department determines, for "good cause", that granting of license would be contrary to public welfare and morals, in so determining department performs a quasi judicial function similar to local administrative agencies, but the discretion is not absolute but must be exercised in accordance with law, and "good cause" necessarily implies that its decision should be based on sufficient evidence and that it should not act arbitrarily. West's Ann. Const. art. 20, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Good Cause".

7. Courts ⚿26

In a legal sense, discretion is "abused" whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered.

See publication Words and Phrases, for other judicial constructions and definitions of "Abuse of Discretion".

8. Intoxicating Liquors ⚿59(1)

Neither the constitution, nor the Alcoholic Beverage Control Act, nor the rules adopted by Department of Alcoholic Beverage Control prohibit the granting of an on-sale license in residential area, and hence that fact, standing alone, would not be ground for denying of license for on-sale of beer in small restaurant. West's Ann.Bus. & Prof.Code, § 23000 et seq.; West's Ann.Const. art. 20, § 22.

9. Intoxicating Liquors ⚿70

On application for on-sale beer license for small restaurant, findings of Department of Alcoholic Beverage Control that premises of applicant were in residential area, that there were inadequate off-the-highway parking facilities, and that issuance of license would be contrary to public welfare and morals were not supported by substantial evidence in light of the whole record. West's Ann.Bus. & Prof. Code, § 23000 et seq.; West's Ann.Const. art. 20, § 22.

10. Intoxicating Liquors ⚿1, 69, 75(7)

There is no inherent right in a citizen to sell intoxicating liquors by retail, and such sale is not a privilege of a citizen since it is a business attended with danger to a community and hence may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils, and manner and extent of regulation rest in discretion of governing authority, but when a license is denied "for good cause" decision of Department of Alcoholic Beverage Control should have meritorious support in the evidence. West's Ann.Bus. & Prof.Code, § 23000 et seq.; West's Ann. Const. art. 20, § 22.

◆

Richard tum Suden, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., by William T. Chidlaw, Deputy Atty. Gen., for petitioner-respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment affirming the decision of the Department of Alcoholic Beverage Control and reversing the decision of the Alcoholic Beverage Control Appeals Board.

Appellant applied for an on-sale beer license for a small restaurant which she owned and operated. Approval of the application was recommended by an investigating officer of the department. However, protests were filed by residents in the vicinity and, after a hearing thereon, an officer of the department found that the premises were in a residential area; that there were inadequate off-the-highway parking facilities and that issuance of the license would be contrary to the public welfare and morals. His recommendation that the protest be sustained and the application denied was adopted by the department. Upon appeal from the decision, the Alcholic Beverage Control Appeals Board, hereinafter referred to as the Appeals Board, found that the findings of fact were not supported by substantial evidence in the light of the whole record, and the decision of the department was reversed. The department petitioned for a writ of mandate to compel the Appeals Board to reverse its decision and reinstate that of the department. As the interested party, appellant appeared and answered in the mandamus proceedings, wherein the trial court found that the Appeals Board's reversal of the decision of the department on the ground that it was not supported by substantial evidence was erroneous, arbitrary and capricious and constituted a prejudicial abuse of discretion, and judgment was entered accordingly. This appeal followed.

[1, 2] Appellant first contends that the trial court erred in looking to the department's decision to determine if it was supported by substantial evidence, since it was the decision of the Appeals Board that was under attack. There is no merit in this contention. The rule of law applicable to the review of the decisions of the Department of Alcholic Beverage Control is stated in Bric v. Department of Alcoholic Bev. Control, 153 Cal.App.2d 315, 320, 314 P.2d 807, 810, as follows:

> "* * * That agency is a constitutional agency that has succeeded to some of the powers of the State Board of Equalization in Alcoholic Beverage Control matters. Being an agency upon which the Constitution has conferred limited judicial powers, its decisions on factual matters must be affirmed if there is substantial evidence to support them. Cal.Const., Art. 20, § 22; Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545; Kirchhubel v. Munro, 149 Cal.App.2d 243, 308 P.2d 432; Molina v. Munro, 145 Cal.App.2d 601, 302 P.2d 818; Dethlefsen v. State Board of Equalization, 145 Cal.App.2d 561, 303 P.2d 7; Griswold v. Department of Alcoholic Beverage Control, 141 Cal.App.2d 807, 297 P.2d 762. In other words, on the mandamus proceeding, the trial court was not permitted to exercise an independent judgment on the facts, as it may do in reviewing the findings of legislatively created state-wide administrative agencies, but was required to give to the factual determinations of the appellant the same deference that an appellate court must give to the findings of a trial court. Thus, the trial court was simply called upon to determine whether the findings of the Board were supported by substantial evidence."

[3] There is nothing in Section 23084 of the Business and Professions Code or in Article XX, Section 22, of the California Constitution which warrants departure from that rule, nor is there any reason why the rule should not control the Appeals Board on appeal to that body. Thus, the Appeals Board was simply called upon to determine whether the findings of the department were supported by substantial evidence in the light of the whole record. It was not permitted to exercise an independent judgment on the facts as contended for by appellant.

More serious questions are presented upon the issues as to (a) whether there is substantial evidence in the record to support the findings that the area is residential in nature and does not afford adequate off-the-road parking facilities, and (b) if so, whether a denial of an on-sale beer license constitutes an arbitrary abuse of the discretion vested by the California Constitution in the department.

Before discussing the facts, a brief reference should be made to the rules of law which we feel are applicable to a determination of the question.

[4, 5] It is well established that the decisions of the department are final, except that they are subject to review for excess of jurisdiction, error of law, abuse of discretion and insufficiency of evidence. Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 173 P.2d 545. It was held in Schaub's, Inc., v. Department of Alcoholic Bev. Control, 153 Cal.App.2d 858, 864, 315 P.2d 459, that when the jurisdiction of the department to grant or refuse a transfer of a license (in this case the granting of a license) depends upon the establishment of an ultimate fact (in the instant case the public welfare and morals by reason of appellant's premises being in a residential district, and the inadequacy of off-the-highway parking facilities) the reviewing court may examine the evidence upon which the findings of the department to that effect

is based, and if the findings of the department are contrary to the evidence, read as a whole, or without meritorious support in the evidence, the findings of the department, like those of a trial court, may be set aside and the decision based thereon may be set aside. See also Southern Pac. Co. v. Railroad Com., 13 Cal.2d 125, 127, 128, 87 P.2d 1052; West v. Industrial Acc. Com., 79 Cal.App.2d 711, 719, 720, 180 P.2d 972. In other words, in such case the question presented is, are the findings and the decision of the department supported by substantial evidence in the light of the whole record?

[6] While under the provisions of Section 22 of Article XX of the California Constitution the department is vested with the power to deny or revoke in its discretion any specific liquor license if it determines, for good cause, that the granting of the license would be contrary to public welfare and morals, in so determining the department performs a quasi-judicial function similar to local administrative agencies. Covert v. State Bd. of Equal., supra. But as stated in Stoumen v. Reilly, 37 Cal.2d 713, 717, 234 P.2d 969, 971:

> " * * * The board's discretion under section 22, however, is not absolute but must be exercised in accordance with the law, and the provision that it may revoke a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals." See also Weiss v. State Bd. of Equalization, 40 Cal.2d 772, 775, 256 P.2d 1; Schaub's, Inc., v. Department of Alcoholic Bev. Control, supra.

The same rules apply to the determination of an application for a license as those for a revocation of a license. Weiss v. State Bd. of Equalization, supra, 40 Cal.2d at page 775, 256 P.2d at page 2.

[7] "Arbitrarily" is defined in Ballentine's Law Dictionary as "unreasonably". In Vol. 1 Bouv. Law Dict., Rawle's Third Revision p. 94, we find the phrase "abuse of discretion" defined as: "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence." Ballentine says: "The expression does not mean only the decision of a case by whim or caprice, arbitrarily or from a bad motive, but it also means that the discretion has not been justly and properly exercised under the circumstances of the case. It has also been held to mean such an abuse as amounts practically to a denial of justice. In this view, it signifies a clearly erroneous conclusion and judgment; one that is clearly against the logic and effects of the facts presented." In Sharon v. Sharon, 75 Cal. 1, 48, 16 P. 345, 366, the court said: "In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered."

Tested by these rules, we feel that the findings are not supported by substantial evidence in the light of the whole record and that the decision of the board cannot be upheld.

The evidence taken before the hearing officer and weighed by him and the department discloses the following facts: Appellant's premises and restaurant are located on the westerly side of a 1200 foot section of the old Auburn highway about 9/10ths of a mile south of the city limits of Grass Valley. The distance between the two roads varies up to 150 feet. Appellant and her blind husband live on the premises. The building housing the restaurant is comparatively new, with a well-equipped kitchen. It is a small restaurant specializing in "fish and chips", with which many customers desire beer. In the immediate vicinity are nine residences. Seven of the residences are situated on the opposite side of the road, ranging in distance from about 100 feet to 300 feet from appellant's premises. The other two adjoin the appellant's premises on the north. In addition, there are two junk yards in the immediate vicinity and a garage used for a welding shop. One of the residents conducts a sand and gravel business from his home, using 8 or 9 trucks in such business. Another operates a septic tank spraying business from his residence. In one of the junk yards cars are dismantled as late as 9 or 10 o'clock at night. There is also a dump from mine tailings, and poultry and rabbits have been raised for sale in the neighborhood. It also appears that between the restaurant and the road there is sufficient space to park 12 cars. However, the hearing officer, who viewed the premises, found "that it would not be practicable to park that many cars"; that "the parking area would be inadequate to accommodate sufficient cars for any substantial amount of patronage" and "the parking of cars along the road would create a traffic hazard". Some of the families have children of school age living at home. Other than the viewing of the premises and the area in question by the hearing officer, these are the facts upon which the Department of Alcoholic Beverage Control based its finding that the premises are in a residential area; that "the premises do not afford adequate off-the-highway parking facilities" and that the "issuance of the license would be contrary to public welfare and morals".

[8] We find no inhibition in the Constitution, or in the Alcoholic Beverage Control Act, or in the rules adopted by the Department of Alcoholic Beverage Control against the granting of an on-sale license in a residential area. That fact, standing alone, would not be a ground for the denying of a license. We dare say that many hundreds of on-sale and off-sale licenses have been granted to establishments, stores, restaurants, and cafes in residential areas throughout the state. It is conceded that appellant's personal qualifications are not in question and there are no charges that her restaurant is conducted in a disorderly manner or had caused any problems, traffic or otherwise. As one of the agents for the department testified: "It's just a spot in the road where there's a couple of houses and this business—this two junk yards, and an abandoned garage." There are no churches, hospitals, schools, or public playgrounds within the immediate area or vicinity.

[9, 10] There is no evidence that the parking space has been inadequate for customers of the restaurant or that their parking has created a parking hazard. It is only conjectural and without support in the evidence that the serving of beer would so increase the patronage as to create any traffic problems, even though some cars were parked along the side of the old highway. Likewise, there is no evidence to support the finding that "ordinary noises incidental to even orderly operation of the appellant's premises will result in substantial annoyance to the occupants of the homes on the easterly side of the road." Again, it is merely speculative that the serving of beer with meals would increase the ordinary noises incidental to the operation of appellant's restaurant. No complaints had been made as to any noise or disturbances caused by the appellant's establishment. Moreover, any additional noise would hardly be appreciable in this neighborhood where one resident conducts a sand and gravel business from his home, using 8 or 9 trucks in such business; where another operates a septic tank spraying business; where poultry and rabbits have been raised for sale; where, at one of the junk yards, cars are dismantled, sometimes as late as at 9 or 10 o'clock at night. Under the circumstances, the neighborhood can hardly be classified as strictly "residential". Such being the facts and circumstances, we conclude that the findings are not supported by substantial evidence in the light of the whole record. In so holding, we are not unmindful of the rule announced in Crowley v. Christensen, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620, quoted with approval in Ritz v. Lightston, 10 Cal.App. 685, 688, 103 P. 363, 364, to the effect that:

> " * * * There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the ut-

most its evils. The manner and extent of regulation rest in the direction of the governing authority. That authority may invest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose."

We do hold, however, that when a license is denied "for good cause," the department's decision should have meritorious support in the evidence.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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160 Cal.App.2d 422

Florence Mae MADDEN, Plaintiff and Appellant,

v.

Harry Wilbur MADDEN, Defendant and Respondent.

Civ. 22603.

District Court of Appeal, Second District, Division 3, California.

May 13, 1958.

Divorce action, wherein legitimacy of child conceived after last separation of parties was put in issue. From that part of a judgment of the Superior Court of Los Angeles County, A. E. Paonessa, J., adjudging defendant not to be father of her child, plaintiff appealed. The District Court of Appeal, Vallée, J., held that failure to identify blood tested as that of plaintiff, defendant, and child rendered testimony of doctor as to results of tests inadmissible; and held that improper admission of such evidence would require reversal of that portion of judgment adjudicating defendant not to be father of child.

Reversed.

1. Appeal and Error 🔑110

Order denying motion for new trial is not appealable.

2. Bastards 🔑3

Quoted word, in civil procedure code subsection creating conclusive presumption of legitimacy as to issue of wife "cohabiting" with potent husband, means the living together of man and woman ostensibly as husband and wife. West's Ann.Code Civ. Proc. § 1962, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Cohabiting".

3. Bastards 🔑5

Testimony of nonintercourse is not precluded where husband and wife have not cohabited or lived together during period of conception and gestation. West's Ann.Code Civ.Proc. § 1962, subd. 5.

4. Bastards 🔑3

Conclusive presumption of legitimacy created by Civil Procedure Code subsection may be removed by proper and sufficient evidence showing that husband, though not impotent, was entirely absent at that period during which child could, in course of nature, have been begotten. West's Ann.Code Civ.Proc. § 1962, subd. 5.

5. Bastards 🔑5

In divorce action, wherein legitimacy of child conceived after last separation of parties was put in issue, Civil Procedure Code section, creating conclusive presumption as to legitimacy of issue of wife cohabiting with potent husband, did not preclude admission of blood group tests. West's Ann.Code Civ.Proc. §§ 1962, subd. 5, 1963, subd. 31; West's Ann.Civ.Code, § 193.

6. Divorce 🔑312.6(9)

Evidence 🔑150

In divorce action, wherein legitimacy of child conceived after last separation of parties was put in issue, failure to identify blood tested as that of plaintiff, defendant, and child rendered testimony of doctor as to results of tests inadmissible; and improper admission of such evidence would require reversal of that portion of judgment adjudicating defendant not to be father of child.

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Malvina Goodstein, Van Nuys, for appellant.

O. Phillips Anderson, Van Nuys, for respondent.

VALLÉE, Justice.

[1] This is an action for divorce. In the interlocutory decree the court adjudged that defendant is not the father of a minor child named Charles. Plaintiff appeals from that part of the decree adjudging that defendant is not the father of the child and from an order denying her motion for a new trial with respect to that issue. The order denying a new trial is not appealable and the appeal therefrom must be dismissed.

Plaintiff asserts the court erred in admitting evidence of a blood test. Dr. Madeline Fallon testified a technician in her office drew blood samples from plaintiff, defendant, and the child Charles; she was not present when the blood was drawn. Over plaintiff's objection Dr. Fallon was then permitted to testify that a test was made and she found that "The blood group, Mr. Madden, Group O; Florence Madden, Group O; Baby Charles, Group A"; that the children of plaintiff and defendant "would have to be O"; none of their offspring "could have any A or B group in their tests"; defendant could not possibly be the father of Charles.

It is first argued it was error to admit the evidence because under section 1962(5) of the Code of Civil Procedure Charles is conclusively presumed to be legitimate. Section 1962 in relevant part reads:

> "The following presumptions, and no others, are deemed conclusive: * * *
>
> "5. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate."

Section 193 of the Civil Code reads:

> "All children born in wedlock are presumed to be legitimate."

Section 1963(31) of the Code of Civil Procedure is to the same effect.

[2-4] The word "cohabiting" as used in section 1962(5) of the Code of Civil Procedure means the living together of a man and woman ostensibly as husband and wife, in which case the parties are not permitted to rebut the conclusive presumption created by the statute. In re Estate of Mills, 137 Cal. 298, 301, 70 P. 91; Daniels v. Daniels, 156 Cal.App.2d 371, 319 P.2d 662. Testimony of non-intercourse is not precluded where the husband and wife have not cohabited or lived together at the time and during the period of conception and gestation. Hilton v. Hilton, 54 Cal.App. 142, 150–151, 201 P. 337; In re Estate of Young, 132 Cal.App.2d 25, 28, 281 P.2d 368, 371; McGillis v. Hofeditz, 101 Cal.App.2d 760, 762, 226 P.2d 372; Mathews v. Hornbeck, 80 Cal.App. 704, 708–709, 252 P. 667. "In re Estate of Walker, 180 Cal. 478, 181 P. 792, Dazey v. Dazey, 50 Cal.App.2d 15, 122 P.2d 308, 309, and other cases, lay down the rule that a conclusive presumption may be removed by proper and sufficient evidence showing that the husband, though not impotent, was 'entirely absent at the period during which the child must, in the course of nature have been begotten.'" In re Estate of Young, 132 Cal.App.2d 25, 28, 281 P.2d 368.

[5] The complaint alleged the date of last separation of the parties was July 15, 1955. The answer admitted the allegation. Charles was conceived in October 1955 and born July 22, 1956. Thus the parties were not cohabiting or living together at the time of conception and section 1962 did not preclude admission of the blood tests.

What we have said disposes of plaintiff's contention that the court erred in permitting defendant to testify he did not have sexual intercourse with his wife after the parties separated in July 1955.

[6] Contending there was no foundation laid for admission of the blood tests, plaintiff argues there was no proof the blood with respect to which Dr. Fallon testified was the blood of plaintiff, defendant, or the child. The point is well taken. Dr. Fallon did not draw the blood. She was not present. There was no evidence that the blood groups as to which Dr. Fallon testified were those of plaintiff or defendant or the child. Plaintiff testified she, defendant, and the child went to Dr. Fallon's office "for a blood test." She was asked whether a nurse took a sample of blood from her, defendant, and Charles but the question was not answered.

In McGowan v. City of Los Angeles, 100 Cal.App.2d 386, 223 P.2d 862, 21 A.L.R.2d 1206, on similar facts this court held that testimony as to the results of the blood analysis was inadmissible. Here there is complete lack of identification of the blood tested by Dr. Fallon. In fact she was not asked if she made the tests, although perhaps that fact may be inferred. There was no evidence that any blood was ever drawn from plaintiff, or from defendant, or from Charles. Dr. Fallon had no personal knowledge on the subject. If any blood was drawn, there was no evidence as to the identity of the person who drew it, or how long after it was drawn tests were made. "It is rudimentary that a specimen taken from a human body for the purpose of analysis must be identified before such specimen or any analysis made from it attains standing as evidence of the condition of the person whose conduct is questioned. Without identification, there is no connection between the two. Reason dictates that the testimony of a witness that a blood sample contains alcohol without some evidence to show that the blood is that of the person charged amounts to no proof at all." American Mut. Liability Ins. Co. v. Industrial Acc. Comm., 78 Cal.App.2d 493, 496, 178 P.2d 40, 42. The court erred in admitting the testimony of Dr. Fallon. The failure to identify the blood tested as that of plaintiff, defendant, and Charles renders the testimony of Dr. Fallon of no evidentiary value at all.

The question remains whether the error in admitting the testimony was prejudicial. Plaintiff testified she and defendant had sexual intercourse the second or third week of October 1955 "and also before that a couple of times"; it took place in the front room of her home.

> "Q. * * * When was this sexual intercourse in October—what day? A. I don't know which day. All I know it was about the third week—it was about a week before I filed for my divorce. If his mother remembers, he went to the war surplus store and got something. I don't know whether it was a cot or something. I happened to go with him. He will remember that.
>
> "Q. Do you remember when you filed your divorce? A. Yes, it was October 27th.
>
> "Q. The twenty-sixth, as a matter of fact. You say it was a week before that. It would be October 19th you had sexual intercourse. Is that right? A. About that. I don't know a day before or after. I didn't keep track of it. I didn't think it would make much difference, the 17th, eighteenth, nineteenth, or twentieth. Somewhere around then. That was in there around then.
>
> "Q. That was in your front room? A. Yes.
>
> "Q. What time of day was that? A. Afternoon.
>
> "Q. About two? What time? A. About two or three o'clock.
>
> "Q. Two or three? A. Yes.
>
> "Q. Now, was there any contraceptives used? A. No.
>
> "Q. And after October you had relations with him again? A. No, I never saw him again after I filed for my divorce and she served him with the papers."

Defendant testified that between July and October 1955 he did not see plaintiff alone;

he did not have sexual intercourse with her in October 1955 in the front room of her home. On one side there is the testimony of plaintiff and the presumption of legitimacy; on the other there is the testimony of defendant. In view of this decided conflict in the evidence we cannot say that a different result as to the paternity of Charles might not have been reached had the testimony of Dr. Fallon been excluded.

The appeal from the order denying a new trial is dismissed. The part of the judgment appealed from is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

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160 Cal.App.2d 412

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

George Edward LOIGNON, Defendant and Appellant (two cases).

Cr. 5979, 5980.

District Court of Appeal, Second District, Division 2, California.

May 13, 1958.

Defendant was convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., for violating Penal Code, §§ 288 and 288a and for attempted kidnapping, and he appealed. The District Court of Appeal, Fox, P. J., held that it is fact, not distance of, forcible removal which constitutes kidnapping.

Affirmed.

1. Criminal Law 🔑641(1)

Constitutional right to be represented by counsel is one that may be waived, but waiver, to be effective, must be made competently, intelligently and completely. West's Ann.Const. art. 1, § 13.

2. Criminal Law 🔑1152(1)

Whether waiver of right to be represented by counsel meets standard is largely a matter for determination of trial court, and its decision will not be disturbed on appeal in absence of an abuse of discretion. West's Ann.Const. art. 1, § 13.

3. Criminal Law 🔑641(1)

In prosecution for violating Penal Code, §§ 288 and 288a and for attempted kidnapping, it was not, on record presented, an abuse of discretion to accept defendant's waiver of right to counsel. West's Ann.Const. art. 1, § 13.

4. Witnesses 🔑45(2)

If a child under ten years of age possesses sufficient intelligence, understanding and ability to receive and fairly accurately recount his impressions and he has an understanding of nature of oath and moral sensibility to realize that he should tell truth and that he is likely to be punished for falsehood, he is competent to testify. West's Ann.Code Civ.Proc. § 1880.

5. Criminal Law 🔑1153(2)
Witnesses 🔑40(2)

Competency of child as a witness is a matter resting largely in sound discretion of trial judge and, in absence of showing of abuse of discretion, his decision will not be disturbed on appeal. West's Ann.Code Civ.Proc. § 1880.

6. Witnesses 🔑40(2)

In prosecution for violating Penal Code, §§ 288 and 288a and for attempted kidnapping, it was not, on record presented, an abuse of discretion to admit testimony of children under age of ten. West's Ann.Code Civ.Proc. § 1880.

7. Criminal Law 🔑13

Penal Code section, making it a felony to wilfully and lewdly commit any lewd or lascivious acts upon body of child under age of fourteen years, was not unconstitutionally vague, notwithstanding use therein of words "lewdly", "lewd" and "lascivious." West's Ann.Pen.Code, § 288.

8. Criminal Law ⚿200(1)

Defendant who, after copulating child, engaged in conduct of type denounced by Penal Code, § 288, was properly charged with violating both Penal Code, § 288 and Penal Code, § 288a, notwithstanding close relationship of all of his conduct in point of time, and he did not thereby suffer double jeopardy. West's Ann.Pen.Code, §§ 288, 288a.

9. Kidnapping ⚿1

It is fact, not distance, of forcible removal which constitutes kidnapping. West's Ann.Pen.Code, § 207.

10. Criminal Law ⚿13

Quoted word, in Penal Code section making every person who forcibly takes and carries another into another "part" of county guilty of kidnapping did not render statute unconstitutionally vague. West's Ann.Pen.Code, § 207.

11. Kidnapping ⚿5

Evidence that defendant had opened door of his automobile and pulled child into it against child's will and that he had, after quieting child, started motor would sustain conviction for attempted kidnapping. West's Ann.Pen.Code, § 207.

12. Infants ⚿20

Sodomy ⚿6

Convictions, for violating Penal Code, §§ 288 and 288a, were sustained by evidence. West's Ann.Pen.Code, §§ 288, 288a.

13. Criminal Law ⚿982

Conduct supporting conviction, for violating Penal Code, §§ 288 and 288a, justified revocation of probation conditioned upon not associating with minors except in presence of responsible adults.

14. Criminal Law ⚿1023(10)

Appeal from sentence is not authorized.

◆

Samuel C. McMorris, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Ray R. Goldie, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was convicted of violating Penal Code sections 288a[1] and 288[2] and attempted kidnaping. He was sentenced to the penitentiary on each count. All of these offenses were committed on August 17, 1956. A conviction in 1948 of child stealing was alleged and admitted. Defendant was granted probation on that charge, one of the conditions being that he was "not to associate with minors unless in the presence of responsible adults." Upon conviction in the current case defendant's probation was revoked and he was sentenced to the state penitentiary on that charge; the sentence, however, was to run concurrently with those mentioned above. Defendant has appealed from the judgment and sentence in each case.

Appeal No. 5980.

On the evening of August 17, 1956, Stanley and his mother were at his father's store. At approximately 8:00 o'clock Stanley was skating back and forth to the corner from the front of the store. Defendant, whose car was parked across the street, engaged Stanley, who was nearly six, in conversation and invited him to go for a ride, which invitation he accepted. Stanley suggested that they go around the block; defendant, however, took him down to the railway tracks near the Stanford School. Defendant thereupon took Stanley's pants down to his ankles and had him lie down on the seat. He then committed an act of copulation on Stanley. Defendant thereafter had Stanley turn over on his stomach. He then put his finger in his "bottom," and also chewed on his ear and spanked his leg. Stanley told defendant that he wanted to go home to his mother. In response defendant said to him several times that he would take him in just a minute, but continued to commit these acts. Defendant finally drove Stanley back to where his car had been parked and let Stanley out. He skated back to his mother who was on the corner looking for him. He was crying and told her what had happened. The boy knew that the car he had been in was a Plymouth. Stanley's mother called the police, who searched defendant's car and found some rocks in the front seat, which appeared to his mother to be the same rocks that had fallen out of Stanley's pockets the night before when she was undressing him and which had been put back into his pockets.

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[1] Penal Code section 288a provides in part:

"Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment * * *."

[2] Penal Code section 288 provides in part:

"Any person who shall wilfully and lewdly commit any lewd or lascivious act * * * upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony. * * *"

Between 4:30 and 5:00 o'clock on the afternoon in question, defendant parked his car near Lincoln School in Lynwood. Ricky, seven years of age, was walking back to school. Defendant called Ricky and asked him if he wanted to take a ride. Ricky declined, explaining that it was against the law to ride with strangers and that his mother would not like it. Defendant said, "Come on and get in the car." Ricky replied, "No, I can't." Defendant opened the door and pulled him in. Ricky fought with defendant a little. Defendant told him to quiet down; Ricky did quiet down but got ready to open the door. When defendant started the motor Ricky opened the door, jumped out of the car, and ran. He turned back, however, to look at the license plate and remembered that the number was LKU 707. He also observed that "part of the license plate frame was hanging over." Ricky told the coach at school what had happened, and the coach took him home. His mother wrote down the license number and called the police.

Two other boys saw defendant and Ricky in the car. They took the license number, went back to their home and also called the police.

Ricky saw defendant that night at the Lynwood police station and recognized him as being the man that pulled him into the car.

Defendant's defense was that of an alibi. He attempted to account for his time from approximately 1:45 to 9:30 on the afternoon and evening in question. He did not, however, take the witness stand in his own behalf.

Although the public defender had been appointed to represent the defendant, when his case was called for trial he stated that he no longer desired the services of that office and that he wished to represent himself. He informed the court that he felt that under the circumstances he could present the case better than a lawyer. The court fully explained to him the difficulties of representing himself and earnestly recommended that he not dispense with the services of counsel. The defendant's request, however, was finally granted.

Defendant now contends that the court erred in accepting his waiver of the right to counsel. He asserts that such waiver was "incompetent, contrary to law, and a denial of due process."

[1, 2] The constitutional right to be represented by counsel (Calif.Const. art. I, sec. 13) is one that may be waived. In re Connor, 16 Cal.2d 701, 709, 108 P.2d 10. The waiver, however, to be effective must be made "competently, intelligently, and completely." In re Jingles, 27 Cal.2d 496, 498, 165 P.2d 12, 14. Whether a waiver in a particular case meets this standard is largely a matter for the determination of the trial court, and its decision will not be disturbed on appeal in the absence of an abuse of discretion. People v. Rogers, 150 Cal.App.2d 403, 416, 309 P.2d 949.

[3] In the instant case, defendant had been an accountant. He had had previous

experience in the criminal courts. He indicated he had given considerable thought to the idea of discharging his counsel and representing himself and that his decision was a considered one. The trial court fully explained to him the problem and difficulty of acting as his own attorney and admonished him not to dispense with the assistance of the public defender. Defendant, however, persisted in his view that in the circumstances of this case he could present it better than a lawyer. It is thus clear that the trial judge was abundantly justified in accepting defendant's waiver of the right to counsel, and such acceptance was in accordance with the established law and not a denial of due process.

[4, 5] Defendant's second contention is that the court erred in admitting the testimony of incompetent witnesses. Relying on section 1880, Code of Civil Procedure, he argues that the children who testified were not competent witnesses. That section provides that children under ten years of age cannot be witnesses if they "appear incapable of receiving just impressions of the facts with respect to which they are examined or of relating them truly." That section imposes upon the trial judge a duty to determine whether a child under ten is a competent witness. If a child possesses sufficient intelligence, understanding and ability to receive and fairly accurately recount his impressions and he has an understanding of the nature of an oath and a moral sensibility to realize that he should tell the truth and that he is likely to be punished for a falsehood, he is competent to testify. People v. Trolinder, 121 Cal.App.2d 819, 823, 264 P.2d 601; People v. Lamb, 121 Cal.App.2d 838, 846, 264 P.2d 126; People v. Goff, 100 Cal.App.2d 166, 170, 223 P.2d 27. The competency of a child as a witness is a matter resting largely in the sound discretion of the trial judge and, in the absence of a showing of an abuse of discretion, his decision will not be disturbed on appeal. People v. Ash, 70 Cal.App.2d 583, 585, 161 P.2d 415; People v. Ernst, 121 Cal.App.2d 287, 290, 263 P.2d 114.

[6] The trial judge conducted a voir dire examination of Stanley and Ricky regarding their church and school attendance, obligation to tell the truth and the consequences of telling an untruth before they were sworn. Stanley told the court that he was six years old and was in the first grade; that his Sunday school teacher had taught him what it means to tell the truth, and that if he did not tell the truth he might be punished. Ricky stated that he was 7½ years old, in the second grade, and that he realized he might be punished if he told a lie. In the circumstances, the trial court properly exercised its discretion in permitting these children to testify. People v. Norred, 110 Cal.App.2d 492, 495, 243 P.2d 126.

Furthermore, the trial court inquired of the defendant in each instance whether he was "satisfied with the qualifications of the witnesses" and defendant indicated that he was.

Defendant's third contention is that the language of section 288 of the Penal Code is "too vague, indefinite and uncertain to constitute valid criminal legislation." He argues that the words "lewdly," "lewd" and "lascivious" in the section (see text of section in footnote 2) render it too vague to meet the requirements of due process. The section was held constitutional, however, more than thirty years ago in People v. Maine, 93 Cal.App. 141, 269 P. 194. The section "was enacted to protect children from the lustful advances and tamperings of callous and unscrupulous persons as well as from the assaults of depraved unfortunates." People v. Hobbs, 109 Cal.App.2d 189, 192, 240 P.2d 411, 414. A similar attack was made on section 702 of the Welfare and Institutions Code on the ground that the words "dissolute" and "immoral" contained in the statute were not sufficiently definite to inform those subject to its sanctions what type of conduct was thereby denounced. This court, in People v. Deibert, 117 Cal.App.2d 410, 256 P.2d 355, held that this attack was not valid. At pages 418–419 of 117 Cal.App.2d, at page 360 of 256 P.2d we stated: "Where a statute contains a reasonably adequate disclosure of the legislative intent regarding an evil to be combatted in language giving fair notice of the practices to be avoided, a court will be slow to say that such a statute is too indefinite to be enforced. The complexities of the social problems dealt with by the Legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by over-refined inquiries into the meanings of words. 'Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible.' People v. Kennedy, 21 Cal.App.2d 185, 193, 69 P.2d 224, 229. The use of words of general meaning is the essence of our code system. Thus, in a sphere so vital to the community as the welfare of its youth, the words used in a statute designed to enable the Legislature to come to grips effectively with the problems of juvenile delinquency should be upheld where their frequent use in penal statutes gives assurance that they are understood by men of ordinary intelligence.

" 'To comply with the constitutional requirement of due process of law, the crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. "To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited." [Citation.]

" 'Although higher standards of certainty will be required of penal than of civil statutes [citation], a statute is sufficiently certain if it employs words of long usage or with common law meaning, "notwithstanding an element of degree in the definition as to which estimates might differ [citations]." ' Lorenson v. Superior Court, 35 Cal.2d 49, 60, 216 P.2d 859, 866. This same decision notes, with appropriate citations of authority, that California courts have upheld statutes employing such terms as: 'to make diligent effort to find the owner'; 'unreasonable speed;' 'unjustifiable physical pain or mental suffering'; and 'to the annoyance of any other person.'

"Applying these criteria and considering the relative certainty of words employed in the statutes referred to whose validity has been upheld, it is manifest that the words 'dissolute' and 'immoral' meet the constitutional standards of certainty and definiteness. A person charged with being a dissolute person is given sufficient warning of the nature of his offense. In re McCue, 7 Cal.App. 765, 766, 96 P. 110. ' "Lewd" and "dissolute" are terms often used interchangeably * * *. "Dissolute" is defined to mean: "2. * * * loose in morals and conduct; wanton; lewd; debauched." Webster's New Inter. Dict., 2d Ed.' People v. Babb, 103 Cal.App.2d 326, 330, 229 P.2d 843, 846."

[7] Applying these principles to the challenged language in section 288, it cannot be said that the section is rendered unconstitutional on the theory that it is too vague, indefinite and uncertain.

[8] Defendant's next contention is that he "was twice convicted for one act and twice held in jeopardy." His theory apparently is that but one criminal act was committed. In this, however, he is in error. The act of copulating the child is a specific crime that is denounced by section 288a. His subsequent conduct, though closely related in point of time, was nevertheless a separate criminal offense which is denounced by section 288 of the Penal Code. The defendant was therefore properly charged and convicted of the two crimes and he did not suffer double jeopardy. People v. Akers, 143 Cal.App.2d 224, 228, 299 P.2d 398; People v. Slobodion, 31 Cal.2d 555, 561–563, 191 P.2d 1.

Defendant's reliance on People v. Greer, 30 Cal.2d 589, 184 P.2d 512, is adequately disposed of in the Slobodion case, supra.

[9–11] Defendant's fifth contention is that the evidence is insufficient to sustain the conviction of attempted kidnaping. He argues that there is no proof of an attempt to take the alleged victim to another part of the county, and that the words "other part" of the county as used in the statute [3] are "too vague, indefinite and uncertain;" that it cannot be ascertained whether it means "a few inches away, across the street, around the corner, or into another political subdivision of the county." Defendant misconceives the point. It is the fact, "not the distance, of forcible removal which constitutes kidnaping in this state." People v. Chessman, 38 Cal.2d 166, 192, 238 P.2d 1001, 1017; People v. Cluchey, 142 Cal.App.2d 563, 565, 298 P.2d 633. The court further observed in the Chessman case: "The fact that Regina in being kidnaped or carried away was forced to move only 22 feet does not make her abduction any the less kidnaping within the meaning of the statute."

Defendant's act in opening the door of his car and pulling Ricky into it against his will and then, after quieting him, starting the motor, clearly shows an attempt to kidnap the child and amply sustains his conviction on that count.

[12] Finally, on this appeal, defendant contends that the evidence is insufficient to sustain his conviction of violating sections 288 and 288a. The simple answer to this contention is that Stanley testified to acts which show a clear violation of both sections, and the trial judge believed his story.

Appeal No. 5979.

[13] One of the conditions of defendant's probation in the child stealing case was that he was "not to associate with minors unless in the presence of responsible adults." Defendant's conviction in the later case involving misconduct with children was a clear violation of the quoted condition of his prior probation and obviously justified the revocation of probation and the imposition of sentence.

[14] "Since an appeal from the sentence is not authorized" (People v. Millum, 42 Cal.2d 524, 525, 267 P.2d 1039, 1040), the purported appeals therefrom will be dismissed.

The purported appeal from the sentence in each case is dismissed. The judgment in each case is affirmed.

ASHBURN and HERNDON, JJ., concur.

Marjorie COATES and Kenneth Francis Coates, Jr., a minor, by Marjorie Coates, his guardian ad litem, Plaintiffs and Appellants,

v.

Jessie Robson CHINN, also known as Jessie Whipple Robson, also known as Jesse Whipple Robson, and Robert C. Chinn, Defendants and Respondents.*

Civ. 9245.

District Court of Appeal, Third District, California.

May 26, 1958.

Rehearing Denied June 20, 1958.

Hearing Granted July 23, 1958.

Wrongful death and personal injury action. The Superior Court, Napa County, Percy King, Jr., J., rendered judgment for defendants following an order of nonsuit, and plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that growing and maintenance of eucalyptus trees in proximity to highways is not negligence per se, and that to make it such there must be something in attained age, or

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3. The material portion of section 207, Penal code, defining kidnaping, reads:
"Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county * * * is guilty of kidnaping."

* Opinion vacated 332 P.2d 289.

in reasonably ascertainable condition, of tree sufficient to warn ordinarily prudent person that permitting tree to stand in that condition will create undue risk to persons using highway; and held that notwithstanding testimony by expert that even healthy eucalypti would drop their limbs, it was not error to grant nonsuit in wrongful death and personal injury action arising out of collision between automobile and limb which had fallen from eucalyptus tree on defendants' property adjacent to highway.

Affirmed.

1. Nuisance ⚷61

If maintenance of eucalyptus trees along highway constituted a nuisance, it was a "public nuisance", that is, an act or omission causing inconvenience or damage to public in exercise of rights common to all.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Nuisance".

2. Nuisance ⚷71

If maintenance of eucalyptus trees along highway constituted a nuisance, it was not that type of nuisance which carried with it absolute liability, since it had its basis, not in an intentional invasion of public or private interest nor in conduct abnormal and out of place in its surroundings, but, on contrary, in negligence.

3. Highways ⚷199

In absence of prohibitory legislation, landowner may grow trees upon his property in proximity to public way without assuming obligations of an insurer if, through casualty, tree, or limb from tree, obstructs way by falling upon it to damage of one traveling thereon.

4. Nuisance ⚷7

Test of liability for nuisance having its basis in negligence is reasonableness of conduct under the circumstances.

5. Automobiles ⚷308(8)
Highways ⚷199

Growing and maintenance of eucalyptus trees in proximity to highways is not negligence per se, and to make it such must be something in attained age, or in reasonably ascertainable condition of tree, sufficient to warn ordinarily prudent person that permitting tree to stand in that condition will create undue risk to persons using highway; and notwithstanding testimony by expert that even healthy eucalypti would drop their limbs, it was not error to grant nonsuit in wrongful death and personal injury action arising out of collision between automobile and limb which had fallen from eucalyptus tree on defendants' property adjacent to highway.

Charles R. Garry, Francis J. McTernan, Jr., Garry, Dreyfus, McTernan & Keller, San Francisco, and Laura O. Coffield, Napa, for appellants.

Taft, Wright & Hopkins, Vallejo, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment following an order of nonsuit in a wrongful death and personal injury action.

Appellants are the widow and minor child of Kenneth Coates, deceased, who was killed when the automobile which he was driving ran into a large limb which had fallen from a eucalyptus tree onto the road way. The accident occurred on a state highway near Oakville in Napa County. The tree from which the limb fell was growing on respondents' property. It was approximately one hundred years of age and was neither diseased nor decayed. The limb was about 6 to 8 inches in diameter at the point where it joined the trunk. It extended outward over the highway a distance of approximately 30 feet. It was affirmatively shown to have been sound and without exterior or internal blemish or defect. It was not shown to have carried an unusual load of smaller branches and leaves. The accident happened November 14, 1954, at about 6:30 P.M. It was dark and the weather was stormy. Decedent was driving at about 45 to 50 miles per hour. Mrs. Coates described the occurrence as follows: Suddenly the end of a broken limb 6 to 8 inches in diameter loomed up in front of the car and there was no way of avoiding it; the jagged end of the limb came through the windshield.

Appellants contend that under the circumstances disclosed in the evidence, respondent was an insurer of the safety of appellants and of decedent because the maintenance of eucalyptus trees along the highway in close proximity thereto constituted an obstruction to the public way and a nuisance. Appellants also contend that on the theory of negligent conduct without regard to nuisance the evidence was sufficient to require submission of the cause to the jury.

[1, 2] If there was a nuisance here it was a public nuisance, that is, an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all. Prosser says that the most obvious illustration of a public nuisance is the obstruction of a public highway which inconveniences only those who are traveling upon it. Prosser on Torts, p. 402. If, however, there was a nuisance it was not that type of nuisance which carries with it absolute liability or, as appellants phrase it, the liability of an insurer, since it had its basis, not in an intentional invasion of public or private interest nor in conduct abnormal and out of place in its surroundings, but on the contrary rested upon negligence. Says Prosser, at page 392:

> "* * * [A] nuisance may also result from conduct which is merely negligent, where there is no intent to interfere in any way with the plaintiff, but merely a failure to take precautions against a risk apparent to a reasonable man. The defendant may, for example, carry on some entirely proper activity * * * without reasonable care * * *.
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> "* * * [A] public nuisance may also arise through conduct which is merely negligent, * * *."

[3] Research has not disclosed and our attention has not been called to any statute or ordinance applicable in the locality of this accident which forbids the growing of trees along highways in such close proximity thereto that the trees or their limbs may fall into the public way. In the absence of prohibitory legislation a landowner may grow trees upon his property in proximity to a public way without assuming the obligations of an insurer if, through casualty, a tree or a limb from a tree obstructs the way by falling upon it to the damage of one traveling thereon. Says Prosser, at pages 398–399:

> "Where the basis of the nuisance is negligence, the reasonableness of the defendant's conduct is obviously in issue, and is determined by the familiar process of weighing the gravity and probability of the risk against the utility of his course * * *. [T]here is no liability for nuisance unless the defendant's conduct is unreasonable under the circumstances."

[4] It is obvious that since the nuisance here complained of, if nuisance there was, had its basis in negligence, and since the test for both that type of nuisance and for negligence is reasonableness of conduct the circumstances considered, the merits of this appeal may hereafter be discussed upon that basis. Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 613, 623, 195 P.2d 501.

The subject of the liability of an owner or occupant of abutting property for damage caused by the fall of a tree into a highway is annotated in 11 American Law Reports 2d, beginning at page 626. The annotation is appended to the report of Caminer et al. v. Northern & London Investment Trust Ltd., decided by the English Court of Appeal in 1949. The plaintiffs had been injured by the fall of the tree and the trial court had given judgment in their favor. On appeal, the decision was reversed for want of evidence of negligent conduct. We quote the summary of the decision as it appears in the report, page 617:

> "An elm tree 120 to 130 years old, which is less than half of the ordinary life of an elm, standing on property adjacent to a highway, was felled by an ordinary gust of wind, injuring persons driving along the highway. It had not been lopped for some time, but its crown of foliage was not of extraordinary size. After the tree fell it was discovered for the first time that disease had attacked the roots, causing them to rot. Although there was testimony to the effect that elms, being shallow-rooted, should be lopped from time to time, the occupier of the property was held not liable to the persons injured, either on the ground of negligence or of nuisance, where nothing in the appearance of the tree indicated that it was likely to be blown over."

The author of the Annotation states the following, page 627:

> "While the ownership of land carries with it the right of dominion or control, it should be noted that such dominion must be considered, especially with relation to the users of the public highway, not as an absolute, unrestricted dominion, but as a privilege qualified by the collective and perhaps superior rights of the group of individuals who are the public and who are entitled to the enjoyment and safety of the roads dedicated to their use.
>
> "With reference to this concept of ownership the abutting landowner, in the absence of municipal or statutory regulations placing the control of trees in or along the highway in the public authorities, is required to use due care to prevent harm from falling trees to persons lawfully using the highway. [The author of the annotation states that the phrase "fall of tree into highway" as used by him includes a tree or a limb therefrom which has already fallen into the highway and with which a traveler comes in contact.]
>
> "Two general situations arise in which the landowner on whose property the tree is growing * * * may be charged with negligence. The first is the situation in which the landowner or someone at his intervention is the active cause of the fall of the tree.
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> * * * * * *
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> "The second situation in which the landowner may become liable is that in which the fall of the tree is due to natural processes of decay of which the landowner is or should be cognizant. The view has been taken in this situation that it is the duty of the landowner to exercise reasonable care to prevent the fall of a tree into the highway even though this may entail constant and periodic inspection of the tree to determine its safe condition.
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> * * * * * *
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> "* * * [W]hile the landowner is charged with the duty of reasonable inspection to prevent trees abutting or growing in the highway from becoming dangerous to the users of the public highway, it would appear that such liability does not exist where the accident is the result of a defect which such inspection would not reveal."

Eucalyptus trees are a familar part of the California landscape. From "Eucalyptus in California", by Norman D. Ingham, published as Bulletin Number 196 of the University of California Publications, we read that the eucalypts were introduced in California from Australia in the early fifties; that between 1870 and 1875 considerable planting was done for fuel, windbreaks, and shade along avenues; that in Australia the eucalypti attain an age from 400 to 500 years and dimensions second only to the California sequoias; that many species are said to reach heights of 300 to 400 feet and diameters of 12 to 15 feet; that naturally the timber eucalypts maintain an erect form with strong main axes and slender limbs; that the production of an extensive lateral root system renders the eucalypts very wind firm; that their strong anchorage in the soil, combined with the flexibility of the growing stem, renders them particularly valuable for windbreak purposes, since a break which will yield before the force of the wind tends to deflect the air currents upward and to protect areas far to leeward, whereas an unyielding barrier breaks the wind only on areas in close proximity to it.

The trees being grown and maintained by respondents were comparatively young and the particular tree from which the limb fell was not shown to have been in anywise defective or unsafe. So far as proof goes, inspection of this tree would have revealed no defects, and examination, after the accident, of the tree and of the limb that fell was equally unproductive of any indicia of weakness.

Appellants sought to bring their case within the rule that requires reasonable care on the part of those who, on their land, grow trees in proximity to highways, and for reversal they point to the following testimony: Joseph A. Flynn, whose occupation was stated to be tree surgery, said that in the course of his business he had worked on eucalypti in Napa County, and considered himself an expert. He said that the eucalypti in that county grow very fast and rather rangy (this, according to Ingham, is generally typical of these trees); that in summer, during the hot days, a number of limbs will break due to the excessive flow of sap into the limbs; that a number of them break in the fall, usually with the first rains and the winds, and that these things are common characteristics of eucalyptus trees in that area; that it was standard practice around there to top the trees and shorten the limbs; that the shortening reduced the leverage of the limbs; that prior to trial he had looked at the tree in question; that there had been no obvious change for several years; that the limbs still overhung the highway; that the trees on respondents' property were rather tall and spreading, in the neighborhood of 100 feet high; that the tree in question had a wider circumference around the base than the others; that there were quite a number of dead limbs on the tree, but he would not be in a position to know the conditions of the limbs at the date of the accident; that he estimated the age of the respondents' trees as anywhere from 50 to 150 years; that he saw no evidence of rot in the trunk of the tree in question nor any evidence of disease; that if trees of any species are examined some small dead limbs would be found; that there were many eucalyptus trees in Napa County, probably several hundred thousand; that he possibly trimmed or topped eucalyptus trees for ten or fifteen clients per year; that he did not mean to infer that all landowners in Napa County make it a standard practice to call him in; that eucalypti will drop their limbs, even good healthy ones; that the common practice of topping which he referred to was established by men in the same line of work that he was in; that there were probably three such men in the Napa County area.

Respondent, Jessie Robson Chinn, called under Section 2055 of the Code of Civil Procedure, gave the following testimony: "I have been told that it is the nature of eucalyptus trees that their limbs will fall. I do not know it. I have been told so. They do not fall regularly, but fall at times. It is the nature of the trees. The eucalyptus trees along the road were planted in my early childhood. They seem to have always been there. In the last five years I have had no work done on the trees by a tree surgeon. The trees were perfectly healthy as far as I could see."

[5] We find nothing in the foregoing from which it could be concluded or inferred that respondent had been guilty of negligence in the growing and maintenance of the eucalyptus tree from which fell the limb that caused the death of Mr. Coates and the injuries of Mrs. Coates. We hold that the growing and maintenance of these trees in proximity to highways is not negligence per se; that there must be something in the attained age, or in the reasonably ascertainable condition of the trees sufficient to warn an ordinarily prudent person that permitting the tree to stand in that condition would create an undue risk to persons using the highway;

and that the facts shown here do not measure up to that test.

The judgment appealed from is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

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160 Cal.App.2d 711

Leland Robert LEWIS, Plaintiff and Appellant,

v.

Herman GREENSPUN, a.k.a. Hank Greenberg; Lawrence C. Ives; Nat Rather, a.k.a. Nathan Ratner; Al Elliott; Jake Fuchs, a.k.a. Jacob Foues; Henry Bellows, and Lloyd Rosenblum; Haganah Jewish Military Organization, an Association, Haganah Jewish Agency of Palestine; an Association, and various Does and Roes, Defendants,

Herman Greenspun, Defendant and Respondent.

Civ. 22570.

District Court of Appeal, Second District, Division 3, California.

May 22, 1958.

Action for alleged conspiracy between defendants to convert plaintiff's boat. From an order of the Superior Court, Los Angeles County, Aubrey N. Irwin, J., dismissing the complaint, the plaintiff appealed. The District Court of Appeal, Vallée, J., held, inter alia, that where valid service of summons was had on defendant on November 9, 1953, and on December 21, 1953, defendant appeared in the action and at all times thereafter had an attorney of record, and during period extending more than five years when many motions were made and ruled upon, plaintiff did not at any time take any steps to have the action tried before the five-year period expired, and did not call court's attention to fact that if action was not brought to trial within five-year period it would be subject to dismissal, plaintiff did not as matter of law bring himself within the out-of-state exception in statute requiring trial within five years from date an action is begun, and hence trial court did not abuse its discretion in granting defendant's motion of dismissal.

Affirmed.

1. Dismissal and Nonsuit 🔑45

The statute requiring trial within five years from date an action is begun is mandatory when applicable. West's Ann. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit 🔑60(3)

The statute requiring trial within five years from date action is begun does not contemplate excluding from the five-year period the time necessary for the service of process, disposing of demurrers, amendment of pleadings, or the usual and reasonable time consumed in waiting for a trial date, and fact that action was once set for trial within five-year period and then ordered off calendar on court's own motion does not toll the five-year period within which action must be brought to trial. West's Ann.Code Civ.Proc. § 583.

3. Dismissal and Nonsuit 🔑60(3)

Generally, where it is shown that defendant has been absent from state, the five-year period, within statute requiring trial within five years from date an action is begun, is tolled during time of absence, but when defendant has, or has had, an attorney of record for sufficient time to enable action to have been tried if plaintiff had acted with due diligence, time of absence does not toll the five-year period. West's Ann.Code Civ.Proc. § 583.

4. Appeal and Error 🔑962

Dismissal and Nonsuit 🔑60(1)

Under statute requiring trial within five years from date action is begun, determination of whether plaintiff has been diligent in prosecution of his action is in discretion of trial court, whose determination will not be disturbed on review unless there has been a clear abuse of discretion. West's Ann.Code Civ.Proc. § 583.

5. Appeal and Error ⚿962

Under statute requiring trial within five years from date action is begun, whether defendant who was absent from state had an attorney of record for sufficient time to enable action to have been tried if plaintiff had acted with due diligence was a question for the trial court. West's Ann.Code Civ.Proc. § 583.

6. Dismissal and Nonsuit ⚿60(3)

Where valid service of summons was had on defendant on November 9, 1953, and on December 21, 1953, defendant appeared in the action and at all times thereafter had an attorney of record, and during period extending more than five years when many motions were made and ruled upon, plaintiff did not at any time take any steps to have the action tried before the five-year period expired, and did not call court's attention to fact that if action was not brought to trial within five-year period it would be subject to dismissal, plaintiff did not as matter of law bring himself within the out-of-state exception in statute requiring trial within five years from date an action is begun, and hence trial court did not abuse its discretion in granting defendant's motion of dismissal. West's Ann. Code Civ.Proc. § 583.

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Herschel E. Champlin, Los Angeles, for appellant.

William Strong, Beverly Hills, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an order dismissing the action under section 583 of the Code of Civil Procedure. The order was made as to other named defendants; however, the appeal is taken from the order dismissing as to defendant Greenspun only.

The action is in personam. The cause of action alleged is a conspiracy between defendant Greenspun, called defendant, and other defendants to convert plaintiff's boat for use in smuggling a cargo of arms and ammunition out of the United States and shipping it from Mexico to Israel. It is alleged defendants forcibly seized the boat and converted it to their own use.

The following is the chronological history of the cause:

June 26, 1950, complaint filed and summons issued.

July 6, 1950, defendant served with summons and complaint.

September 1, 1950, service of summons quashed on motion of defendant, represented by counsel.

June 14, 1951, action first set for trial for March 24, 1952.

March 24, 1952, cause ordered off calendar on court's own motion subject to resetting after 30 days.

August 8, 1952, alias summons issued.

November 9, 1953, alias summons and complaint served on defendant by personal service within the jurisdiction.

November 24, 1953, alias summons and return of service filed.

December 21, 1953, demurrer to complaint filed on behalf of defendant by his present counsel.

December 23, 1953, counsel for plaintiff and counsel for defendant stipulate that the hearing on the demurrer be continued to January 29, 1954.

January 29, 1954, by stipulation between counsel for plaintiff and counsel for defendant, demurrer ordered off calendar.

February 25, 1954, plaintiff served on counsel for defendant and filed notice of motion for leave to file an amended complaint. In an affidavit filed in support of the motion plaintiff stated: "Further that some delay has been occasioned herein for reasons set forth above, and the fact that your affiant was in Honolulu, Hawaii, from about Dec. 1st, 1949 to the approximate date of *June 15th, 1952,* during which time your affiant was without funds to return to California for conferences with counsel, and further delay resulted from your affiant's residence and employment in the vicinity of Carmel, California, at considerable distance from offices of his respective counsel, now therefore, he states that if leave is allowed to amend his Complaint, your affiant is ready and able to proceed with the disposition of said cause of action as soon as Motion can be heard and his case again set for trial."

March 5, 1954, motion to file amended complaint ordered off calendar.

March 19, 1954, notice of motion to restore to calendar and hear motion for leave to file amended complaint served on counsel for defendant and filed.

March 24, 1954, motion for leave to file amended complaint granted.

May 6, 1954, notice of ruling on motion to file amended complaint served on counsel for defendant and filed.

July 26, 1954, defendant, represented by his present counsel, served on counsel for plaintiff and filed demurrer to amended complaint and motion to strike parts thereof; defendant's counsel gave plaintiff's counsel notice that the demurrer and motion to strike would be heard August 13, 1954.

August 13, 1954, counsel for plaintiff present, hearing of demurrer and motion to strike continued to September 8, 1954.

September 8, 1954, plaintiff served on counsel for defendant and filed memorandum in opposition to demurrer and motion.

September 8, 1954, counsel for plaintiff and defendant being present, demurrer overruled, motion to strike denied.

October 20, 1954, defendant, by his present counsel, filed answer to amended complaint and a counterclaim.

December 8, 1954, plaintiff filed memorandum for setting for trial.

December 14, 1954, defendant, by his attorney, served and filed a demand for a jury trial.

November 25, 1955, cause set for trial for March 6, 1956.

January 25, 1956, plaintiff served on defendant's attorney notice that cause was set for jury trial on March 6, 1956.

February 2, 1956, defendant filed notice of motion to dismiss, one of the grounds being that the action had not been brought to trial within five years after plaintiff had filed his action.

February 15, 1956, opposition to motion to dismiss filed in which it was stated: "Beginning with Nov. 24, 1953, defendant obtained a stipulation for continuance to demur or answer. After demurrer was filed, plaintiff amended his complaint after motions were noticed, continued by stipulation at request of said defendant now joined by defendant Rosenblum, and heard on March 24, 1954. Defendant Ives filed his answer to amended complaint on June 15, 1954. Defendants Rosenblum and Greenspun obtained additional time by oral stipulation to October 20, 1954, on which date they filed answers after exhausting a series of motions to strike and demurrers were filed. Said extensions of time were given defendants Rosenblum and Greenspun as the usual courtesy to counsel upon representations that his secretary was ill or that he had other pressing cases on trial. Many reasons were assigned and many continuances were given. Plaintiff's memorandum of setting was filed Dec. 8, 1954, as aforesaid." In an affidavit in opposition, counsel for plaintiff stated: "While the above delays may not constitute legal excuses according to the authorities, they were beyond the control of plaintiff, except for the usual courtesy extended by continuances to other counsel, and therefore are assigned as equitable defenses to the said motion and which total approximately two years of the five year period, exclusive of the three plus years Greenspun was absent from the state and could not be served in this case."

February 29, 1956, motion to dismiss granted. Plaintiff appeals from the order of dismissal as to defendant Greenspun.

Defendant was at all times a resident of and engaged in business in the state of Nevada. It appears without conflict that from the commencement of the action to the filing of the motion to dismiss he was out of the state of California about 3 years, 4 months, and 13 days.

Plaintiff contends the court erred in dismissing the action as to defendant Greenspun. He claims that as defendant was a resident of Nevada and service of summons and complaint could not be made on him for 3 years, 4 months, and 13 days, the case falls within the express exception to the five-year rule under section 583 of the Code of Civil Procedure; that to include this period as part of the five years was an abuse of the court's discretion.

Section 583 of the Code of Civil Procedure in pertinent part provides:

> "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period. *When, however, such defendant has, or has had, an attorney of record for a sufficient time to enable the action to have been tried if the plaintiff had acted with due diligence, such period of absence or concealment shall be a part of said five-year period.*" (Emphasis added.)

There is no issue as to a written stipulation extending the time of trial beyond the five-year period since no such stipulation was ever entered into.

[1, 2] Section 583 is mandatory when applicable. Andersen v. Superior Court, 187 Cal. 95, 97, 200 P. 963. The statute does not contemplate excluding from the five-year period the time necessary for the service of process, disposing of demurrers, amendment of pleadings, or the usual and reasonable time consumed in waiting for a trial date. Continental Pacific Lines v. Superior Court, 142 Cal.App.2d 744, 750, 299 P.2d 417; O'Donnell v. City and County of San Francisco, 147 Cal.App.2d 63, 65–66, 304 P.2d 852; DeMota v. Superior Court, 130 Cal.App.2d 58, 62, 278 P.2d 537. See Berri v. Superior Court, 43 Cal.2d 856, 858, 279 P.2d 8. The fact that the action was once set for trial within the five-year period and then ordered off calendar on the court's own motion does not toll the five-year period within which the action must be brought to trial. Hastings v. Superior Court, 131 Cal.App.2d 255, 258, 280 P.2d 74.

[3] Generally where it is shown that the defendant has been absent from the state the five-year period is tolled during the time of absence. Ojeda v. Municipal Court, 73 Cal.App.2d 226, 166 P.2d 49. However when the defendant has, or has had, "an attorney of record 'for a sufficient time to enable the action to have been tried if the plaintiff had acted with due diligence'," the time of absence does not toll the five-year period. Hunt v. United Artists Studio, 79 Cal.App.2d 619, 624, 180 P. 2d 460, 463.

[4] The determination of whether the plaintiff has been diligent in the prosecution of his action is in the discretion of the trial court. Wisler v. California State Board of Accountancy, 136 Cal.App.2d 79, 81, 288 P.2d 322; Ojeda v. Municipal Court, 73 Cal.App.2d 226, 231, 166 P.2d 49. Its determination will not be disturbed on review unless there has been a clear abuse of discretion. Gurst v. San Diego Transit System, 119 Cal.App.2d 51, 55, 258 P. 2d 1109.

[5, 6] Valid service of summons was had on defendant on November 9, 1953. On December 21, 1953 defendant appeared in the action. At all times after that date

he had an attorney of record. After the alias summons was served on defendant on November 9, 1953 plaintiff gave him until December 21, 1953 in which to plead. On that date defendant filed a demurrer to the complaint. Plaintiff stipulated that hearing on the demurrer be continued to January 29, 1954. On February 25, 1954 plaintiff filed a motion for leave to file an amended complaint. On March 5, 1954 he permitted the motion to go off calendar. He did not seek to restore it to the calendar until March 19, 1954. On March 24, 1954 leave to file the amended complaint was granted. Plaintiff did not give notice of the ruling until May 6, 1954. He then gave defendant until July 26, 1954 in which to plead to the amended complaint. Defendant filed a demurrer. On August 13, 1954 plaintiff permitted the hearing on the demurrer to be continued to September 8, 1954. On that date the demurrer was overruled. Plaintiff then gave defendant until October 20, 1954 to answer the amended complaint. On that date defendant filed his answer. Plaintiff did not file a memorandum for setting until December 8, 1954. Plaintiff did not at any time take any steps to have the action tried before the five-year period expired. He did not call the court's attention to the fact that if the action was not brought to trial within the five-year period it would be subject to dismissal. Sanford v. Superior Court, 111 Cal.App.2d 311, at page 313, 244 P.2d 463, at page 464 says:

> "Under rule 12 of the Superior Court Rules provision is made for advancing or specially setting a case for trial, which was obviously intended to cover cases where some reason exists for so doing. Although this procedure was available at all times, the appealing party failed to make such a request. After a long delay in filing the ordinary memorandum to set, he let the rest of the time expire without calling the urgency to the attention of the court or taking any steps whatever to bring the matter to a hearing within the required time. There is no showing that it was impossible for him to bring the matter to a hearing within that time, or that he was prevented from doing so by causes beyond his control, and the facts do not bring him within the exceptions relied on."

Whether defendant had an attorney of record for a sufficient time to enable the action to have been tried if plaintiff had acted with due diligence was a question for the trial court. It cannot be said as a matter of law that plaintiff brought himself within the out-of-state exception on which he relies or that the trial court abused its discretion in granting the motion.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

160 Cal.App.2d 726

Patrick CUNNINGHAM, Dennis Cunningham and Ruby Cunningham, Plaintiffs, Cross-Defendants and Respondents,

v.

Goldsmith FRYMIRE, Defendant and Cross-Complainant,

Cecelia Gwendolyn Jones, Charlotte Orlena Dunlavy, Benjamin C. Jones, Jane Keeling Barnes, as Executrix, and Venn Keeling, as Executor of the Estate of Myrtle J. Elliott, Deceased, and Richmond-Martinez Abstract and Title Company, a California Corporation, Defendants and Cross-Defendants,

Goldsmith Frymire, Cecelia Gwendolyn Jones, Charlotte Orlena Dunlavy, Benjamin C. Jones, Appellants.

Civ. 9389.

District Court of Appeal, Third District, California.
May 22, 1958.

Proceeding to partition land brought by owners of undivided one-third interest therein and remaindermen of undivided one-third interest which was subject to life estate of party objecting to partition and who had by his voluntary conveyance conveyed his undivided one-third interest subject to his own life estate, to remaindermen. The Superior Court, Lake County, Ben R. Ragain, J., entered judgment that property be partitioned through a sale, and life tenant appealed. The District Court of Appeal, Schottky, J., held that evidence sustained finding that partition in kind of nonincome producing and mostly unimproved land was not feasible.

Affirmed.

1. Executors and Administrators ⚷315(5)

Where during probate of estate, owner of undivided one-third interest conveyed the same to certain remaindermen subject to his life estate therein and decree of distribution assigned such one-third interest to remaindermen subject to life estate of grantor who was given right to have, hold, use and enjoy the same during the term of his natural life, decree did not compel conclusion that decree ratified a purported agreement between the parties that land would not be partitioned during lifetime of life tenant.

2. Appeal and Error ⚷1009(4)

Appellate court will not weigh questions of fact determined by trial court in partition action if there is any substantial evidence to support them.

3. Partition ⚷77(4)

Character and location of property is itself evidence from which a court may infer that partition in kind may not be made without great prejudice to the owners and this is essentially a factual question.

4. Partition ⚷77(4)

In proceeding to partition land, evidence sustained finding that partition in kind of nonincome producing and mostly unimproved land was not feasible and that there should be a partition by sale. West's Ann.Code Civ.Proc. § 752.

5. Partition ⚷12(5)

Owner of an undivided one-third interest in land was entitled to partition and fact that party had a life estate in undivided interest therein, does not preclude partition. West's Ann.Code Civ.Proc. § 752.

◆

Phil N. Crawford, Lakeport, and Hoey, Hall & Conti, Martinez, for defendant-complainant-appellant Frymire.

Mannon, Brazier & Bell, Ukiah, and Frederic S. Crump, Lakeport, for other defendants-appellants.

Kasch & Cook, Ukiah, for plaintiffs-defendants-respondents.

SCHOTTKY, Justice.

This is an appeal from a judgment ordering partition by sale of certain real property. The property in question was all part of the estate of Samuel Jones who died in 1938. By the terms of his will his daughter Celia H. Frymire and his son Benjamin C. Jones were each devised a one-third interest in the property, and his daughter Ruby Cunningham was devised a one-third interest in trust. During probate Celia H. Frymire died, and her husband, Goldsmith Frymire, succeeded to her interest. Prior to the distribution of the estate Goldsmith Frymire created by deed a life estate in himself in his share of the property, with a remainder over in favor of Patrick Cunningham and Dennis Cunningham, sons of Ruby Cunningham, and Cecelia Gwendolyn Jones and Charlotte Orlena Dunlavy, daughters of Benjamin C. Jones. By the decree of distribution dated November 12, 1952, Ruby Cunningham received her one-third interest free of the trust, Benjamin C. Jones received his one-third interest and Goldsmith Frymire was given a life estate in the remaining one-third with remainder over to the above named sons of Ruby Cunningham and the daughters of Benjamin C. Jones.

In 1954 Ruby Cunningham and her sons, Patrick Cunningham and Dennis Cunningham, commenced this action to compel the partition of the real property. Partition was opposed by Benjamin C. Jones and his daughters and by Goldsmith Frymire. Myrtle J. Elliott did not oppose partition. The Richmond-Martinez Abstract and Title Company disclaimed any interest in the property. Goldsmith Frymire filed a cross-complaint in which he alleged that the life estate in his share of the property was created gratuitously on the condition that he would have and receive for his support and maintenance one-third of the income received from the property for life; that he should have full possession and use of the property during his life; that the title of the remaindermen was conditional on the fulfillment of the conditions; that the deed was accepted by the remaindermen subject to these conditions; and that the Cunningham boys had violated the conditions by seeking partition. He asked that the court enter a decree impressing a trust in his favor upon the interest claimed by the Cunningham boys.

The cause proceeded to trial. The evidence produced disclosed that the property in question consisted of four parcels of land:

1. McClury land, 10 acres—unimproved,	$ 7,500.00
2. Mountain place, 300 acres—unimproved,	15,000.00
3. Home place, 160 acres—improved with a house and barn,	25,000.00
4. Orlena Jones place, 10 acres—unimproved	7,500.00

The property is not producing any net income for any of the owners and Ruby Cunningham testified that all the property was too small to be partitioned in kind.

The court determined that Ruby Cunningham and Benjamin C. Jones were each the owners of a one-third interest in the property; that Goldsmith Frymire was the owner of a life estate in a one-third interest in the property; that Patrick Cunningham and Dennis Cunningham, Ruby Cunningham's sons, and Cecelia Gwendolyn Jones and Charlotte Orlena Dunlavy, Benjamin C. Jones's daughters, were the owners as tenants in common of an undivided one-third interest in the property in which Goldsmith Frymire had a life estate; and that partition of the real property could not be had without injury to the rights of all the parties. The court ordered that the property be partitioned through sale and that all other matters such as division of the proceeds of the sale according to the rights of the parties and all other matters necessary for a complete determination of the action be reserved for determination at the time the report of the referee is considered by the court.

[1] Appellants contend that partition should have been denied because the language of the decree of distribution in the estate of Samuel Jones ratified a contract between the distributees that the property would not be partitioned during the lifetime of Goldsmith Frymire. If such an agreement had been made, of course Ruby Cunningham could not seek partition. But the record does not disclose any evidence of any agreement. This would be a question of fact, and the mere language of the decree that Goldsmith Frymire was given the "right to have, hold, use and enjoy the same during the term of his natural life" does not compel the conclusion that the decree ratified an agreement between the parties.

[2] Appellant Frymire contends that an agreement was made with the remaindermen that he would have the use and possession of the property during his lifetime and therefore the action of the Cunningham boys in bringing this partition action violated the agreement and a trust should have been impressed upon their interest. Both Patrick Cunningham and Ruby Cunningham denied any such agreement was made. There was a clear conflict in the evidence upon this issue, which conflict the court resolved against appellant. An appellate court will not weigh questions of fact determined by the trial court in a partition action if there is any substantial evidence to support them. (37 Cal.Jur.2d, Partition, p. 504.)

[3] The contention is also made that the property should have been partitioned

in kind rather than by sale. There was testimony that the property could not be partitioned in kind without great prejudice. As held in Priddel v. Shankie, 69 Cal.App.2d 319, 159 P.2d 438, the character and location of the property is itself evidence from which a court may infer partition in kind may not be made without great prejudice to the owners. This is essentially a factual question, too. Sting v. Beckham, 94 Cal.App.2d 823, 211 P.2d 586. In the instant case two of the plots of land were less than 10 acres and each was unimproved. One plot of 300 acres was mountain land which had a fine spring. The fourth plot was 160 acres and contains a house and a barn. Whoever got the property with the spring would get the best portion of the mountain land and whoever got the portion of the land containing the house and barn would get the best portion of that plot. These facts would support partition by sale rather than in kind.

[4, 5] The basic issue on this appeal is whether or not partition was proper. Section 752 of the Code of Civil Procedure provides that "When several cotenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, or when real property is subject to a life estate with remainder over, an action may be brought by one or more of such persons * * * for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property * * * if it appears that a partition can not be made without great prejudice to the parties." By the very words of the statute, Ruby Cunningham clearly was entitled to partition. The fact that Goldsmith Frymire was the owner of a life estate would not preclude partition. At this point we are not concerned with the distribution of the proceeds of the sale, and any question of whether or not Goldsmith Frymire will have the use of his share of the proceeds of the property for his life is premature, for the court expressly reserved for future determination the question of the distribution of the proceeds of the sale.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

160 Cal.App.2d 640

Ben NEWMARKER, Benjamin F. Tibbetts, James Jay Harrison, Frank Barone, Robert Croke, Plaintiffs and Appellants,

v.

The REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.

Civ. 17686.

District Court of Appeal, First District, Division 2, California.

May 20, 1958.

Rehearing Denied June 19, 1958.

Action by certain employees of the regents of the state university for declaratory relief determining their rights to sick leave accrued prior to a date on which they struck. The Superior Court, Alameda County, A. T. Shine, J., entered judgment adverse to employees and they appealed. The District Court of Appeal, Kaufman, J., held that Board of Regents of State University constituted a public entity, and therefore, strike against such entity was unlawful and terminated such striking employees' employment relationship with the Board and under university rule providing that rights to accrued sick leave were lost on termination of employment, such employees' right to accrued sick leave terminated on the date of their unlawful strike.

Judgment affirmed.

1. Colleges and Universities ⊂⇒7

The Board of Regents of the State University is a public legal entity charged with the government of a public trust. West's Ann.Const. art. 6, § 18; art. 9, § 9; St. 1867–8, p. 248, § 1.

2. Labor Relations ⊂⇒342

A strike against a public entity is unlawful.

3. Labor Relations ⊂⇒342

Where a strike against a public entity is unlawful, a strike terminates the employment relationship.

4. Labor Relations ⊂⇒52

Section of the Labor Code which declares policy of the state is in favor of collective bargaining does not apply to public employment. West's Ann.Labor Code, § 923.

5. Colleges and Universities ⊂⇒7
Labor Relations ⊂⇒342

Board of Regents of State University constituted a public entity, and therefore strike against such entity was unlawful and terminated such striking employees' employment relationship with the Board, and under university rule providing that rights to accrued sick leave were lost on termination of employment, such employees' right to accrued sick leave terminated on the date of their unlawful strike.

6. Appeal and Error ⊂⇒170(2)

In declaratory judgment action, where contentions as to unconstitutionality of certain conduct of Board of Regents of State University were not duly raised below, such contentions would not be considered by District Court of Appeal.

7. Colleges and Universities ⊂⇒7

Government Code sections making provisions for sick leave do not apply to institutions governed by the Board of Regents of the State University. West's Ann.Gov. Code, §§ 18100–18105, 18101.5, 20008, 20011–20015.

8. Declaratory Judgment ⊂⇒345

In action by certain employees of the Regents of the State University for declaratory relief determining their rights to sick leave accrued prior to a date on which they struck, evidence sustained finding that when employees resumed employment following their strike, they were aware that Board of Regents had canceled accumulated sick leave, and employees were thereby precluded from asserting resolution by which the sick leave was cancelled was ambiguous as not showing a clear intention to abolish accumulated sick leave.

◆

Smith & Parrish, Oakland, for appellants.

Thomas J. Cunningham, John P. Sparrow, Berkeley, John E. Landon, Berkeley, of counsel, for respondent.

James H. Phillips, Sacramento, for amici curiæ, California State Employees Ass'n.

KAUFMAN, Presiding Justice.

Plaintiffs, who are employees of the defendants, filed a complaint for declaratory relief to determine their rights to sick leave accrued before July 1, 1954. Both sides waived a jury trial. The court made findings of fact that the plaintiffs were not entitled to any sick leave and that all accrued sick leave accumulated by the plaintiffs up to July 1, 1954, was cancelled on that date, and entered judgment in favor of the defendants. Plaintiffs' motion for a new trial was denied, and this appeal from the judgment ensued.

The chronology of events leading to the controversy is as follows: On June 30, 1954, all the plaintiffs were employed at the University of California in Berkeley, as full time Building and Construction Trades employees. Under the wage policy of the defendants in effect at that time, all of the plaintiffs were paid the prevailing construction wages paid by private employers in Alameda County for comparable services, excluding social security and unemployment insurance benefits, but including the monetary equivalent of health and welfare fringe benefits, and non-academic university personnel benefits such as vacation and sick leave. It was stipulated that under the rules issued by the President of the University pursuant to the authority granted to him by the standing orders of the defendants, the governing body of the University, the right to draw on accrued sick leave during periods of injury or illness was lost on termination of employment. As of June 30, 1954, the plaintiffs had accumulated unused sick leave as follows:

Plaintiff	Ben Newmarker	58	days
"	Benjamin F. Tibbetts	24½	"
"	James J. Harrison	40½	"
"	Frank Barone	16	"
"	Robert Croke	16	"

Plaintiffs were members of craft unions affiliated with the Building and Construction Trades Council of Alameda County, hereinafter referred to as the Council. For six months during the winter of 1953–54, Mr. Childers, the Business Representative of the Council and a committee of the Council met with Mr. Corley, the University Vice-President in charge of business affairs, to discuss the wages and working conditions of the University building trades employees. The parties stipulated that Mr. Childers and Mr. Corley represented them at all relevant times. As result of a request for an increase in wages by the Council, the defendants examined and studied their wage and working condition policies in the entire field. They found that University building trades employees were receiving wages and benefits which were 11% higher than those paid by private industry for comparable services. Mr. Childers stated that private industry union contracts did not include sick leave benefits. On June 25, 1954, in order to equalize their wage policies with that of private industry, the defendants at a meeting in Los Angeles, adopted the following new wage policy applicable to the plaintiffs as of July 1, 1954:

> "1) That for those building trades on the Berkeley, Los Angeles, and San Francisco campuses, subject to construction and/or maintenance rates of pay, there be established effective July 1, 1954, the following policies:
>
> "a) For all employees on the rolls as of June 30, 1954, the present University wage policies shall continue, but without increase until such rates are surpassed by rates of personnel recruited after June 30, 1954.
>
> "b) For all new employees a rate of pay shall be computed from the area craft base construction prevailing rate (exclusive of health and welfare and other union fringe benefits) less 11% but inclusive of regular University fringe benefits."

The University of California building trades employees at the Richmond Field Station and at the Los Angeles campus accepted the above 11% ruling. Mr. Childers knew of the proposed wage policy change before June 25th and had registered the opposition of the Alameda County Building and Trades Council in a letter to the defendants dated June 7th and requested that the Alameda Council be permitted to present oral arguments at the June 25th meeting. Pursuant to this request Mr. Childers and some members of the union committee were present at the June 25th meeting of the defendants in Los Angeles. There, Mr. Childers again stated that the general concept of the proposal was not acceptable to the men he represented. On June 26th the above quoted resolution was presented to Mr. Childers who reiterated his opposition. Mr. Childers and Mr. Corley met several times in order to work out a program acceptable to both sides. In protest against the June 25th resolution, the Alameda Council called a strike effective July 1, 1954. Plaintiffs and some 450 union employees of the University in the area participated in the strike. At first, there was a complete shut-down, but after conferences with the union, certain essential university operations were restored to service.

On July 6, 1954, the Regents held another meeting and adopted the following wage policy resolution applicable to the plaintiffs:

> "(a) That effective July 1, 1954, all Building Trades employees of the Berkeley campus of the University, the San Francisco campus of the Uni-

> versity, and the Richmond Field Station of the University, be paid the prevailing wages of the various crafts, and in addition to be granted the prevailing working conditions (except as limited by existing laws) in each craft, including health and welfare. It is to be understood that University personnel benefits shall be withdrawn.
>
> "(b) That health and welfare not be recognized as such, but the cash equivalent be paid to the employees as a part of wages for all employees of all organized groups that have established it as prevailing practice.
>
> "Nothing in this resolution in any way constitutes an admission by the Regents of the right of any group to picket the University of California or any of its campuses or activities."

On the evening of July 6th, Mr. Corley discussed the above quoted resolution with Mr. Childers. Mr. Childers admitted that Mr. Corley explained to him that the vacation pay accrued until June 30th would be paid, but that the accrued sick leave would be cancelled. Mr. Childers further testified that when he indicated that the proposal would never be accepted by the employees, Mr. Corley indicated that the matter of the accrued sick leave was open to further negotiation. Mr. Corley denied making the latter statement and testified that he told Mr. Childers that he was limited to offer the terms of either the June 25th or the July 6th resolution. At a meeting on the afternoon of July 7th, the July 6th proposal was again discussed by Mr. Corley, Mr. Childers, Mr. Ash, the Secretary of the Oakland Trades Council and Mr. Bartalini, a member of the Union's committee. Mr. Bartalini testified that he clearly understood that the July 6th resolution wiped out accumulated sick leave. On July 7, 1954, at a meeting of the Building Trades employees, attended by the plaintiffs, Mr. Childers stated that sick leave and vacation benefits would be cancelled after July 1, but that accrued vacation would be paid and that the matter of accrued sick leave had been left open for negotiation. On July 8, 1954, the building trades employees returned to work. The trial court found that when the plaintiffs returned to work on July 8th they were aware that the defendant had cancelled accrued sick leave privilege and that the plaintiffs returned to work pursuant to the wage policy announced by the defendants on July 6th. From July 7, 1954, until the filing of this action in August 1955, Mr. Childers did not again approach Mr. Corley about the matter of the accrued sick leave.

During the following year, the plaintiffs were absent from work as follows: plaintiff Newmarker for 14⅝ days from December 27, 1954 to January 17, 1955, because of an industrial accident; plaintiff Tibbetts for 23 days from January 4, 1955 to February 4, 1955, because of an ulcer and hemorrhoids operation; plaintiff Harrison for 11 days from October 15, 1954 to November 1, 1954, because of stomach ulcers; plaintiff Barone for 17½ days from April 27, 1955 to May 23, 1955, because of a hernia operation; and plaintiff Croke for 13 days from May 4, 1955 to May 23, 1955, because of an appendectomy. Each of the plaintiffs applied for sick leave for the above mentioned periods of time. The defendant denied all of the applications on the basis of the July 6th resolution. This denial is the substance of this action.

On appeal, plaintiffs contend that they are the employees of a private corporation; that they cannot be deprived of their vested right to sick leave which is a part of their contract of employment; that even if the defendants are a public body, the attempt to deprive them of accrued sick leave is unconstitutional as an impairment of the obligation of contracts and a violation of the equal protection clauses of the State and Federal Constitutions, as well as of Government Code, sections 18100 and 18105; that the resolution of July 6th was ambiguous and ultra vires; that their strike was not illegal and did not, even if illegal, terminate their employment relationship with the defendants.

[1] Plaintiffs' chief authority for their argument that the defendants are a private corporation is 20 Op.Atty.Gen. 229, which stated only that a Superior Court Judge may be a member of the Board of Regents as such status is not "other office or public employment" prohibited by Article VI, Section 18 of the State Constitution. While the judicial pronouncements as to the nature of the Board of Regents as a public body are not completely consistent (Lundy v. Delmas, 104 Cal. 655, 38 P. 445, 26 L.R.A. 651; In re Estate of Royer, 123 Cal. 614, 56 P. 461, 44 L.R.A. 364; City Street Imp. Co. v. Regents of Univ. of Calif., 153 Cal. 776, 96 P. 801, 18 L.R.A.,N.S., 451; Caminetti v. Pacific Mutual Life Ins. Co., 22 Cal.2d 344, 139 P.2d 908; Raisch v. Regents of Univ. of Calif., 37 Cal.App. 697, 174 P. 943), common sense and the weight of authority indicate that the Board of Regents is a public legal entity charged with the government of a public trust. Calif.Const. art. IX, § 9; Organic Act, Stats. 1867–8, ch. CCXLIV, § 1, p. 248; Williams v. Wheeler, 23 Cal.App. 619, 138 P. 937; Davie v. Board of Regents, 66 Cal. App. 693, 227 P. 243; People ex rel. Attorney General v. Board of Supervisors, 77 Cal. 136, 19 P. 257; In re Estate of Purington, 199 Cal. 661, 250 P. 657; Pennington v. Benelli, 15 Cal.App.2d 316, 59 P.2d 448; Wall v. Board of Regents of Univ. of Calif., 38 Cal.App.2d 698, 102 P.2d 533; Webster v. Board of Regents of Univ. of Calif., 163 Cal. 705, 126 P. 974; Fraser v. Regents of Univ. of Calif., 39 Cal.2d 717, 249 P.2d 283; Hamilton v. Regents of Univ. of Calif., 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343; In re Estate of Munson, 54 Cal.App.2d 590, 129 P.2d 420; 1 Fletcher "Cyclopedia of Private Corporations" (1933) ch. 3, § 58, pp. 195–203.

[2] In this state as elsewhere, a strike against a public entity is unlawful. City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council, 94 Cal.App.2d 36, 210 P.2d 305; Norwalk Teachers' Ass'n v. Board of Education, 138 Conn. 269, 83 A.2d 482, 31 A.L.R.2d 1133; City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 131 A.2d 59, 31 A.L.R.2d 1142 & cases cited therein. As pointed out in the Los Angeles case, supra, 94 Cal.App.2d at page 48, 210 P.2d at page 312: "All the cited cases either expressly or implicitly acknowledge that to the extent that the terms and conditions of public employment are governed by statute or charter, they are not subject to modification by contract, and concerted labor activity instigated for the purpose of affecting such terms and conditions is not sanctioned by the law." Here, the terms and conditions of plaintiffs' employment were set by the Rules of the President of the University, issued pursuant to the standing orders of the defendants, who under Article IX, Section 9 of the state Constitution have been given "full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds." Plaintiffs have not shown that the defendants' resolutions of June 25th and July 6th, which sought to bring the rates of compensation in harmony with the prevailing rates in private industry were so fraudulent or palpably unreasonable as to indicate an abuse of discretion as a matter of law. Parker v. Bowran, 40 Cal.2d 344, at page 363, 254 P.2d 6. If the plaintiffs are unhappy about the amount of discretion and power in the matter of wage policy given to the defendants, and the fact that their conditions of employment are not protected by existing statutes, as well as the fact that as public employees they do not have the same rights to strike and to bargain collectively (State of California v. Brotherhood of Railroad Trainmen, 37 Cal.2d 412, 232 P.2d 857) as their counterparts in private industry, plaintiffs' remedy lies with the legislature, not with the courts.

[3, 4] Plaintiffs also contend that even as public employees their strike did not terminate their employment relationship with the defendants. Plaintiffs rely on

Mark Hopkins, Inc., v. California Emp. Comm., 24 Cal.2d 744, 151 P.2d 229, 154 A. L.R. 1081. That case, however, dealt with a collective bargaining agreement made with a private employer. Labor Code, section 923, which declares this state's policy in favor of collective bargaining does not apply to public employment. Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741. The common law rule which applies here is that a strike terminates the employment relationship. Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324. The parties stipulated that under the University Rules in effect on June 30, 1954, rights to accrued sick leave are lost on termination of employment.

[5] As we have concluded above that the lower court correctly found that plaintiffs' rights to accrued sick leave were terminated with the strike of July 1st it is not necessary to discuss at length plaintiffs' argument that sick leave is a part of the bargained for "wage" and thus a right which vests at the beginning of service, which cannot be retroactively and unilaterally withdrawn. We need to note only that in this state the fundamental difference between sick leave and vacation pay has long been recognized. In Adams v. City & County of San Francisco, 94 Cal.App.2d 586, at pages 596 and 597, 211 P.2d 368, at page 375, 212 P.2d 272, this court said, "Overtime pay is for actual work performed which is definitely ascertainable as to time and amount. Holiday and vacation pay cover certain designated periods and may be ascertained as definitely as regular daily or hourly pay. The sick leave, in fact, may not be used for a number of years, or it may or may not be taken for a longer period than two weeks, subject to the period of accumulation. Payment for sick leave is too indefinite to form the basis of 'rate of pay' though the real distinction may rest upon the fact that it is welfare pay. Sick leave or disability leave pay is not a gratuity. There is no vested right to such compensation until the happening of the contingency * * *" In Hatch v. Ward, 27 Cal.2d 883, 168 P.2d 22, the Supreme Court recognized the propriety of an amendment to the rules of the State Personnel Board which reduced from 100 days to five, the amount of sick leave pay a State Civil Service employee could draw for a particular purpose. In 1955, the Attorney General of this State ruled that a State Civil Service employee who had been laid off was not entitled to be paid for the sick leave theretofore accumulated, noting that in this respect sick leave differs from unused vacation. 26 Op.Atty.Gen. 107.

Nor is there any merit to plaintiffs' argument that if sick leave is not a vested right, it is a gratuity which would amount to a gift of public monies in violation of Article IV, Section 31 of the State Constitution. In the first place it is questionable whether Article IV, Section 31 is applicable to the defendants. Cf. 3 Op.Atty. Gen. 42, where art. IV, § 32, prohibiting extra compensation was found inapplicable to the defendants, who are an independent constitutional agency created pursuant to art. IX, § 9. In the second place, even if applicable, sick leave would probably come within the public purpose exception to Article IV, Section 31. Allied Architects' Ass'n of Los Angeles v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029; California Employment Stabilization Comm. v. Payne, 31 Cal.2d 210, 187 P.2d 702; 23 Op.Atty. Gen. 271.

[6, 7] We need not concern ourselves with the plaintiffs' other contentions as to the unconstitutionality of the resolution of July 6th as this matter was not duly raised below. Hershey v. Reclamation District, 200 Cal. 550, 254 P. 542. As to Government Code, sections 18100–18105, plaintiffs, relying on Tolman v. Underhill, 39 Cal.2d 708, 249 P.2d 280, argue that by this statute the Legislature has undertaken to exclusively occupy the field of sick leave for state employees. However, in that case, the court also said at page 712 of 39 Cal.2d at page 283 of 249 P.2d:

> "Determination of the question of whether the Legislature has under-

> taken to occupy exclusively a given field * * * depends upon an analysis of the statute and the consideration of the facts and circumstances upon which it was intended to operate."

A brief examination of the statute mitigates against the plaintiffs' position. Government Code, sections 18100 and following, provide for sick leave for all State officers and employees under rules prescribed by the State Personnel Board. Section 18105 impowers the appointing power of any officer or employee not a member of the State Civil Service to administer sick leave in accordance with the rules of the State Personnel Board. The State Personnel Board does not determine the employment policies of the defendants who have been given full powers to govern the University by Article IX, section 9 of the State Constitution. 2 Op.Atty.Gen. 143. Nor can it be argued that the employment and wage conditions of University employees at different campuses is a matter of general statewide concern like the loyalty of teachers at the University. Tolman v. Underhill, supra. In order to bring plaintiffs within the State Employees Retirement System, they and the defendants are specifically mentioned in Government Code, sections 20008, 20011, 20012, 20013, 20014, 20015, etc. Furthermore, Government Code, section 18101.5, adopted in 1951, which makes a special provision for sick leave credits for former University employees who subsequently enter service, appears to indicate that the Legislature did not intend that sections 18100–18105 apply to institutions governed by the defendants. As we indicated above, if the plaintiffs seek to question the wisdom of this policy, their remedy lies with the Legislature, not with the courts.

Plaintiffs next contend that the defendants' resolution of July 6, 1954, was not passed in accordance with the corporate by-laws which provide for notice of meetings and the affirmative vote of thirteen members of the Board to amend standing orders. The stipulation of facts, plaintiffs' exhibit 1, par. 11 states that the July 6th resolution was "duly and regularly passed and adopted" by the defendants. This issue, also, was not raised below and need not detain us further here.

[8] Plaintiffs' next argument is that even if validly adopted, the July 6th resolution is ambiguous and does not show a clear intention to abolish accumulated sick leave. The resolution of July 6th provided that, effective July 1st, "It is to be understood that all University Personnel benefits shall be withdrawn." The meaning of this proposal was explained as follows according to the minutes: "The effect of the above would be to pay contract (construction) wages, to grant constract working conditions, including health and welfare, but excluding social security and unemployment insurance, and to withdraw from all building trades employees, old and new, University benefits except State Employees' Retirement System benefits, which under the law must be continued. Except for vacations as of June 30, 1954, all holiday, sick leave and vacation with pay would be cancelled." The record indicates that the same explanation was made to Mr. Childers on the evening of July 6th. The trial court found that when plaintiffs resumed employment on July 8th, they were aware that the defendants had cancelled accumulated sick leave. The only evidence in the record relating to the question of whether the matter was open to further negotiations is conflicting. There is uncontroverted evidence in the record showing that after July 7th, Mr. Childers made no efforts to further negotiate the issue of accumulated sick leave. We must resolve all reasonable inferences from the evidence in favor of the conclusion reached below. We therefore conclude that there is no merit in plaintiffs' arguments on this issue.

In view of the foregoing we conclude that the judgment finds ample support in the record before us.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

William T. CRESPINEL, Plaintiff and Respondent,

v.

COLOR CORPORATION OF AMERICA, a corporation, Defendant and Appellant.

Civ. 22747.

District Court of Appeal, Second District, Division 1, California.

May 13, 1958.

Rehearing Denied June 6, 1958.

Hearing Denied July 9, 1958.

Action by director of corporation against corporation for breach of employment contract. The Superior Court of Los Angeles County, Ben Koenig, J., entered judgment for director and corporation appealed. The District Court of Appeal, Fourt, J., held that provision of employment contract to effect that director fully understood that in future it might be necessary for business purposes that a seat of board of directors be available and, in that event, director agreed that he would, upon request of majority of board of directors, forthwith resign, was not illegal on theory that director was being bought out of office.

Affirmed.

1. Contracts ⚷121

Provision of employment contract to effect that director fully understood that in future it might be necessary for business purposes that a seat of board of directors be available and, in that event, director agreed that he would, upon request of majority of board of directors forthwith resign, was not void and did not provide illegal consideration on theory that director was being bought out of office. West's Ann.Civ.Code, §§ 2230–2235; West's Ann.Corp.Code, § 820.

2. Corporations ⚷308(3)

Employment contract providing that director of corporation would render certain services for corporation and that he would not during term of agreement engage directly or indirectly in taking or processing of other work and providing for his resignation as director in the event it became necessary to provide a seat on the board of directors if other financial interests became associated with the corporation, was not unfair and unreasonable to corporation in absence of showing that director had at any time participated in any activity competitive to corporation. West's Ann. Bus. & Prof.Code, § 16600.

3. Appeal and Error ⚷1056(1)

Corporations ⚷308(6)

Where corporation agreed to retain services of director as technical color film consultant and agreed to provide a salary for services, fact that corporation thereafter discontinued color processing for its own benefit and convenience and not due to factors beyond its control did not affect agreement and therefore, in director's action on agreement, refusal to admit certified copy of minutes of board offered to establish defense of impossibility of performance and frustration of purpose was not prejudicial.

◆

Irving A. Bernstein, Beverly Hills, foı appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from a judgment for plaintiff in an action for damages for breach of contract by defendant Color Corporation of America, a corporation.

The agreement of employment was entered into on or about May 14, 1948, by and between plaintiff and Cinecolor Corporation, the previous name of defendant. At the time of the execution of the agreement William T. Crespinel was still a director of Cinecolor Corporation, and had very recently retired as President thereof after the acquisition by the corporation of a motion picture exchange, which constituted an expansion of the scope of the corporation's activities of which Crespinel did not approve. The uncontradicted testimony was that Crespinel had been in the business of color film processing in England and in the United States continuously from 1907; that he was a co-founder of Cinecolor Corporation in 1932; that in 1946 when he became President of the corporation it was operating at a loss, and that thereafter substantial profits were realized.

The agreement covering an initial period from May 15, 1948 through May 14, 1955, was drawn by Graham Sterling, Jr., who at the time was the secretary and attorney and one of the directors of the corporation; and it contained, among others, the following recitals and provisions:

"Whereas, Cinecolor Corporation desires to be able to call upon Mr. Crespinel's extensive experience and knowledge from time to time in connection with the taking and processing of color motion pictures, and

"Whereas, Mr. Crespinel has consented to remain as a director of Cinecolor Corporation in order to give the corporation the benefit of his knowledge and experience in the management of its affairs, * * *

"1. Cinecolor agrees to, and does hereby, retain the services of Crespinel as a technical consultant in connection with the taking and processing of color motion pictures as conducted and to be conducted at its plant in Burbank, California and elsewhere as determined by Cinecolor; and Cinecolor agrees to pay Crespinel for such services the sum of Thirteen Thousand Dollars ($13,000.00) per year, payable at the rate of Two Hundred Fifty Dollars ($250.00) per week.

"2. Crespinel agrees to diligently and conscientiously render such services as called upon by Cinecolor to perform, provided that such call for the services of Crespinel shall not require more than twenty-five percent (25%) of the usual business days in any month and shall not, in any event, interfere unreasonably with other business projects and activities of Crespinel. * * *

"5. (as amended by letter dated September 1, 1948) *Crespinel shall not during the term and any extension hereof engage directly or indirectly in the taking or processing of color motion pictures, nor become employed by, advise, consult, or in any manner assist or further the interests of any person, firm or corporation, competitive to Cinecolor;* provided that until such time as Cinecolor shall be prepared to offer a means or method for taking and processing three-color motion pictures in 16 MM., nothing in this section shall preclude Crespinel from engaging in the activities herein mentioned for the sole purpose of producing 16 MM. color prints in 'Kodachrone' or Ansco or other media for television broadcast and non-theatrical release. All discoveries and inventions together with all knowledge and information which Crespinel has heretofore conceived or acquired or shall conceive or acquire during the term of this contract respecting the business of Cinecolor shall be and remain at all times the property of Cinecolor and shall be held by Crespinel in trust and confidence for the sole benefit of Cinecolor, its successors and assigns and Crespinel agrees not to divulge or publish or authorize anyone else to divulge or publish either during the pendency of this agreement or subsequent thereto, knowledge of said discoveries or inventions or any technical or other information heretofore acquired or acquired under or in connection with this agreement or any confidential information concerning Cinecolor's business thus acquired. * * *

"6. *Crespinel has been informed and fully understands that in the future it may be necessary for the business of the Corporation that a seat on the Board of Directors be available, as for instance in the event that other financial interests become associated with Cinecolor. In the event that it becomes necessary to provide a seat on the Board of Directors, Crespinel agrees that he will, upon the request of a majority of the Board of Directors forthwith resign as a member of the said Board in order to assist in the conduct of the affairs of Cinecolor and to permit its freedom of action.* * * *

"8. The foregoing constitutes the entire agreement between the parties and there are no agreements, representations or understandings other than as hereinabove set forth. This contract shall be construed in accordance with the laws of the State of California." (Emphasis added.)

Crespinel at no time was called upon to render any services of any kind to defendant corporation. He was told on August 25, 1948 that the other directors wanted to put a banker from New York on the board in his place, and was asked if he would be prepared to resign. The minutes indicate Crespinel indicated his willingness to resign "in favor of anyone considered by the Board to be of particular value to the Board and to the company," and his resignation was accepted.

Pursuant to the terms of said agreement Crespinel was paid the sum of $76,500 and in this action, he was awarded the sum of $14,500, representing the remainder of the $91,000 specified in the agreement ($13,000 per year for seven years at the rate of $250 per week).

Appellant contends that the contract was illegal, void and against public policy; that the contract was unfair and unreasonable to the corporation and may be avoided; and that the trial court erred in excluding from evidence a certified copy of the minutes of a meeting of defendant's board of directors.

[1] Appellant contends that the agreement, in essence, is one where the consideration is illegal in that a director is being bought out of office, and relies upon Forbes v. McDonald, 54 Cal. 98, as being directly in point. This case was decided in 1880, at a time when the law of California was that a director of a corporation was a "trustee" within the strict rules as presently set forth in Civil Code, sections 2230–2235. The former rule of disqualification of a director to deal in any way with the corporation was found by a State Bar Committee in 1930 to be unreasonably severe and unduly to hamper legitimate business; and this led to the adoption of Civil Code section 311 in 1931, which in amended form is now Corporations Code, § 820. This section is commented on in Ballantine & Sterling, California Corporation Laws, 1949 Edition (at pages 103–104), as follows: "Directors are no longer subject to the disqualification and disabilities of a trustee when contracting with or on behalf of the corporation as declared in various cases heretofore. *Directors are fiduciaries, but are not strictly trustees.*" (Emphasis added.) It is further stated (at page 106), "The general fiduciary rule is that the burden of proof as to reasonableness and fairness is on the fiduciary, but this is to be regarded as an elastic rule of common law rather than of statute. This section does not attempt to apportion the burden of proof under different circumstances, for example as to the fairness of a loan by directors to a corporation, or to provide what the effect of non-disclosure of adverse interest may be. Such questions must be left to the dictates of policy and fairness rather than to any hard and fast rule. There is not necessarily any presumption of fraud, inadequacy of consideration or unfairness unless the circumstances call for it.

"It had been held that the director of a corporation is not absolutely precluded from dealing directly with the corporation of which he is a director, if the corporation is represented by an independent majority, although any such transaction is subject to scrutiny and is voidable for any violation of his duty as director. This was true in spite of his failure to disclose his adverse interest unless the corporation sustained some detriment or he obtained some undue advantage."

In the contract Crespinel bound himself to render certain services as requested by the corporation and not to "engage directly or indirectly in the taking or processing of color motion pictures, nor become employed by, advise, consult, or in any manner assist or further the interests of any person, firm or corporation, competitive to Cinecolor" and the trial court made certain specific findings of fact, as follows: "that the plaintiff herein did give good and valuable consideration for the promises of the defendant under said agreement;" "that at all times mentioned in the complaint and answer, plaintiff did intend to perform the services contemplated by said agreement, and that plaintiff did in fact render services and hold himself ready to render services on behalf of defendant corporation and pursuant to the terms of said agreement;" "[t]hat it is not true that plaintiff violated his fiduciary duty to the defendant corporation or to its stockholders;" and "[t]hat it is not true that plaintiff used his position as President or Director to induce the Board of Directors to approve and ratify said agreement."

The agreement in question does not come within the prohibition stated in Trumbo v. Bank of Berkeley, 77 Cal.App.2d 704, 709, 176 P.2d 376, 379, where the court stated: "There can be no doubt that a contract by a director or shareholder, at least of an existing corporation, whereby it is agreed that a designated person will be put or maintained in office, or by which, in any other way, a director attempts to contract away his discretionary vote on the board of directors is violative of public policy and is void." The agreement in the case before us, by its terms, required the exercise of discretion in a determination by the Board of Directors that it was *"necessary for the business of the Corporation* that a seat on the Board of Directors be available," and Crespinel agreed to resign upon request of a majority of the Board of Directors only *"in order to assist in the conduct of the affairs of Cinecolor and to permit its freedom of action."* (Emphasis added.)

The case of Mitchell v. Dilbeck, 10 Cal. 2d 341, 74 P.2d 233, is cited by appellant to indicate that it is a violation of trust on the part of a director to make a profit in the matter of his resignation. In that case, the court also stated (at pages 347–348 of 10 Cal.2d at page 236 of 74 P.2d), "There is not a single statement in the written agreement of the parties which can be construed as an obligation on the part of the respondent to procure the resignation of any of the directors. * * * It is only by going completely outside the agreement of the parties, * * * that such an obligation can be 'read into' the written agreement. * * * Such acts on his part were wholly outside the written agreement of the parties, and could not, therefore, affect the legality of such agreement."

There is no evidence in the record that Crespinel in any way contracted away his discretionary vote on the Board of Directors, and on the contrary, there is substantial evidence that Crespinel in the exercise of discretion, acted in good faith and for what he regarded to be the best interests of the corporation in tendering his resignation.

[2] Appellant further contends that the contract was unfair to the defendant corporation and may be avoided on this basis. However, there is substantial evidence to support the findings of the trial court that "the plaintiff herein did give good and valuable consideration for the promises of the defendant under said agreement," and that "plaintiff did intend to perform the services contemplated by said agreement and that plaintiff did in fact render services and hold himself ready to render services on behalf of defendant corporation and pursuant to the terms of said agreement." There is no evidence that Crespinel at any time participated in any activity competitive to the defendant corporation, and the statutory prohibition of Business and Professions Code, section 16600 in our opinion is not applicable to the facts of this case.

[3] The certified copy of the minutes of the board of directors was sought to be introduced to establish a defense to performance on the basis of impossibility of performance and frustration of purpose by a discontinuance of the color processing activities of defendant corporation. The trial court made a specific finding that "if the defendant corporation discontinued its color processing activities as alleged on or about July 1, 1954, it did so for its own benefit and convenience and not due to factors beyond its control.

"That it is not true that the rendition of services by plaintiff under said agreement was made impossible either due to the involuntary discontinuance of its color processing activities or due to any other reason."

The refusal to admit the certified copy of the minutes under the circumstances, was not prejudicial.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

160 Cal.App.2d 570

Flossie WINSTON, Plaintiff and Appellant,

v.

Rose HANSELL, Defendant and Respondent.

Civ. 17707.

District Court of Appeal, First District, Division 1, California.

May 19, 1958.

Pedestrian brought action against owner of abutting property for injuries sustained by pedestrian in fall on public sidewalk in front of the property. The Superior Court, City and County of San Francisco, John B. Molinari, J., entered judgment of dismissal, and the pedestrian appealed. The District Court of Appeal, Peters, P. J., held that generally abutting owner is not liable for injuries caused to members of the public by a defective sidewalk, except where defect is one created by abutting owner, or is the result of constructing or altering the sidewalk in such a fashion that it filled some special and peculiar need of the abutting owner, and that complaint alleging that abutting owner made special use of the sidewalk as a driveway for automobiles did not bring the case within the exception to the general rule.

Judgment affirmed.

1. Municipal Corporations 🔑808(1)

In absence of statute, it is the general rule that there is no common law duty, resting on owner or occupant of land, abutting on a public sidewalk, and owed to the public, to keep sidewalk in safe condition.

2. Municipal Corporations 🔑808(9)

Generally, abutting owner is not liable for injuries caused to members of public by defective sidewalk, at least in absence of notice from public authorities to repair, and such general rule applies unless defect is one created by abutting owner or is result of constructing or altering sidewalk in such fashion that it fills some special and peculiar need of abutting owner.

3. Municipal Corporations 🔑808(1, 9)

If sidewalk is used only for normal sidewalk purposes and has no constructional defects created to fit peculiar needs of abutting property, no liability attaches because of defects in sidewalk, in absence of some affirmative act of abutting owner contributing to defective condition, or in absence of notice by public authorities to repair.

4. Municipal Corporations 🔑816(2)

In action by pedestrian against owner of abutting property for injuries sustained in fall on public sidewalk in front of the property, complaint alleging that owner of abutting property made special use of sidewalk by using it as a driveway for automobiles was insufficient to bring case within exception of general rule that abutting owner is not liable for injuries caused to members of public by defective sidewalk, unless defect is one created by abutting owner or is the result of constructing or altering sidewalk in such a fashion that it fills special and peculiar need of the abutting owner.

5. Pleading ⚷225(1)

Where second amended complaint was fatally defective, and plaintiff did not suggest that she desired to amend it so as to allege any facts not included in it, demurrer to the complaint was properly sustained without leave to amend.

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George P. Finnegan, San Francisco, for appellant.

W. Martin Tellegen, Hall, Henry, Oliver & McReavy, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Flossie Winston, in a second amended complaint, attempted to state a cause of action against the city of San Francisco and against Rose Hansell for damages for personal injuries sustained by her when she fell on the public sidewalk in front of the Hansell property. The complaint purports to state two causes of action, the first against the city, and the second apparently against Rose Hansell[1] as the owner of the abutting property. The cause of action against the city is not involved on this appeal. Rose Hansell demurred generally to the second cause of action. The court sustained the demurrer without leave to amend, and entered its judgment of dismissal in favor of Rose Hansell. Flossie Winston appeals.

The second amended complaint as to respondent avers that respondent owns and occupies the property adjoining the sidewalk where she fell; that "at all times herein mentioned there was and now is a sidewalk in front of said premises for the general public to walk upon, and that defendants * * * did make special use of said sidewalk in that said sidewalk was used as a driveway for automobiles"; that on June 9, 1956, "as a direct and proximate result of the carelessness and negligence of said defendants, and as a direct and proximate result of said special use of said sidewalk, it was maintained and kept in a dangerous and defective state of disrepair in that said sidewalk was worn, broken, cracked and uneven; that defendants had notice and knowledge of said defective condition of said sidewalk for a long period of time prior to said 9th day of June, 1956, but that defendants, and each of them, failed, refused and neglected to repair the same at any time prior thereto."

There are certain fundamental principles of law that are decisive of this appeal.

[1] In the absence of statute it is the general rule that there is no common law duty, resting on the owner or occupant of land abutting on a public sidewalk, owed to the public to keep the sidewalk in a safe condition. Sexton v. Brooks, 39 Cal.2d 153, 245 P.2d 496; Martinovich v. Wooley, 128 Cal. 141, 60 P. 760; Schaefer v. Lenahan, 63 Cal.App.2d 324, 146 P.2d 929; Barton v. Capitol Market, 57 Cal.App.2d 516, 134 P.2d 847.

There are many cases applying this general rule. A few examples will serve to illustrate their general trend. In Martinovich v. Wooley, 128 Cal. 141, 60 P. 760, the plaintiff stepped on a rotten plank which was part of the sidewalk in front of defendants' property. The plank gave way and plaintiff was injured. The complaint alleged that the defective condition of the plank was caused by the negligence of the defendants. A demurrer was sustained and judgment entered for the defendant. This judgment was affirmed. The Supreme Court stated the applicable rule as follows (128 Cal. at page 143, 60 P. at page 760):

"A sidewalk is a part of the highway. [Citations.] At common law, no duty was cast upon the owner of the abutting property to maintain the street in good repair. If such duty exists in this state, it must be by virtue of some statutory enactment. Since culpable negligence cannot exist except from failure to perform a duty imposed by law or by contract, if the duty to repair the sidewalk in this instance was not cast upon defendants they were not responsible for its condition, and the general demurrer was properly sustained."

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[1] The second cause of action does not mention the name of Rose Hansell. It refers to the defendants sued as "First Doe," "Second Doe" and "Third Doe," and states that such defendants own and occupy the real property involved.

In Sexton v. Brooks, 39 Cal.2d 153, 245 P.2d 496, the plaintiff recovered a judgment for injuries when she fell in front of defendant's building. The fall was caused by a constructional defect in the sidewalk. The jury was instructed that as an invitor the defendant owed to invitees the duty "to make all portions of premises over which he has control safe" whether they be inside or outside the building, and that the jury should determine whether defendant should have warned invitees of the dangers inherent in the sidewalk. The instruction was held to be erroneous, and the judgment was reversed. The Supreme Court stated the general rule and the exceptions to it in the following language (39 Cal.2d at page 157, 245 P.2d at page 497):

"It is the general rule that in the absence of statute a landowner is under no duty to maintain in a safe condition a public street abutting upon his property. [Citations.] There is, however, an exception to this rule, and plaintiff claims that the evidence brings this case within that exception. It has been held that an abutting owner is liable for the condition of portions of the public sidewalk which he has altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed. * * *

"A landowner may also be liable under some circumstances where the public sidewalk has been constructed or altered by the city in a particular manner for the special benefit of his property. For example, if an inherently dangerous condition is created on a public sidewalk abutting an entrance to a building, and this is done at the request of the owner and for his special benefit in order to serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed, the landowner may be under a duty to warn invitees of the hazard. If, however, the work is done by the city without regard to whether it benefits the adjoining property, and if the incidental benefit which results could not have been refused by the person who owned the property at that time, neither he nor his successor should be held liable for a dangerous condition caused by the construction."

In Schaefer v. Lenahan, 63 Cal.App.2d 324, 146 P.2d 929, a demurrer without leave to amend was sustained as to Lenahan and the resulting judgment affirmed. There the plaintiff fell because of a defect in the sidewalk abutting Lenahan's property. The court held that "there is no common law duty resting upon the owner or occupant of premises abutting on a public street to keep the sidewalk in repair. Consequently, in the absence of statute, it is well settled that such an abutting owner or occupant is not liable to travelers injured as a result of defects in the sidewalk, which defects were not created by the owner or occupant. [Citations.]"[2] (63 Cal.App.2d at page 326, 146 P.2d at page 929.)

The limited application of the exceptions to the general rule of non-liability is illustrated in the following cases: In Peters v. City & County of San Francisco, 41 Cal.2d 419, 260 P.2d 55, the plaintiff fell while walking on the sidewalk in front of an apartment house owned by Duque. In order to get into the garage of the apartment, the floor of which was lower than the sidewalk, a predecessor of Duque had cut a slope into the sidewalk 11″ deep at the property line and sloping out 6′ 7″ into the sidewalk. The plaintiff walked into this depression. A judgment in favor of Duque was reversed because of an erroneous instruction which told the jury that "when the owner of property abutting a sidewalk creates, by some positive action, a condition which is likely to cause harm to persons lawfully using the sidewalk, and a person so using the walk is injured as a proximate result of such condition, the property owner is then liable for that injury, in the absence, of course, of contributory negligence." (41 Cal.2d at page 423, 260 P.2d at page 58.) This instruction was held to be inaccurate because it did not go far enough. It implied that only the property owner who constructed the sidewalk is liable. The duty created by special construction of the type described runs with the land. The court described the duty of an abutting owner to the public as follows (41 Cal.2d at page 423, 260 P.2d at page 58):

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[2] In the Schaefer case it was also held that section 31 of the Improvement Act of 1911 as amended in 1935, St.1935, p. 2148, did not create such a duty even after notice by the public authorities to repair, though that statute imposed a duty to repair after such notice. In the instant case there is no allegation of such a notice by the public authorities to repair. It should be mentioned that the Schaefer case did not discuss the possible application of section 39 of that statute, also amended in 1935. Even if section 39, first called to the attention of the court in the petition for hearing in the Schaefer case, created a general duty to the public, such duty would only exist after notice from the public authorities. As already pointed out, no such notice is here alleged.

> "* * * The rule is that an abutting landowner may be held liable for the dangerous condition of portions of the public sidewalk which have been altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed."

This liability of the owner for defects created by special construction for the particular needs of the abutting property by the owner or a predecessor in interest was also imposed in Monsch v. Pellissier, 187 Cal. 790, 204 P. 224. There the trial court sustained a demurrer to a complaint, alleging that the owner constructed a vault under the sidewalk, and put iron gratings and inlaid glass in the sidewalk to supply light to the underground vault. The glass became broken or chipped and the plaintiff stepped into the hole. The Supreme Court properly reversed, holding that the complaint alleged that the construction involved was for the special and particular benefit of the property owner, and that under such facts he was under a duty to keep it in repair.

In Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 59 A.L.R. 435, a directed verdict for the property owner was reversed where it was shown by the evidence that the owner of the premises had constructed a wooden driveway in front of his premises instead of a sidewalk for the special use of the property. Nails became loosened in the planks, causing plaintiff to fall. At page 512 of 204 Cal., at page 438 of 269 P. the court stated: "This driveway having been thus constructed and used not primarily for sidewalk purposes but for the benefit and convenience of the said defendants in connection with their adjacent property and which use was one which was independent of and apart from the ordinary and accustomed use for which sidewalks are designed, the duty was cast by law upon the defendants to exercise reasonable care and diligence in the keeping of said driveway at the point where it was superimposed upon said sidewalk in a proper and safe condition for the passage of pedestrians rightfully using said sidewalk and said driveway superimposed by defendants thereon. [Citing many cases.]"

Another illustrative case is Barton v. Capitol Market, 57 Cal.App.2d 516, 134 P.2d 847, where this court reversed a nonsuit in favor of defendant. There the owners of a building adjacent to the sidewalk sprayed the building so that an oily and slippery stain spread across the sidewalk, causing the plaintiff to slip. The court pointed out that in "the absence of statute there is no affirmative obligation on the abutting property owner to keep the sidewalk in a safe condition," (57 Cal.App.2d at page 518, 134 P.2d at page 848) and then declared that it "was equally well settled, however, that if the abutting owner by positive action creates a condition which is likely to cause harm to persons lawfully using the sidewalk, and a person is injured as a proximate result thereof, the property owner is liable. Stated another way, the owner of premises abutting a sidewalk is under a duty to refrain from doing any affirmative act that would render the sidewalk dangerous for public travel."

[2, 3] Thus, the general rule is that an abutting owner is not liable for injuries caused to members of the public by a defective sidewalk, at least in the absence of notice from the public authorities to repair. This general rule applies unless the defect is one created by the abutting owner or is the result of constructing or altering the sidewalk in such a fashion that it fills some special and peculiar need of the abutting owner. It necessarily follows that if the sidewalk is used only for normal sidewalk purposes and has no constructional defects created to fit the peculiar needs of the abutting property, no liability attaches because of defects in the sidewalk in the absence of some affirmative act of the abutting owner contributing to the defective condition, or in the absence of notice by the public authorities to repair.

[4] In the instant case the appellant seeks to bring the facts within the exception to the general rule by the allegation that the defendants "did make special use of said sidewalk in that said sidewalk was used as a driveway for automobiles." There is no allegation that the sidewalk was specially constructed or altered to meet some peculiar need of the abutting property and that such construction created a defective condition. There is no allegation of any affirmative act committed by the abutting owner, or by a predecessor in interest, that contributed to the condition. There is no allegation that the public authorities notified respondents to repair the defective condition. There is no contention made that under the facts the complaint could be amended so as to add any one of such omitted allegations. All that is alleged is that the sidewalk was used as a driveway by the abutting owners, and that such constituted a "special use" of the sidewalk by the property owners. Certainly, in this day and age, the use of a sidewalk as a driveway to the abutting property is not a peculiar or unusual use of such sidewalk. It is one of the ordinary and accustomed uses for which sidewalks are designed. Private garages cannot be built to open directly onto the street, but must be set back at least to the property line in order to allow for sidewalks upon which pedestrians may travel. The use of part of the sidewalk as a driveway is imperative in most, if not all, locations. Such use is no more peculiar or unusual than using the sidewalk for pedestrians who desire to visit the owners of the abutting property. The allegations of the complaint clearly bring the case within the scope of the rule announced in the Martinovich, Sexton and Schaefer cases.

[5] The demurrer to this complaint was sustained without leave to amend. The complaint was the second amended complaint. Appellant does not suggest that she desires to amend so as to allege any facts not now included in the pleading. That pleading is fatally defective. The demurrer was therefore properly sustained without leave to amend.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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160 Cal.App.2d 524

J. L. PRICE and Edna Price, husband and wife, Plaintiffs and Appellants,

v.

Earle M. BRIGGS and Naomi Briggs, husband and wife, Defendants and Respondents.

Civ. 9293.

District Court of Appeal, Third District, California.

May 15, 1958.

Proceedings to compel copartners to permit partners' agents to examine book of accounts of a dissolved partnership. The Superior Court, Glenn County, Wright

L. Callender, J., entered judgment for copartners and partners appealed. The District Court of Appeal, Van Dyke, P. J., held that second amended complaint stated cause of action for inspection.

Judgment reversed.

1. Partnership ⚷80

Second amended complaint by former partners against copartners stated cause of action for examination and inspection of partnership records.

2. Limitation of Actions ⚷180(1)

Where complaint did not show on its face that it was barred by statute of limitations, defense of statute of limitations could not be raised by demurrer.

3. Pleading ⚷207

Although complaint seeking inspection of partnership records contained allegations concerning agreements touching keeping of books and right of partners to inspect and allegations that copartner's refusal of right of inspection was done maliciously and fraudulently, single action pleaded was right to inspect, and complaint was not subject to special demurrers on ground that causes of action for breach of contract and fraud were not separately stated.

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L. C. Smith, Redding, for appellants.

Larimer & Frost, Willows, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment based upon an order sustaining a demurrer to a second amended complaint without leave to amend.

Plaintiffs, who are appellants here, alleged as follows: That from 1943 until 1951 plaintiffs and defendants were joint owners of ranch property in Glenn County and during that time were copartners in the ownership and operation thereof; that defendants, respondents here, managed the partnership business and kept the books and records thereof; that they kept no adequate or formal books of account; that in July of 1950, the partners began negotiating for a dissolution of the partnership and a settlement of its affairs between them and in the course of such negotiations plaintiffs requested of defendants a complete record of partnership affairs, but defendants made available to them only unintelligible scratch memorandums and scraps of papers which represented an unintelligible, inadequate and incomplete record of the financial and business affairs of the partnership; that plaintiffs have never been permitted by defendants to make a complete examination of the partnership records, all of which are in the exclusive possession and control of defendants; that notwithstanding the foregoing, and on the 17th day of March, 1951, the partners entered into a written agreement whereby the partnership was dissolved and the affairs thereof were settled and plaintiffs sold their interest to defendants for a fixed sum; that while the negotiations for dissolution and settlement were progressing, defendants employed an accountant to review the partnership records and to prepare a formal accounting and book of accounts based thereon; that the accountant did this and that defendants paid him for his services with partnership funds; that the formal accounting and book of accounts so prepared by the accountant constitute a part of the books and records of the partnership; that ever since the preparation thereof defendants have had and still have the same in their possession; that now a demand has been made upon plaintiffs by the Bureau of Internal Revenue to produce a full and complete record of the financial and business affairs of the partnership, including the formal accounting and book of accounts prepared by said accountant for the purpose of a determination of plaintiffs' income tax liability arising out of said partnership enterprise; that unless said information is produced plaintiffs stand in danger of heavy income tax penalties; that defendants have refused all requests of plaintiffs for permission to have plaintiffs' accountants examine the formal accounting and book of accounts referred to; that by reason of said refusals plaintiffs have been required to needlessly employ and pay for the services of accountants, investigators and attorneys in an attempt to determine their income tax liability aforesaid and that the reasonable value of such services is the sum of $5,000. Plaintiffs prayed that defendants be compelled by the court to permit plaintiffs' agents to examine the said formal accounting and book of accounts in order that their income tax liability could be properly settled and determined. They also prayed for a judgment in the sum of $5,000 as damages for the expenses they have needlessly been put to.

[1] It appears that appellants informed the court that if it considered the second amended complaint did not state a cause of action and therefore was subject to a general demurrer they required no further leave to amend and judgment of dismissal might be entered subject to their rights to review the action on appeal.

The judgment must be reversed. It is alleged that the formal accounting and book of accounts are partnership records, paid for by partnership funds; that they still exist and are in the possession of respondents; that respondents refuse to permit a reasonable inspection thereof by appellants. These allegations state a cause of action for a decree of equity compelling the respondents to make the said records available to appellants. Although it is true that, in view of the dissolution of the partnership, the settlement of its affairs and the sale to respondents of appellants' interest in the assets thereof, no obligation existed on the part of respondents, at their own expense, to maintain and keep available to appellants the partnership records (68 C.J.S. Partnership § 363, p. 870), the fact is that they have been kept, are readily available and respondents have them. There seems no reason why, if records have been kept, a reasonable inspection for a valid purpose should not be ordered under conditions safeguarding the interests of respondents. In Sanderson v. Cooke, 256 N.Y. 73, 175 N.E. 518, referred to by Corpus Juris Secundum, it was said that, although a limited partner had transferred his property interest in the books and records of the partnership to a new firm and, therefore, was not entitled absolutely, as a matter of right, to an examination of them because his property interest therein had ceased, this did not mean that he could not "at any time have an examination of the books for any sufficient reason recognized by law. The court said at page 522, of 175 N.E.:

> "* * * Equity is very liberal in permitting a partner to examine the partnership books, even when the property in them has passed into other hands. Any plausible or sufficient reason for the protection and enforcement of rights or for the preservation of evidence will move the court. Equity will not, however, in the absence of such property right, direct the extensive examination here demanded in the absence of any reason or necessity therefor, or without any excuse other than the mere desire of the plaintiff to exercise a naked right."

We hold that if the allegations of the complaint are proved appellants will be entitled to an order of the court, under proper safeguards, of course, giving them a reasonable opportunity to inspect the books and records of the partnership, including the formal accounting and book of accounts referred to for the purposes for which such inspection is demanded; and if there be any reason why appellants have forfeited such right, or why it would be inequitable to allow them to exercise it, such matters are matters of defense.

[2] Respondents by demurrer present the defense of the statute of limitations, alleging that the action is barred by various sections of the Code of Civil Procedure. However, the complaint does not show on its face that the action is barred and, consequently, that defense cannot be raised by demurrer. 31 Cal.Jur.2d, Limitation of Actions, page 657.

[3] Finally, respondents contend that various special demurrers interposed by them are good and that, therefore, the

judgment cannot be reversed under the circumstances disclosed by this record. The special grounds are that the complaint contains a cause of action for alleged breach of contract and a cause of action for alleged fraud, which causes are not separately stated. As we view the pleadings, although there are allegations concerning agreements touching the keeping of the books and the right of appellants to inspect, and allegations that the refusal of the right of inspection was done maliciously, fraudulently, etc., these allegations do not constitute the pleading of several causes of action. The single action pleaded is the right under the facts without regard to the motives of the respondents in refusing inspection and without regard to any oral or written contract upon the matter to have under the circumstances pleaded a right of inspection of the records. We have held that this cause of action has been sufficiently pleaded. The special demurrers, therefore, are not well taken.

The judgment appealed from is reversed.

PEEK and SCHOTTKY, JJ., concur.

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160 Cal.App.2d 847

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William Andrew WRIGHT, Defendant and Appellant.

Cr. 2824.

District Court of Appeal, Third District, California.

May 27, 1958.

Prosecution on information charging defendant with committing lewd and lascivious acts upon body of a 12 year old girl. The Superior Court, Stanislaus County, H. L. Chamberlain, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Schottky, J., held that where defendant's contentions that public defender's office erred in not subjecting two complaining witnesses and another to a lie detector test, that his neighbors framed him and that one of complaining witnesses was not in city at time of alleged crime, were outside of record, they could not be considered on appeal.

Judgment affirmed.

Criminal Law 🔑1114(1)

Where defendant's contentions that public defender's office erred in not subjecting two complaining witnesses and another to a lie detector test, that his neighbors framed him and that one of complaining witnesses was not in city at time of alleged crime were outside of record, they could not be considered on appeal. West's Ann.Pen.Code, § 288.

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Richard F. Barbeau, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Lloyd Hinkelman, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

Defendant above named was charged by information with two counts of violating section 288 of the Penal Code, each count charging defendant with committing lewd and lascivious acts upon the body of a 12-year old girl.

On July 12, 1957, appellant appeared without counsel for arraignment. The court appointed Deputy Public Defender William Lundgren to represent appellant. Thereupon appellant pleaded not guilty by reason of insanity of violating section 288 of the Penal Code as charged in the two counts of the information. The appellant waived his right to a trial by jury and the matter was set for hearing on July 29, 1957.

On July 29, 1957, the day set for the appellant's sanity hearing, appellant's counsel moved to withdraw appellant's former plea of not guilty by reason of insanity. Said motion was denied. Dr. R. H. Noce and Dr. Warner M. Soelling were sworn and testified and their reports were received into evidence and filed as a matter of record. The testimony of the two doctors and their reports was the only evidence introduced at said hearing. The court, from the evidence produced, held that appellant was sane in July, 1956, as well as at the time of trial. By leave of court appellant was permitted to withdraw his former plea of not guilty by reason of insanity and entered a plea of not guilty to the two counts as charged in the information. The matter was set for trial by jury for August 20, 1957.

On August 9, 1957, by leave of court, appellant, while represented by counsel, withdrew his former plea of not guilty to the two counts charged in the information and entered a plea of guilty to each of the two counts charged in the information. On the same day, the court suspended proceedings and arraignment was set for August 12, 1957, to determine whether appellant was a sexual psychopath. Thereafter, sexual psychopathy proceedings were had, and it was determined that appellant was not a sexual psychopath. Thereafter, probation was denied and appellant was arraigned for judgment. The court asked appellant if he had any legal cause why judgment should not be pronounced. His attorney replied, "No legal cause." Judgment was pronounced, sentencing defendant on each count to the California Medical Facility at Vacaville, California, for the term prescribed by law. Defendant has appealed from the judgment.

At the request of appellant this court appointed Richard F. Barbeau, a member of the Sacramento Bar, to represent appellant on appeal. Mr. Barbeau, in a letter to this court, stated that after an examination of the record and communication with appellant and counsel who represented appellant at the trial, it is his (Mr. Barbeau's) opinion that there is no merit in the appeal.

Thereafter, appellant wrote letters to the court which have been filed as his opening brief, in which letters he contends that the public defender's office which represented him throughout the lower court proceedings erred in not subjecting the two complaining witnesses and Mrs. Whitmire, one of appellant's neighbors, to a lie detector test; that appellant's neighbors framed him of the counts charged in the information; that one complaining witness was not in the city of Modesto, county of Stanislaus, at the time of the alleged commission of the offense charged in the information; that another man committed the offenses charged and not appellant; that appellant did not have the benefit of jury and witnesses; that appellant pleaded guilty because of the public defender.

We have reviewed the entire record on appeal and it is apparent that appellant's contentions are based upon assertions of alleged facts that are outside of the record. Under well settled rules such contentions may not be considered on appeal. People v. Leon, 152 Cal.App.2d 49, 312 P.2d 736; People v. Collins, 117 Cal.App.2d 175, 255 P.2d 59; People v. Graff, 104 Cal.App.2d 32, 230 P.2d 654; People v. Ruiz, 103 Cal.App.2d 146, 229 P.2d 73.

The record shows that appellant had the benefit of counsel at all stages of the proceedings and that the trial court was careful to see that appellant was fully informed of his rights. When, after a number of preliminary proceedings the case came on for trial before a jury, the Assistant Public Defender, who was acting as counsel for appellant, stated that appellant wished to withdraw his plea of not guilty to both counts of the information. The court asked appellant if that was what he wished to do, to which appellant replied in the affirmative. The clerk then read each count to appellant and asked what his plea was, and appellant pleaded guilty to each.

We have reviewed the entire record and are convinced that there is no merit whatever in the appeal.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

160 Cal.App.2d 437

H. W. BESEMAN, Petitioner, Respondent and Appellant,

v.

Lucien A. REMY et al., as members of the Board of Trustees of the Marin Junior College District, et al., Respondents and Appellants.

C. W. O'BOYLE, Petitioner, Respondent and Appellant,

v.

Lucien A. REMY et al., as members of the Board of Trustees of the Marin Junior College District, et al., Respondents and Appellants.

J. L. MACAULAY, Petitioner, Respondent and Appellant,

v.

Lucien A. REMY et al., as members of the Board of Trustees of the Marin Junior College District, et al., Respondents and Appellants.

N. H. McCOLLOM, Petitioner, Respondent and Appellant,

v.

Lucien A. REMY et al., as members of the Board of Trustees of the Marin Junior College District, et al., Respondents and Appellants.

J. Lee CHAILLE, Petitioner, Respondent and Appellant,

v.

Lucien A. REMY et al., as members of the Board of Trustees of the Marin Junior College District, et al., Respondents and Appellants.

E. E. SHAFER, Petitioner, Respondent and Appellant,

v.

Lucien A. REMY et al., as members of the Board of Trustees of the Marin Junior College District, et al., Respondents and Appellants.

Civ. 17844.

District Court of Appeal, First District,
Division 2, California.
May 14, 1958.

Action by discharged junior college teachers for writs of mandate to compel school district to assign them as classroom teachers in district and recover salaries due and unpaid. The Superior Court, County of Marin, Thomas F. Keating, J., entered judgment for teachers and district's board of trustees appeal. The District Court of Appeal, Brazil, J. pro tem., held that where teachers under contract with junior college conducting school program at state prison had taught at such prison for five consecutive years or more and employment at prison school program had been interpreted by state and district school authorities as being a part of the junior college, prison classes were a part of such school program requiring certification of teachers within meaning of statute giving certified teachers permanent status.

Affirmed.

1. Colleges and Universities ⚷8

Where junior college teacher had taught for five consecutive years and during the last two years thereof was employed under written contract for only three months at a time and paid on an hourly basis with employment contingent on a minimum class size, but continued to teach and be paid all the time, rights of teacher under tenure law were similar to other teachers who had taught for five or more consecutive years under written annual contracts which had been renewed from year to year. West's Ann.Education Code, §§ 13081, 13103, 13104.

2. Colleges and Universities ⚷8

Where teachers under contract with junior college conducting school program at state prison had taught at such prison for five consecutive years or more before discharge without cause, and employment at prison school program had been interpreted by state and district school authorities as being a part of junior college, teaching at prison constituted teaching in a position requiring certification within statute giving certified teachers permanent status. West's Ann.Education Code, § 13081.

3. Schools and School Districts ⚿11

Houses of correction, penal institutions and the like are not "schools" within the public school system of the state. West's Ann.Education Code, § 8006.1.

See publication Words and Phrases, for other judicial constructions and definitions of "Schools".

4. Statutes ⚿219

Contemporaneous practical construction given a statute by executive officers of state charged with administration of law having a state wide application is entitled to consideration by court called upon to construe statutory provision.

5. Colleges and Universities ⚿8

Where junior college teachers having permanent status were wrongfully discharged without cause and brought action to recover salaries and each teacher earned money in addition to that which he was paid by the school at which he was subsequently employed for amount of time comparable to that which would have been required at the school from which he was discharged, such additional income was not properly considered in mitigation of damages for, time of teaching required at the two schools being the same, the additional income could have been earned at either place.

6. Schools and School Districts ⚿144(3)

A teacher is a public employee and not a public officer and teachers having permanent status who were wrongfully discharged could not claim that salary was only an incident to the office and payable in full as a right not based on contractual relationship.

7. Colleges and Universities ⚿8

Where junior college teachers having permanent status were wrongfully discharged without cause and accepted teaching employment elsewhere at lesser salaries, teachers were entitled to difference in compensation between what they received at other schools and what they were entitled to receive under their contracts of employment. West's Ann.Education Code, § 13555.

Joseph Genser, Richmond, for petitioner-appellant.

Leland H. Jordan, County Counsel, E. Warren McGuire, Asst. County Counsel, Marin County, San Rafael, for respondents-appellants.

BRAZIL, Justice pro tem.

The Marin Junior College maintains one school campus at Kentfield and up until the middle of July 1955 had conducted the school program at nearby San Quentin State Prison. The six respondents were all certificated junior college teachers, confining their teaching activities entirely to the San Quentin school program under contracts of employment with the Marin Junior College District. Each of them had taught consecutively for five years or more at San Quentin for the school district and each had been reelected to teach for the district after completion of three consecutive years, with the possible exception of respondent O'Boyle. None of them had ever resigned or been dismissed for cause, and each was notified by letter dated April 28, 1955 of his dismissal effective June 30, 1955. The average daily attendance of the school district at all times with which we are concerned exceeded 850. At no time before the letter of dismissal had appellants made any attempt to determine respondents' ability to perform other teaching services for the junior college which were being rendered by probationary teachers or teachers junior to any of them in point of service. The appellant junior college terminated its San Quentin school program on July 14, 1955.

With the exception of Mr. O'Boyle, all of the respondent teachers had actually been classified as permanent employees of the school district, and each had received and had signed a contract of employment in which he was specifically referred to as a permanent school employee. Mr. O'Boyle's situation must be separately discussed as in his case he taught regularly from November 1, 1950 to June 30, 1955, but from and after June 30, 1953 he was employed on consecutive three months' term notices of employment, each of which he also signed. Upon failure of the school district to retain respondents for the school year beginning July 1, 1955 or to pay them any salary after that time, petitions for writs of mandate were filed to compel the appellants to assign respondents as classroom teachers in the district and to recover salaries due and unpaid since July 1, 1955. The petitions were based on the theory that each petitioner had acquired permanent status or tenure, had never been discharged for cause, that his services were wrongfully terminated by the appellants. The defense to the petitions and the basis of the appeal is the contention that each of the respondents, although a duly accredited and certificated junior college teacher, had not acquired tenure because each, during all the time of employment with the district, had occupied a position which did not require certification qualifications. Stated in another way, the appellants maintain that the San Quentin school program is not a part of the Marin Junior College; that the district could have, if it had so chosen, employed non-certificated employees to conduct the classes at the prison.

The judgment of the superior court ordered appellants to pay each respondent an amount which equaled the difference between what each would have gotten from the district if re-employed and what each one of them had received during the year from other teaching employment during the regular 180 day yearly teaching period. Assuming the writs should have been granted, appellants contend that the resulting amounts are incorrect for the court did not allow, as a credit against the yearly salary, an additional amount each respondent had earned during the year from outside sources such as night or summer employment as further mitigation of damages.

The appeal is from the judgments granting the writs and the amount of allowance made in each case. The respondents have cross-appealed, by which they claim error only in the amount each was allowed. It is respondents' contention that each teacher unlawfully not reemployed by the district was entitled to the whole of his yearly salary without any deduction for salaries he may have received from another school district which employed him during the year.

If the respondents were permanent employees of the appellant district at the beginning of the 1955–56 school year, they are entitled to the writs of mandate commanding the payment of salaries and assignment to classroom teaching in the district, and conversely the writs ought not to have been granted if they were not such permanent teachers. In the situation presented in this school district, permanent status is acquired by virtue of the section of the Education Code set out below, or not at all.

> "§ 13081. Every employee of a school district of any type or class [1] having an average daily attendance of 850 or more, * * * who, [2] after having been employed by the district for three complete consecutive school years [3] in a position or positions requring certification qualifications, [4] is reelected for the next succeeding school year to a position requiring certification qualifications shall, [5] at the commencement of the succeeding school year be classified as and become a permanent employee of the district."

In Mr. O'Boyle's case, while he taught regularly and continuously for five years, during the last two years he was employed under a written contract called a notice of employment for only three months at a time, being paid on an hourly basis, and employment being contingent on a minimum class size. There is no merit in appellants' claim of laches as far as this teacher is concerned, for the district was in no way prejudiced by the delay, if any, in filing the petition. He was teaching and being paid all the time up to June 30, 1955. He was not a substitute teacher as defined by Education Code section 13103 for he was not replacing anyone or filling a position of a regularly employed person absent from service. He was not a temporary employee as defined by Education Code section 13104 for he was not employed "to serve from day to day during the first three months of any school term to teach temporary classes not to exist after the first three school months of any school term." The latter section provides further that "If the classes or duties continue beyond the first three school months of any school term * * * the certificated employee, unless a permanent employee, shall be classified as a probationary employee."

[1] Appellants maintain that Mr. O'Boyle was not employed under a written contract for a year and therefore could not have become a permanent employee, even though he taught continuously for more than a year after having been employed and classified during the first three years as a probationary teacher. The appellants make no attempt to name the classification of teacher this petitioner became by reason of his continued, consecutive service on three months written contracts. There does not appear any authority in the code for this short term form of contract. Appellants rely on Richardson v. Board of Education, 6 Cal.2d 583, 58 P.2d 1285 and Hogsett v. Beverly Hills School Dist., 11 Cal.App.2d 328, 53 P.2d 1009. In the first cited case, the teacher was hired as a substitute for the fourth year, and in the second one the teacher had not completed a full teaching year as was required by the law in effect at that time. If appellants were correct in their position on this phase of the case, school districts by the simple method of giving fourth year teachers only short term contracts could effectively defeat the purposes of the teachers' tenure law. The trial court was correct in finding that Mr. O'Boyle's rights were similar to those of the other five petitioners.

[2] The controversy is settled by determining whether or not the several petitioners in their employment by the district have met the requirements of that portion of Education Code section 13081, hereinbefore set out as bracket [3]. If they were employed "in a position or positions requiring certification qualifications," then the writs were properly issued for it is agreed by all concerned that every other provision of that section has been met. It is not sufficient, in order to get tenure, to have been employed for the required number of years by the school district unless that employment is of a kind which requires certification. A certificated employee could be employed by the district as a custodian or business manager, positions which could be filled by non-certificated employees. The time spent in such a position would not be counted towards tenure. Brintle v. Board of Education, 43 Cal.App.2d 84, 110 P.2d 440.

What school employment requires the employee to hold a certificate of one kind or another appears to be determined by Education Code sections 12125 to 12146.1, inclusive, which sections set up standards for and authorize issuance of various credentials for different kinds and types of employment. The only positions requiring certification qualifications are those set forth in the sections last cited. Brintle v. Board of Education, supra. Appellants then argue that nowhere in these sections is there a special credential for teaching classes in a state prison and, therefore, it follows that the latter type of work does not require certification qualifications within the meaning of section 13081, and that the judgments of the trial court must be reversed. However, teaching a class of students within a state prison, while being employed to do so by a school district, is not necessarily teaching for the prison nor does the teacher become an employee of the Department of Corrections because, in conducting the classes, he must teach under conditions of control and supervision which do not occur on the campus. The control and supervision of prisoners by the prison authorities is not as students, but as prisoners. To a far lessor degree, of course, junior college students while attending regular school classes still come within the control and supervision of their parents. There can be little doubt that "[t]he credentials set forth in Sections 12125–12146.1 very substantially in reference to the positions authorized to be *taught* by them; some authorize service as a *teacher* in a college (Section 12127); some authorize service as a *teacher* in certain grades only," etc. (appellants' opening brief, p. 11, emphasis added). It must be remembered that what these petitioners were doing at the state prison was teaching classes conducted as part of the Marin Junior College; they were not acting as supervisors, custodians or reseachers. The fact that the students couldn't get away, that they were older than the average of junior college students, that the admission to classes was limited to inmates, that courses, hours and facilities were different from those at the regular campus, and the fact that prison authorities might be consulted on who the district should hire as a teacher or that the teacher's methods of instruction of necessity might be restricted, does not alone determine that the classes so conducted were not a part of the educational system of appellant school district.

[3] Section 8006.1 of the Education Code enacted in 1947 recognizes the right of the governing board to "establish and maintain classes for the inmates." It is reasonable to interpret such language to mean that the classes so established and maintained became a part of the school system, not a part of the state penal system. Houses of correction, penal institutions and the like are, of course, not schools within the public school system of the state. Boys' & Girls' Aid Society v. Reis, 71 Cal. 627, 12 P. 796. But that is not the same thing as saying that a public school cannot establish a class for prisoners within the prison walls. Appellants have not cited any authority that such cannot be done. The argument that, in speaking of "classes" in section 8006.1, the Legislature does not mean part of a school is not reasonable, for schools are substantially institutions composed of classes.

The evidence discloses that the classes at San Quentin were at all times treated and considered as part of the Marin Junior College. The form of teacher contracts were similar, five of the petitioners were carried on the records as permanent employees of the district, they were listed as faculty of the day school program, the teachers at San Quentin maintained a full-time teaching program, and the students in the classes at the prison were considered students of the college for apportionment of funds from the state. The school principal, in making up his annual report which listed the students at San Quentin as part of the average daily attendance of the college, signed an affidavit to the effect that "no illegal attendance has been included in this report nor any attendance except that of pupils while engaged in educational activities required of such pupils and under the immediate supervision and control of an employee of the district who possessed a valid certification document registered as required by law authorizing him to render service in the capacity and during the period in which he served." The appellants regularly reported the average daily attendance of the State Department of Education, showing plainly that it included attendance at San Quentin. The college received its apportionment of funds from the state on the basis of that attendance and upon the common understanding of all that San Quentin classes were part and parcel of the Marin Junior College curriculum.

The conduct of various governmental bodies, officials and employees, as herein in part set forth, does not in and of itself make something legal which was actually illegal, nor can it be the basis of an estoppel. It is important, however, in determining whether or not the prison classes were a part of the school, for if they were then the teachers who conducted them would have to be certificated. It is also of considerable significance in the application of the rule of contemporaneous construction of a statute.

[4] "Another reason for holding that pupils attending kindergartens should be included in computations for the purpose

of determining teachers' tenure is the well-established rule of statutory interpretation that the contemporaneous practical construction given a statute by the executive officers of a state charged with the administration of the laws having a state-wide application is entitled to consideration by a court called upon to construe such statutory provision. Godward v. Board of Trustees, 94 Cal.App. 160, 163, 270 P. 725. True, such contemporaneous construction is not conclusive of the question under consideration, but is entitled to great weight." La Rue v. Board of Trustees, 40 Cal.App.2d 287, at page 295, 104 P.2d 689, at page 694. If ever there was a case for the application of the rule of contemporaneous construction, this one is surely it, for everybody, and there were many, construed the applicable statutes to require certification for employees teaching in the classes at San Quentin. Not only the school officials and the teachers of the district, but the legal advisor of the district, who would be the predecessor of appellants' present counsel, the State Department of Education and its legal advisor, the attorney general, construed the statutes for ten years or more as respondents maintain they should have been interpreted. On the basis of such construction, large sums of money have been apportioned to the school district by the state over the years, which would, if appellants were correct, have been illegal. The attorney general of the state in 19 Op. Atty.Gen. 210 had occasion to consider the provisions of Education Code section 8006.1. After quoting the section, the opinion states "Where school districts are requested to conduct cosmetology *schools* in penal institutions of the state, *students* in such schools would be brought within the provisions of Act 7419, Deering's General Laws, * * * We are, therefore, of the opinion that while the State Board of Cosmetology may not license schools of cosmetology established in penal institutions, nevertheless when a local school district conducts classes in cosmetology" (§ 8006.1) the board "may evaluate the courses and shall recognize a graduate of such a *school*," etc. (emphasis added).

It may be that a considerable portion of the school work done in the classes at the prison was below the junior college level, but that in and of itself would not change the result. Holbrook v. Board of Education, 37 Cal.2d 316, 231 P.2d 853. In that case, the Supreme Court held that a certificated employee whose certificated duties required only one-fourth of his time, the balance being devoted to school work not requiring certification, was nevertheless entitled to full-time permanent employment.

[5] The appellants claim that the school district is entitled to further credit as mitigation of damages. Each of the teachers did earn money in addition to that which he was paid by the school which hired him for an amount of time comparable to that which would have been required at the junior college. Such additional income was not considered in mitigation of damages and correctly so, for, the time of teaching required at the two schools being the same, additional income could be earned at either place.

[6, 7] The respondents in their cross-appeal claim they are entitled to the full annual salary without deduction of amounts earned as teachers at other schools. The petitioners were not discharged for cause so the requirement of payment of full salary contained in Education Code section 13555 is not applicable. A teacher is a public employee and not a public officer (Leymel v. Johnson, 105 Cal.App. 694, 288 P. 858); so petitioners may not successfully claim that the salary is only an incident to an office and therefore payable in full as a right not based on a contractual relationship. The question here involved is not whether petitioners, who were prevented by appellants from performing their contracts, were bound to seek other employment, for, in fact, they all voluntarily accepted other lesser paying teaching positions. The case of La Rue v. Board of Trustees, supra,

40 Cal.App.2d 287, 104 P.2d 689 is not under the facts of these cases authority for respondents' position in this regard. The respondents were entitled to the difference in compensation between what they got at other schools and what they were entitled to receive under their contracts of employment, which resulted from their tenure status, with appellant school district; and that is the amount allowed each petitioner in the trial court.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

160 Cal.App.2d 599

BOARD OF SUPERVISORS OF the COUNTY OF MARIN, a political subdivision of the State of California, Petitioner and Appellant,

v.

Leon A. DE LISLE, Auditor of the County of Marin, Respondent.

Civ. 17812.

District Court of Appeal, First District, Division 2, California.

May 19, 1958.

Mandamus proceedings to compel county auditor to permit county clerk to enter upon 1956–7 local assessment roll changes therein ordered by county board of supervisors, sitting as a board of equalization. The superior Court, Marin County, Thomas F. Keating, J., sustained demurrer and county board of supervisors appealed. The District Court of Appeal, Draper, J., held that where county auditor secured assessment roll from clerk on August 25, which date was five days after date when he was required by statute to prepare and forward duplicate valuation statements but board continued in session until August 27, and at some unspecified date thereafter sought the roll to enter upon it changes made by the board on or after August 21, auditor properly refused and court would not compel auditor to permit county clerk to enter upon the 1956–7 local assessment roll changes ordered by county board of supervisors at its meetings of August 21, 23 and 27.

Affirmed.

1. Mandamus 🔑**187(9)**

Even though mandamus proceeding to compel county auditor to permit county clerk to enter upon local assessment roll changes ordered by county board of equalization did not affect any taxpayer and only the county counsel, as attorney for petitioner, appeared at oral argument and the office of county counsel advised county auditor on preparation of pleading and brief filed in propria persona, appellate court could consider case moot, as representing no truly adversary interest; however, since auditor would possibly be exposed to penalty, appellate court would determine the issues presented.

2. Counties 🔑**88**

As between county officials, one who is subject to penalty for delay may require timely performance by officials who must act before he does. West's Ann.Rev. & Tax.Code, § 1650.

3. Taxation 🔑**435**

Where county auditor secured assessment roll from clerk on August 25, which date was five days after date when he was required by statute to prepare and forward duplicate valuation statements, but board of supervisors, sitting as board of equalization, continued in session until August 27, and at some unspecified date thereafter board sought the roll to enter upon it changes made by the board on or after August 21, auditor properly refused to permit county clerk to enter upon the 1956–7 local assessment roll changes ordered by county board of supervisors at its meetings of August 21, 23, and 27. West's Ann.Rev. & Tax.Code, §§ 24, 155, 616, 617, 1603, 1614.

1646, 1647, 1649, 1650; West's Ann.Code Civ.Proc. § 1963, subd. 15.

4. Counties ⟹91

Statute providing that no act in all proceedings for raising revenue by taxation is illegal on account of informality or because not completed within required time had no application to situation not involving an issue of invalidity of an assessment raised by one asserting the right to do so or in situation where county auditor was confronted with penalty imposed by law for failure to act in time. West's Ann.Code Civ.Proc. § 1963, subd. 15; West's Ann. Rev. & Tax.Code, § 1650.

◆

Leland H. Jordan, County Counsel of Marin County, San Rafael, for appellant.

Leon A. DeLisle, County Auditor of Marin County, in pro. per.

DRAPER, Justice.

[1] This mandamus proceeding concerns the effect of the statutory time limits upon revision of assessments by the supervisors, sitting as a board of equalization. The dispute is among county officials only. No affected taxpayer is a party, nor does the record show whether the attempted revisions were upward or downward. Neither party purports to represent the pecuniary interest of any taxpayer. Only the County Counsel, as attorney for petitioner-appellant, appeared at oral argument. He concedes that respondent is not an attorney, and that the office of the County Counsel "advised" respondent in the preparation of the pleading and brief filed in propria persona. We might well infer that the case is moot, as presenting no truly adversary interest. However, in the light of respondent's possible exposure to penalty, we have determined that the issue presented should be decided.

The petition seeks to compel respondent to permit the county clerk to enter upon the 1956–7 local assessment roll changes therein ordered by the county board of equalization at its meetings of August 21, 23 and 27, 1956. Respondent's demurrer was sustained without leave to amend, and petitioner appeals.

The Revenue and Taxation Code requires the County Assessor to complete the local roll on or before the first Monday in July (July 2, 1956), and thereupon to deliver it to the clerk of the Board of Supervisors (§§ 616, 617). That board shall meet on the first Monday in July as a board of equalization, and shall continue in session until the business of equalization is disposed of, but not later than the third Monday in July (§ 1603). On the third day after adjournment of the board of equalization, the clerk must deliver the corrected local roll to the County Auditor (§ 1614), who shall add the valuations and enter on the roll the total valuation of each kind of property (§ 1646). On or before the third Monday in August (August 20, 1956), the auditor must prepare duplicate valuation statements (§ 1647), and forthwith transmit one to the controller and one to the State Board of Equalization (§ 1649). "Every auditor who fails to transmit the valuation statements as required forfeits one thousand dollars to the State, to be recovered in an action brought by the Attorney General * * *" (§ 1650). The State Board of Equalization may, by resolution, extend for not more than 20 days the time fixed for performance of any of these acts by the assessor, auditor or county board (§ 155).

In 1956 the assessor of Marin County obtained a 14-day extension of his time to complete the local assessment roll. He delivered the roll to the clerk on the extended date, July 16, 1956. The supervisors then began their hearings as a board of equalization. They did not complete such hearings on the date fixed by the code, July 16, or by August 5, the date to which the State Board of Equalization could have extended this time. Rather, they continued in session until August 27. Meanwhile, on August 25, respondent auditor secured the roll from the clerk. This was far later than the date, July 19, on which the roll normally should have been delivered to him, and beyond the date, August 8, to which this time might have been extended. It was 5 days after the date when he was required by the code to prepare and forward duplicate valuation statements. It is presumed that such statements were transmitted promptly thereafter (Code Civ.Proc. § 1963, subd. 15). At some unspecified date after August 25, appellants sought the roll to enter upon it the changes made by the board on and after August 21. Respondent refused.

Only one decision passes upon an attempted reassessment made not only after the statutory date for completion of the "business of equalization," but after the latest date to which that time could have been extended. In that case (Napa Savings Bank v. County of Napa, 17 Cal.App. 545, 120 P. 449), the county board of equalization increased an assessment more than 20 days after the third Monday in July. In an action by the taxpayer, the order of the board was held to be in excess of jurisdiction and void.

The decisions relied upon by appellant do not alter that rule. In one (Buswell v. Board of Supervisors, etc., 116 Cal. 351, 48 P. 226), the board acted after the statutory date, but well within the 20 days which the state board could have allowed as an extension. In fact, the county board had acted under a purported extension. The decision in Buswell preceded that in Napa Savings Bank, and was distinguished by the latter upon the ground just stated. Whiting Finance Co. v. Hopkins, 199 Cal. 428, 249 P. 853 holds that an increased assessment made by the board after the statutory date is valid, but does not state whether the reassessment was made within the 20-day period, and thus is not helpful upon the issue before us. In Universal Cons. Oil Co. v. Byram, 25 Cal.2d 353, 153 P.2d 746, rejection of plaintiff's application for reduction of assessment was set aside because of the board's denial of procedural due process. The court held that it should not resolve the fact issues involved, and returned the case to the board for the hearing upon the merits which had been denied. The language relied upon by appellant is used in pointing out that the board could act despite the passage of the statutory date. Obviously, such action was necessary to implement the court's order that due process be accorded. The decision does not disapprove the Napa case, and need not be construed as doing so by implication.

[2–4] Appellant cites Revenue and Taxation Code, Section 24: "No act in all the proceedings for raising revenue by taxation is illegal on account of informality or because not completed within the required time." But that provision has no application here. No issue of invalidity of an assessment is raised by one asserting a right to do so. Rather, the situation here is that respondent auditor, confronted with the penalty imposed by law for failure to act in time, secured the roll as then corrected in order to perform his duty of preparing and forwarding duplicate valuation statements. The code provisions "furnish a fit and orderly plan by which the successive duties imposed upon [the officers] may be performed without clash or interference." Buswell v. Board of Supervisors, etc., supra, 116 Cal. 351, 354, 48 P. 226, 227. Appellant board cannot assert that respondent's act in conforming to that plan is invalid. No claim of an aggrieved taxpayer is before us. We hold that, as between county officials, one who is subject to penalty for delay may require timely performance by the officials who must act before he does. Appellant cites no authority requiring the auditor to authorize changes in the assessment roll after the required valuation statements have been transmitted to the appropriate state officials.

Judgment affirmed.

KAUFMAN, P. J., and BRAZIL, J. pro tem., concur.

160 Cal.App.2d 481

N. E. YOUNGBLOOD, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants,

City of Los Angeles, a municipal corporation; Los Angeles County Flood Control District, a body corporate and politic; Max A. Rosenberg & Sons, a co-partnership, Defendants and Respondents.

Civ. 22560.

District Court of Appeal, Second District, Division 2, California.

May 15, 1958.

Hearing Denied July 9, 1958.

Action for damages due to flooding and erosion of plaintiff's land. The Superior Court of Los Angeles County, Edward R. Brand, J., rendered judgment of nonsuit and plaintiff appealed. The District Court of Appeal, Ashburn, J., held that in determining flood control district's liability in inverse condemnation for damages to land resulting from diversion of waters from their natural flow by revetment, it was immaterial whether construction of revetment was negligent or design thereof defective, and removal by district of fallen tree which had temporarily prevented the damage was at most a contributing proximate cause, not a superseding cause, and did not affect liability.

Affirmed in part, and reversed in part with instructions.

Opinion, 322 P.2d 274, vacated.

1. Appeal and Error 🔑927(3)

In reviewing a nonsuit, courts accept evidence most favorable to plaintiff.

2. Eminent Domain 🔑63

In determining flood control district's liability in inverse condemnation for damages to land resulting from diversion of waters from their natural flow by revetment, it was immaterial whether construction of revetment was negligent or design thereof defective, and removal by district of fallen tree which had temporarily prevented the damage was at most a contributing proximate cause, not a superseding cause, and did not affect liability.

3. Appeal and Error 🔑1047(3)

Eminent Domain 🔑296

In action in nature of inverse condemnation for water damage to land, wherein removal of fallen tree which had held back waters was alleged as proximate cause of injury as respects defendant flood control district, but such causation was dependent on surrounding circumstances, including location and position of revetment, striking of evidence concerning the revetment was error and highly prejudicial where it resulted in erroneous granting of nonsuit.

4. Eminent Domain 🔑293(3)

In action in nature of inverse condemnation for water damage to land, wherein original complaint alleged the removal of fallen tree which had obstructed waters as proximate cause, plaintiff should have been permitted to amend his complaint to conform to proof that original cause of damage was improper construction and maintenance of revetment, effect of which was delayed by presence of fallen tree.

5. Pleading 🔑248(2)

Where basic facts are the same, shifting from one theory of liability to another is not the substitution of a new cause of action and hence is not a valid objection to a proposed amendment.

6. Pleading 🔑238(1)

Showing of exact amendment which plaintiff seeks to make in order to conform to proof is not essential to a motion for leave to amend. West's Ann.Code Civ.Proc. § 470.

7. Bridges 🔑23

Municipal Corporations 🔑845(4)

Evidence did not authorize recovery from city for water damage on ground of city's participation with flood control district in removing fallen tree which had prevented the damage, or of improper maintenance and alignment of bridge. West's Ann.Gov.Code, § 53050 et seq.

8. Bridges ⚷21(4)

Except as imposed by statute, city was under no duty to reconstruct bridge to conform to flood control district's realignment of the channel below. West's Ann.Gov.Code, § 53050 et seq.

9. Limitation of Actions ⚷127(17)

Where original complaint in nature of inverse condemnation alleged no cause of action against city except for having participated with flood control district in removing fallen tree which had prevented water damage complained of, amendment of complaint as against city to allege improper construction and maintenance of bridge would have introduced a new cause of action after running of limitations, and permission to so amend was properly refused. West's Ann.Code Civ.Proc. § 338; West's Ann.Gov.Code, § 53050 et seq.

10. Limitation of Actions ⚷127(1)

In determining whether a wholly different cause of action is introduced by amendment after running of limitations, technical considerations or ancient formulae are not controlling and nothing more is meant than that defendant must not be required to answer a wholly different legal liability or obligation from that originally stated.

11. Limitation of Actions ⚷127(12)

The substitution of a statutory obligation for a common law obligation as cause of action relied upon in complaint, after running of limitations, would not be a mere change in theory of action but introduction of an entirely different and new cause of action and improper.

12. Waters and Water Courses ⚷119(3)

Subdividing of property a mile or half mile upstream from plaintiff's property, which did not divert natural drainage flow, but merely increased and accelerated it through creating greater runoff into natural watercourse which normally passed near plaintiff's property, was not actionable.

◆

N. E. Youngblood and Marvin Gross, Beverly Hills, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Joseph N. Owen, William E. Still, Weldon S. Weber, Deputy City Attys., Los Angeles, for respondent City of Los Angeles.

Harold W. Kennedy, County Counsel, Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondent County Flood Control Dist.

Crider, Tilson & Ruppé and Garvin F. Shallenberger, Los Angeles, for respondent Max Rosenberg & Sons.

ASHBURN, Justice.

Plaintiff appeals from a judgment of nonsuit in favor of defendants Max Rosenberg & Sons, a copartnership, City of Los Angeles and Los Angeles County Flood Control District. The action is one for recovery of damages due to flooding and erosion of plaintiff's property during heavy rains of January, 1952.

[1] Reviewing a nonsuit, we of course accept that evidence which is most favorable to plaintiff. His property is situated in the Pacific Palisades area of Los Angeles County, is hillside property known as 708 Greentree Road. He purchased the property in 1947 and built a home on a leveled area lying higher than the floor of the adjoining canyon. The property is situated a short distance south of Sunset Boulevard, which is a winding road in that vicinity and at least a half mile from plaintiff's property where it passes the subdivision of Max Rosenberg & Sons. That firm was subdividing a plateau on the top of a hill lying north of Sunset and north of plaintiff's property, same being known as Will Rogers Riviera Estates. The settled statement on appeal indicates the intervening distance to be one and one-half miles, but the briefs say one-

half mile. On the west side of the subdivision is Rivas Canyon, and on the east side is Rustic Canyon. The normal drainage was and is into both of these canyons, each of which is a natural watercourse. Those canyons join south of Sunset and northeast of plaintiff's property, continuing as a single watercourse under the name of Rustic Canyon which carries the waters in a general southerly direction and passes the rear or easterly part of plaintiff's property at a distance of some 10 to 20 feet. This watercourse passes under a bridge in Brooktree Road (northeast of plaintiff's land), which bridge is maintained by the City of Los Angeles. At that point the water flows in a southwesterly direction toward the rear of plaintiff's property but normally it turns southerly before reaching same and passes at said distance of 10 to 20 feet still flowing southwesterly. The bridge at the time of the storms in question was aligned with the thread of this natural watercourse. Though his house was built in 1948, plaintiff never had any water problem before the heavy rains of January, 1952.

Downstream from plaintiff's land and extending northerly to a point about 50 feet south of same, the Los Angeles County Flood Control District had partially constructed a double pipe and wire revetment for the control of flood waters, which was 18 feet wide between its wire fences; at its northerly end it had a wing extending out at a 45-degree angle and designed to act as a funnel for the receipt of waters flowing south. This revetment was built in such manner as to be at a 45-degree angle with the course of the stream as it came through the Brooktree bridge; between the bridge and the revetment the channel made an "S" curve.

Plaintiff's expert witness, Thomas C. Shields, testified that it was not good engineering practice to construct or leave the revetment in its then condition; that the opening was too narrow, would clog with debris, and would build up a head of water upstream (i. e. toward plaintiff's property), that it was readily foreseeable that the revetment would clog up and divert south flowing waters onto plaintiff's property. "It was such a narrow opening for waters that have spread out in there that it will form a clog up orifice there so that brush or a tree or anything—even small ones—can get on there and impinge and thus clog it up and build up the head of water here (indicating) upstream * * *."

When the rains of January, 1952, came the runoff from the Rosenberg tract was greater than it would have been while raw land; the flood waters accumulated near the south end of the tract, overflowed the curbs, ran down the hillside, carrying considerable eroded material with it. But the direction of the flow of the water from that plateau was the same as it had been before subdividing, into Rivas and Rustic Canyons. None of the eroded material got south of or downstream from Sunset Boulevard. The water, carrying debris from other areas, went through the Brooktree Road Bridge and the volume was such as to carry it onto the rear or southeast portion of plaintiff's home property. Two large sycamore trees were situated in that part of the lot. The water backed up from the revetment, which became clogged, ate into the natural bank removing its lateral support and causing the upper part to fall or sink. Thereupon one of the big sycamores fell across the stream in such a way as to act as a dyke, retarding and preventing erosion which at that time was entirely below or south of the fallen tree. Agents of the Flood Control District were engaged in removing fallen trees and debris during the storm. Mrs. Youngblood (now deceased) told the District Superintendent not to remove the fallen tree and he told her that would not be done. But it was removed and later cut into pieces and placed behind the revetment fences. (The Superintendent said that was another tree.) When the tree was removed the waters which had backed up from the clogged revetment flowed north onto plaintiff's land, met those coming southwesterly through the bridge, formed a whirlpool which eroded the sloping bank away and left a cliff at the rear of the lot. There was a small amount of erosion before the tree was removed, but plaintiff testified that 90 per cent, almost 100 per cent, of it was caused by the removal of the sycamore.

Plaintiff's complaint primarily sought to charge Max Rosenberg & Sons and the City of Los Angeles with negligence through dumping upon his property storm waters in "considerably increased volume, increased velocity, and increased scouring capacity." It then alleged that this caused considerable erosion and removal of adjacent and subjacent support to plaintiff's property; "That during the erosion and loss of soil, as aforesaid, a large tree fell across the base of the hill between plaintiff's property and the waterway or stream hereinbefore referred to, which constituted adjacent and subjacent support for the property of the plaintiff; that during said storm the defendants, City of Los Angeles and Los Angeles County Flood Control District, removed and took away said tree, thereby removing said adjacent and subjacent support from the property of the plaintiff, which removal caused further erosion and loss of soil therefrom; all of which acts and conduct were without the knowledge, consent or approval of the plaintiff."

The case has been discussed by counsel as if the removal of the tree were the event determining liability or absence of liability of the Flood Control District. Appellant says this was maintenance in furtherance of the general plan of the public improvement and hence is governed by Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1, and Ward Concrete Products Co. v. Los Angeles County Flood, etc., Dist., 149 Cal. App.2d 840, 309 P.2d 546, rendering the District liable to him in inverse condemnation. Counsel for the District argue that the removal of the tree was but an exercise of the police power in an emergency created by the storm, and hence could not be the basis for any liability, citing such cases as Short v. Pierce County, 194 Wash. 421, 78 P.2d 610; Surocco v. Geary, 3 Cal. 69, 70; Gray v. Reclamation District No. 1500, 174 Cal. 622, 163 P. 1024; and House v. Los Angeles County Flood Control District, 25 Cal.2d 384, 153 P.2d 950.

[2] We have concluded that the removal of the tree is not the event which creates liability (if any there be) upon the Flood Control District. It plainly appears that the waters would have met and, creating a whirlpool, have eaten away plaintiff's land if the tree had not fallen. Upon the facts disclosed by this record the District would be prima facie liable in inverse condemnation because its uncompleted revetment diverted the waters from their natural flow onto plaintiff's land and to its damage. It is immaterial whether the construction of the revetment was negligent or the design defective or well conceived; when it directly caused damage to plaintiff's land the District became liable. This is the doctrine of Bauer v. County of Ventura, supra, 45 Cal.2d 276, 289 P.2d 1; Ward Concrete Products Co. v. Los Angeles County Flood, etc., Dist., supra, 149 Cal.App.2d 840, 309 P.2d 546, and other cases. Bauer says, 45 Cal.2d at page 283, 289 P.2d at page 5: "It is well established that the diversion of water from its natural course resulting in damage to adjacent property is actionable. * * * But to escape liability the improvements thus described must follow the natural drainage of the country or the natural stream." Ward Concrete Products Co., supra, 149 Cal.App.2d at page 844, 309 P.2d at page 549, quotes Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897: " 'The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. If private property is damaged thereby the state or its agency must compensate the owner therefor [citations], whether the damage was intentional or the result of negligence on the part of the governmental agency [citations].' " The District, through its own construction within the channel below the Youngblood property, had exposed itself to liability in case of storm regardless of any falling tree. When the partic-

ular one did fall it acted as a dyke which temporarily protected defendant from the liability which otherwise would have ensued immediately. When the tree was removed the invasion of plaintiff's premises, caused by the angle and the clogging of the revetment, immediately occurred and gave rise to a cause of action. The removal of the tree, whether lawful or tortious, an exercise of police power or expropriation, an antecedent, concurrent or subsequent causing cause, could be nothing more than a contributing proximate cause and hence could not immunize the direct invasion of plaintiff's property growing out of the construction and maintenance of the revetment. Certainly it was not a superseding cause. See Trice v. Southern Pacific Co., 174 Cal. 89, 96, 161 P. 1144; Denman v. City of Pasadena, 101 Cal.App. 769, 773–774, 282 P. 820; 35 Cal.Jur.2d § 65, page 564.

Because of what they conceived to be the limited scope of the charge concerning the removal of the fallen tree, defendants Flood Control District and City of Los Angeles early and often throughout the trial objected to evidence concerning the revetment or the Brooktree Road bridge. The trial judge overruled the objections subject to later motions to strike. At the close of plaintiff's evidence the District moved to strike from the record "all testimony pertaining to the revetment south of plaintiff's property, the engineering practice and construction of said revetment, as outside the scope of the pleadings." The motion was granted. Then followed the motion for nonsuit which was likewise granted.

[3] Plaintiff complains of error in striking the said evidence. The point is well taken. Though the tree removal is alleged as the proximate cause of injury so far as the District is concerned, it should be evident from the above review of the facts that plaintiff could not possibly prove his charge as to the tree being the proximate cause of his loss without also proving the surrounding facts,—the location and position of the revetment causing southbound water to impound and then reverse its flow; the flow of the southbound water through the bridge abutments onto plaintiff's land; the meeting of the southbound and northbound waters forming a whirlpool which washed out plaintiff's land. Without proof of these surrounding circumstances the bare removal of the tree would prove a sterile thing in any view of the case. With the subject evidence in the record, ground for holding the District liable was present. Without it there was no basis for a judgment against it. The striking of this evidence was erroneous and highly prejudicial for it permitted the granting of a nonsuit which should have been denied.

[4, 5] Just before the nonsuit was granted plaintiff moved for leave to amend his complaint to conform to the proof; this motion was denied. It should have been granted. True, an amendment conforming to the views herein expressed would have changed plaintiff's legal theory somewhat, but that is not a valid objection to a proposed amendment. "When the basic facts are the same a shifting from one theory of liability to another is not the substitution of a new cause of action. Oberkotter v. Woolman, 187 Cal. 500, 504, 202 P. 669; Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 718, 128 P.2d 522, 141 A.L.R. 1358; Barr v. Carroll, 128 Cal.App.2d 23, 33–34, 274 P.2d 717." Smith v. Los Angeles Bookbinders Union, 133 Cal.App.2d 486, 495, 284 P.2d 194, 199. These further observations of the Smith case are pertinent at bar: "The absence of a vital allegation in an original complaint, resulting in the statement of no cause of action at all, does not preclude an amendment to incorporate that indispensable element of the action. The correct view is well stated in 2 Witkin's California Procedure, § 606, page 1619: 'If the original complaint *fails to state a cause of action,* because of defective pleading of the elements, it is in a sense true that the amended pleading states a new cause of action. But there is no objection to an amendment

of this kind, for this is the typical next step when a general demurrer is sustained with leave to amend. The important point is that the amended complaint merely improves the formerly defective statement of the same cause of action; there is no change in the nature of the case and therefore no surprise or prejudice to the defendant. [Citations.]' Great liberality is indulged in this matter of amendment to the end that lawsuits may be determined upon their merits." 133 Cal.App.2d at page 495, 284 P.2d at page 199. To the same effect, see, Bice v. Stevens, 136 Cal. App.2d 368, 379, 289 P.2d 95.

[6] The record before us does not show the exact amendment which plaintiff sought to make in order to conform to the proof, but that is not essential to a good motion. In Armstrong v. Lassen Lumber & Box Co., 204 Cal. 529, 531, 269 P. 453, where leave to make such an amendment was given, the right was not exercised until after an appeal had been taken, but that omission was held not fatal in the absence of a definite showing of prejudice to the opposing party. Moreover, evidence being in the record which showed prima facie liability resting upon the District, there was but a variance between the pleading and the proof. Section 470, Code of Civil Procedure, says: "Where the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." The following cases recognize the right of the court to order an amendment to conform to proof. Younglove v. Hacker, 15 Cal.App.2d 211, 217, 59 P.2d 451; Burrows v. Burrows, 18 Cal.App.2d 275, 279, 63 P.2d 1135; Unruh v. Smith, 123 Cal.App.2d 431, 437, 267 P.2d 52. That should have been done here. In the instant case there was an error which in law amounts to an abuse of discretion.

The judgment of nonsuit must be reversed as to Los Angeles County Flood Control District.

[7] As to the City of Los Angeles there was a complete failure to prove a cause of action. The complaint did not allege one except to the extent that it avers the City to have participated with the Flood Control District in removing the fallen tree. There is no proof whatever in support of this latter allegation.

[8] The extent of the actual showing against the City is that the Brooktree Road bridge was maintained by it and was aligned with the thread of the natural waterway which it spanned; that there had been no changes in the natural channel above plaintiff's property prior to the storms of January, 1952. Plaintiff's expert, Mr. Shields, testified that although the bridge was aligned with the thread of the stream it was at an angle of 45 degrees with the downstream revetment; that it was not good engineering practice to leave the bridge in that position and it should have been brought into alignment with the revetment or a fender should have been built at the southwest corner of the bridge to deflect the waters away from plaintiff's land. The District's revetment was still in the process of construction at the time of the storms in question. How much time the City had had to make changes in the bridge does not appear in the record. Except as imposed by statute (see Govt.Code § 53050 et seq.), the City was under no duty to reconstruct its bridge to conform to the Flood Control District's realignment of the channel below. "The improvements must follow the natural drainage of the country. If the water is diverted out of its natural channel and discharged into a different channel or upon neighboring land, the diverter is liable to the owner whose land is injured by such discharge." Archer v. City of Los Angeles, 19 Cal.2d 19, 26, 119 P.2d 1, 5. The city was not the diverter.

The settled statement on appeal makes no mention of plaintiff's motion to amend but the clerk's minutes show such a motion made and denied. Counsel for appellant says he tendered exhibit 59 for identification as such proposed amendment as to the City and counsel for respondent City seem to agree. That document is before us. It alleges that the bridge was so constructed and maintained "that water was wrongfully diverted and caused to flow onto plaintiff's property with a considerably increased volume, increased velocity, and increased scouring capacity;" also that the City had notice and knowledge of a defective and dangerous condition and failed to remedy same within a reasonable time after acquiring such knowledge.

[9] The City contends rightly that this amendment, if allowed, would have introduced a new cause of action after the statute of limitations had run. The damage occurred in January, 1952, and the amendment was offered on October 10, 1956, four years and nine months after the cause of action, if any, arose.

[10] "In determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated. As the court says in the Frost case [Frost v. Witter] supra, 132 Cal. [421, at] page 426, 64 P. [705, at] page 707, * *, for the purpose of determining whether amendment is possible, the 'cause of action' referred to as furnishing the test means only the legal obligation which it is sought to enforce against the defendant. Other courts have used almost identical language; the test is not whether under technical rules of pleading a new cause of action is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant. The power to permit amendment is denied only if a change is made in the liability sought to be enforced against the defendant." Klopstock v. Superior Court, 17 Cal.2d 13, 20, 108 P.2d 906, 910, 135 A.L.R. 318.

Appellant virtually concedes that the amended complaint upon which the case was tried did not state any cause of action against the City. His reply brief says: "Plaintiff, of course, concedes that to establish the liability of the defendant City of Los Angeles he must allege and prove a dangerous and defective condition, notice, and failure by the defendant to remedy the condition after a reasonable time, as provided in Government Code Section 53051.

[11] "It is obvious that the complaint does not adequately cover all of these points. It was to this end that plaintiff moved to amend his complaint to conform to proof." If the complaint stated no cause of action at all, clearly this amendment would introduce one after the expiration of three years from date of injury (Code Civ. Proc. § 338). If the removal of the tree gave a cause of action, as alleged in the complaint, it would be one based upon a common law obligation. The substitution of a statutory obligation (Govt.Code § 53050 et seq.) would not be a mere change in theory of action but the introduction of an entirely different and new cause of action because based upon a new and different obligation. Burnett v. Boucher, 108 Cal.App.2d 37, 238 P.2d 1, and McKnight v. Gilzean, 29 Cal.App.2d 218, 84 P.2d 213, are persuasive. Those cases hold that an attempt in an automobile accident case to substitute a statutory liability for a common law one would introduce a new cause of action within the purview of the rule now under discussion.

There was no error in granting the motion of City of Los Angeles for a nonsuit, nor did the court err in refusing to permit the amendment of the complaint with respect to the City.

[12] The same is true of the nonsuit granted to respondent Max Rosenberg & Sons. Its subdividing of property situated a mile or half mile upstream from plaintiff did not divert the natural drainage flow at all. It merely increased and accelerated it through creating a greater runoff. So far as Rosenberg was concerned, the water

went into a natural watercourse which normally passed near plaintiff's property and it continued to flow therein. San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 402, 188 P. 554, 558, 9 A.L.R. 1200, governs here: "If the surface waters are gathered and discharged into the stream which is their natural means of drainage, so that they come to the land below only as a part of the stream, it is held that no action lies because of their being added. * * * 'We have just noticed the difference between merely draining on to another's land, and draining into a natural channel or watercourse, which flows across such land. So far as streams or natural watercourses are concerned, there can be no doubt that one may drain into them, and thereby increase their volume without subjecting himself to liability for any damage suffered by a lower owner.'" To the same effect, see, Bauer v. County of Ventura, supra, 45 Cal.2d 276, 283, 289 P.2d 1.

LeBrun v. Richards, 210 Cal. 308, 316, 291 P. 825, 828, 72 A.L.R. 336, cited by appellant, is not opposed to the cases just cited. It involved a diversion of surface waters, not mere increase in the flow of a natural watercourse. The following quotation is pertinent: "The upper proprietor may not divert by artificial means the surface waters upon his own lands to the lands of the lower proprietor, nor may he accelerate by means of ditches or increase the drainage of his own land to the injury of the lower owner. His right 'is limited to the disposition of the water through the chosen channels of nature.' Board of Trustees of Leland Stanford Junior University of Rodley, supra, [38 Cal.App. 563, 177 P. 175]."

The judgment of nonsuit is affirmed as to defendants City of Los Angeles and Max Rosenberg & Sons, and reversed as to Los Angeles County Flood Control District with instructions to permit plaintiff to amend his complaint with respect to said defendant if so advised.

FOX, P. J., and HERNDON, J., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR and SPENCE, JJ., dissenting.

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160 Cal.App.2d 736

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul Eugene WALKER, Defendant and Appellant.

Cr. 1233.

District Court of Appeal, Fourth District, California.

May 22, 1958.

Hearing Denied July 16, 1958.

Defendant was convicted in the Superior Court of Fresno County, George M. DeWolf, J., for burglary, and he appealed. The District Court of Appeal, Mussell, J., held that it had been improper for district attorney to ask question as to whether an individual accused of participating in crime with defendant had plead guilty; but held that in view of trial court's admonition, reversal was not required.

Affirmed.

1. Burglary ⚿41(1)

In burglary prosecution, evidence sufficiently connected defendant with crime. West's Ann.Pen.Code, § 459.

2. Larceny ⚿64(1)

Mere possession of stolen property is not alone sufficient to sustain conviction for grand theft, but such possession plus slight corroborative evidence of other inculpatory circumstances will suffice.

3. Criminal Law ⚿622(2), 867

Trial court would not be put in error for failure to order separate trials for defendants in burglary prosecution nor for overruling defendant's motion for mistrial because evidence was introduced as to admissions made by a codefendant out of his presence.

4. Criminal Law ⚿1171(2)

In burglary prosecution, it was not prejudicial misconduct for prosecuting attorney to recite in his opening statement facts based on extrajudicial statement made by one of the defendants, even if such extrajudicial statements would not be admissible against other defendant.

5. Criminal Law ⚿706, 730(3)

In burglary prosecution, it was improper for district attorney to ask question as to whether an individual accused of participating in crime with defendant had plead guilty; but, in view of trial court's admonition, reversal of conviction was not required because of such impropriety.

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Paul Eugene Walker, in pro. per., and Edward H. Spraker, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., and Herschel Elkins, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Henry Pilgrim, Guy Albright and appellant Paul Eugene Walker were accused of the crime of Burglary (Pen.Code, Sec. 459) in an information containing two counts. In count one they were charged with having entered "Ed's Lawnmower and Gun Shop" in Fresno with intent to commit theft therein and in the second count with having entered the L. H. Butcher Company building in said city with like intent. Appellant was also charged with two prior felony convictions. He admitted these prior convictions and he and Albright were tried by a jury which returned a verdict finding them both guilty of burglary in the second degree as charged in counts one and two of the information. Appellant was sentenced to imprisonment in the state prison for the term prescribed by law and appeals from the judgment of conviction.

On April 7, 1957, at about 10:30 p. m., William Brunson, operator of "Ed's Lawnmower and Gun Shop" in Fresno was called to his store and noticed that the front door had been broken into. There was glass on the floor and 27 guns had been stolen from the gun rack. Three BB guns taken had tags attached to them and one of the rifles taken had been received in a trade.

The branch manager of L. H. Butcher Company was in his establishment in Fresno on Sunday, April 7, 1957, and when he left, he locked the door to the building. When he returned later in the day he found that a window had been smashed, the door had been opened, and two office machines, a typewriter, including the cover, a calculator and an adding machine had been stolen from the building.

At about 10:00 p. m. on April 7, 1957, a Mr. Kirkman and his wife were driving past the gun shop when they saw a 1949 black Mercury automobile, license No. FAE 470, parked in front of the shop. Mr. Kirkman testified that "it looked like someone was sitting in the car"; that he observed two men carrying guns from the shop to the car and that they drove away; that he followed the black car, stopped a police car two blocks away, and "yelled the circumstances to the officers."

Mr. Hillman, who resided near the shop, testified that he heard a crash, saw two men inside the shop, and saw one man run out of it with an armload of guns; that the man put the guns in the car; that he, Hillman, thought it was a black Mercury sedan; and that "The silhouette, or whatever it was, looked like a man sitting in the front seat of the car behind the wheel."

At about 2:00 a. m. on April 8th officer Al Smith, employed by the highway patrol, stopped a 1949 black Mercury, license No. FAE 470. There were two men sitting in the front seat of this car. Defendant Pilgrim was driving and defendant Albright was in the right front seat. The appellant was lying in the back seat with a coat over his head and apparently had been sleeping. There was a rifle in the back seat. Other officers searched the Mercury about 2:45 a. m., April 8th, and found the rifle in the back seat of the car. It was later identified as one of the guns taken from the gun shop. They also found in the car a 16 inch silver pry bar, a flashlight, 2 ball peen hammers, a pair and a half of gloves and some tags in the car. These tags were found to be the ones which had been attached to the 3 BB guns which had been stolen from the gun shop.

On the day of his arrest appellant stated to one of the officers that he lived part time at 732 North Second Street in Fresno; that he was with two other people on the night of April 7th and that they were the ones with whom he had been arrested; that he had been around Hanford with them and that they were on their way to Fresno when arrested. Officers went to the Second Street address and found the typewriter cover which had been stolen from the Butcher building under the mattress on a cot. The cover was wrapped around a box which had been given to appellant on the last day of March, 1957.

Between May 3rd and May 6th Melvin Jones, a prisoner in the Fresno city jail, had a conversation with appellant in which appellant stated that he went for a ride in a Mercury automobile; that they went to Hanford and were arrested on the way back; that some rifles were involved and they were in the back of the car; that somebody broke the glass and obtained entrance through the door; that there were three in the car when they were arrested; that two went into the place and got an armful of rifles and handed them through the window to "the guy in the back seat"; and that they had the typewriter cover at the house.

George Lindsey testified that a week or so after April 19, 1957, he had a conversation with appellant in the city jail and that appellant there stated that he and the "guy who was driving the car went over to this building and broke the glass"; that "the guy who was driving the car opened the door and each one of them got an armload of guns, went back out the door and handed them to someone else that was in the car"; that they were chased by a sports car and after they lost him they went to Hanford and stashed the guns in a barn.

[1] Appellant does not contend that the evidence was insufficient to show that two burglaries were committed but argues that there was a lack of evidence to connect him with them. This contention is without merit. The evidence that one of the stolen guns was found in the possession of appellant, that the pry bar, gloves and tags from the stolen BB guns were found in the car in which appellant was riding when he was arrested three or four hours after the burglaries, and the admissions made by appellant to the witness Lindsey are amply sufficient to connect appellant with the burglary of the gun shop. This evidence, together with the fact that the stolen typewriter cover was found under a mattress in a room occupied by appellant, and the fact that the typewriter cover was wrapped around a box belonging to appellant, as well as other facts and circumstances shown by the record, were sufficient to connect appellant with the burglary of the Butcher Company building.

[2] As is said in People v. Wissenfeld, 36 Cal.2d 758, 763, 227 P.2d 833, 836:

> "While the mere possession of stolen property is not alone sufficient to sustain a conviction of grand theft [Citation], such possession plus 'slight corroborative evidence of other inculpatory circumstances' will suffice. [Citations.]"

[3] It is further argued that separate trials should have been ordered or a motion for a mistrial granted because evidence was introduced of admissions made by a co-defendant not in the presence of appellant. This argument is likewise without merit. In People v. Isby, 30 Cal.2d 879, 897, 186 P.2d 405, 416, the court said:

> "There is likewise no merit to defendants' position that the court erred in refusing to grant their respective motions for a separate trial. The code section bearing upon this subject provides that when two or more defendants are jointly charged with a public offense, whether felony or misdemeanor, 'they must be tried jointly, unless the court order separate trials.' Pen.Code, sec. 1098. And it has been held repeatedly that a defendant so charged is not entitled as a matter of right to a separate trial [Citations], but that the question of severance is one that must be left necessarily to the determination of the trial court in

> the exercise of its sound discretion. [Citations.] It is not an abuse of discretion to refuse to grant a demand for separate trials because damaging testimony, admissible against one defendant, and not against the other, may be received in the case, but it is then incumbent upon the court to limit such evidence in its application to the defendant to whom it is referable. [Citations.]"

[4] Appellant claims that there was prejudicial misconduct in the opening statement of the prosecuting attorney wherein he recited facts which he knew he would not be able to support and that the facts that he presented to the jury were based on an extrajudicial statement made by co-defendant Albright which the prosecuting attorney knew would not be admissible against appellant. While the statement of the prosecutor would have been improper if appellant were the only defendant, there was no reversible error here. The statements made by Albright were admissible against him and the court repeatedly instructed the jury that they were to receive the evidence of an admission made by one defendant not in the presence of the other defendant as evidence against the defendant making the statement only. People v. Matthew, 194 Cal. 273, 279, 228 P. 424.

[5] It is further claimed that it was prejudicial misconduct on the part of the district attorney when he asked a question which he knew to be improper. In this connection the record shows that when one of the officers was being questioned concerning his investigation he was asked if he had questioned any of the suspects. After answering that he had, he was asked, "And who were those that were questioned, officer Cox?" Officer Cox answered, "Questioned a man by the name of Henry Pilgrim, Paul Walker seated here with the checked shirt on, and a Guy Albright in the white shirt." The district attorney then asked, "As a matter of fact, officer Cox, Mr. Pilgrim pled guilty?", and officer Cox answered, "Yes." An objection was made and the court said:

> "Let the record show that the jury has returned and the Court at this time will sustain the objection of Mr. Pearson made to the question which was asked immediately before the jury left this courtroom. It strikes the question from the record. It orders the jury to disregard totally the question which they heard. It admonishes the district attorney not to repeat any such question."

While the question was improper, there was no reversible error under the circumstances. People v. Sourisseau, 62 Cal. App.2d 917, 929, 145 P.2d 916.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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160 Cal.App.2d 836

Lewis B. FELDMAN, Plaintiff, Cross-Defendant and Appellant,

v.

Leonard KATZ and Eleanor Katz, Defendants, Cross-Complainants and Respondents,

Nellie Feldman and Dora Greenblatt, and Ben Greenblatt, Individually and doing business as Ben G. Construction Co., Cross-Defendants and Appellants.

Civ. 22661.

District Court of Appeal, Second District, Division 3, California.

May 27, 1958.

Hearing Denied July 23, 1958.

Action to quiet title in which an order denying motion for new trial was entered by the Superior Court of Los Angeles County, John J. Ford, J., and plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that where stenographic reporter died before being able to transcribe her notes and an appeal had been taken with due diligence but effort to have notes transcribed were unsuccessful, denying motion for new trial constituted, under all circumstances of the case, an abuse of discretion.

Reversed.

1. New Trial ⚷6

Under statute respecting granting of new trial, there is no compulsion upon a court to grant a new trial and exercise of power by court under statute is discretionary and whether court has abused its discretion depends on the facts of the particular case. West's Ann.Code Civ. Proc. § 953e; West's Ann.Rules on Appeal, rule 4(e).

2. Appeal and Error ⚷977(3)
New Trial ⚷6

Discretion in granting new trial is not unlimited but is a legal discretion, the exercise of which is reviewable. West's Ann.Code Civ.Proc. § 953e; West's Ann. Rules on Appeal, rule 4(e).

3. New Trial ⚷93

In action to quiet title where court stenographer died before being able to transcribe her notes and an appeal had been taken with due diligence but efforts to have notes transcribed were unsuccessful, under all circumstances of case, denial of motion for new trial constituted an abuse of discretion. West's Ann.Code Civ.Proc. § 953e; West's Ann.Rules on Appeal, rule 4(e).

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Louis Thomas Hiller, Los Angeles, for appellant.

Henry J. Merdink, Hollywood, for respondents.

PATROSSO, Justice pro tem.

Appeal by plaintiff and cross-defendants from an order denying their motion for a new trial made pursuant to section 953e of the Code of Civil Procedure upon the ground of the impossibility of securing a phonographic report of the proceedings had upon the trial due to the death of the stenographic reporter.

This action was instituted by plaintiff to quiet title to and recover possession of an improved parcel of real property in the city of Los Angeles. The defendants filed an answer and cross-complaint. The latter was directed against the plaintiff and other named cross-defendants and thereby defendants sought specific performance of an alleged oral contract for the sale of the real property in question or in the alternative for damages.

The following facts are made to appear without conflict:

On September 5, 1956, judgment was entered in favor of the defendants and cross-complainants and against the plaintiff and cross-defendants. On September 28, 1956, the present attorney for the plaintiff and cross-defendants was substituted in the place and stead of their former attorney of record who had participated in the trial of the action. On October 8, 1956, plaintiff and cross-defendants filed notice of appeal from the judgment and on October 10, 1956, they filed a notice to the clerk to prepare clerk's and reporter's transcripts upon appeal. On November 1, 1956, counsel for the appellants was advised by the trial judge that Mrs. Price, the stenographic reporter who had acted as such upon the hearing of the cause, had suffered a stroke and was disabled from transcribing her notes and that her notes could not be transcribed by any other reporter. An effort was thereupon made to have other reporters in the shorthand pool transcribe her notes, but none was found who was able to do so and Mrs. Price in the meantime died.

Following Mrs. Price's death, and on November 28, 1956, appellants filed their notice of motion for a new trial pursuant to Civil Code Procedure section 953e. Accompanying the notice of motion was an affidavit by appellants' counsel which recited the facts hereinbefore stated. In addition, the affidavit avers that the trial judge had advised counsel for the appellants to communicate with the attorney for the respondents as well as the former attorney for the appellants in an endeavor to work out an agreed statement of the facts of the case; that appellants' attorney did call the former attorney for the appellants and was by him advised "that he, in all fairness to his former clients, could not arrive at an agreement as to the statement of facts because of the many variances in the testimony of the witnesses at the trial, and the absence of any written notes to assist him in reconstructing said testimony." Said former counsel further advised appellants' attorney that the trial had occupied four days "and that many factual issues developed at the trial including rulings on objections to testimony, both oral and documentary, and that he had no recollection of all of said issues or rulings." The affidavit further avers that present counsel for the appellants "has no knowledge whatsoever of the facts of the case and was unable to obtain a detailed analysis of the testimony of the various witnesses from his clients."

In opposition to the motion, counsel for the respondents filed an affidavit wherein none of the facts hereinabove recited is denied but in which it is stated that in conversations with the present attorney for the appellants he informed him "of his willingness to endeavor to agree on a Statement of Facts; that if an attempt had been made to agree on a statement of Facts, a satisfactory Statement might and probably could have been agreed upon," but none was submitted or proposed.

The motion for new trial came on for hearing on November 30, 1956, before Judge McKesson who had tried the case and was continued for 10 days by Judge McKesson in order to permit Mr. Van Horn, a certified shorthand reporter and the son-in-law of the deceased reporter, to make a further effort to have the notes of the deceased reporter transcribed, but Mr. Van Horn, as he avers in his affidavit, was unsuccessful in his attempt to find anyone capable of transcribing the notes. In the intervening period, Judge McKesson was appointed District Attorney of Los Angeles County and the hearing of the motion was thereupon transferred to Judge Ford, by whom it was heard on December 18, 1956, and denied on December 28, 1956.

[1, 2] The rule is well settled that there is no compulsion upon a trial court to grant a new trial under section 953e; that the exercise of power by the court under that section is discretionary and whether the court has abused its discretion depends on the facts of the particular case. Such discretion is not unlimited but is a legal discretion, the exercise of which is reviewable. Fickett v. Rauch, 1947, 31 Cal. 2d 110, 112, 187 P.2d 402.

[3] Recognizing the rule to be as above stated, the appellants contend that under the circumstances present in the case at bar, a denial of their motion for a new trial constituted an abuse of discretion, and we are constrained to agree.

Respondents concede that, as in the case last cited, where the order denying a motion for new trial under section 953e was reversed, the appellants here were diligent in taking their appeal and in undertaking to secure a clerk's and reporter's transcript. It it likewise admitted that due to the disability of the reporter and her subsequent death, and the inability to find another reporter who could read her notes, it was impossible to secure a transcript of the proceedings had upon the trial. The only reason assigned by respondents in support of the trial court's ruling is that appellants did not make a diligent effort to prepare a record, either by way of an agreed statement or settled statement pursuant to rule 4(e) of Rules on Appeal. However, it appears from the affidavit of appellants' present counsel that he did, in accordance with Judge McKesson's suggestion, communicate with the former attorney for the appellants as well as the attorney for the respondents with respect to the preparation of a statement of the case and that he was advised by appellants' former counsel that due to the length of the trial and the fact that he had no notes of the testimony of the various witnesses, he was not in a position to furnish the factual data necessary for the preparation of such a statement. Under the circumstances it was manifestly impossible for the appellants' present counsel, who had not participated in the trial, to undertake the preparation of any such record unless he could obtain the requisite information with respect thereto from former counsel. It must be remembered too, that present counsel for appellants was substituted in the case before the appeal was taken and before the disability of the court reporter occurred, and when the substitution was effected no one had reason to believe that there would be any difficulty in securing the necessary transcript of the oral proceedings. Moreover, the affidavit of counsel for the respondents filed in opposition to the motion for new trial does not cause one to believe that there was any real possibility of agreement upon an agreed or settled statement. In this affidavit, as previously noted, it is merely stated that respondents' counsel informed appellants' attorney "of his willingness to endeavor to agree on a Statement of Facts; that if an attempt had been made to agree on a statement of Facts, a satisfactory Statement might and probably could have been agreed upon." It is noteworthy that nothing is said therein as to whether respondents' counsel had in his possession notes of the testimony and proceedings had upon the trial or if so, that he offered to make the same available for the use of appellants' counsel. Furthermore, it is extremely doubtful that a settled statement could have been prepared due to the fact that Judge McKesson, who had tried the case and was familiar with the proceedings upon the trial, had ceased to hold judicial office, and consequently any proposed statement would have had to be settled by a judge who did not preside at the trial. In this respect the case here is much stronger than that presented in Fickett v. Rauch, supra, where at page 116 of 31 Cal.2d at page 406 of 187 P.2d the Supreme Court says:

"The appellant is not necessarily required to prepare a settled statement pursuant to Rule 4(e) of the Rules on Appeal. That remedy, as stated in the rule, is in addition to any remedy given by law. Therefore in the absence of a transcript it would be unreasonable to require an appellant to prepare a settled statement from insufficient data. The respondent does not contend that existing data is sufficient. He is content to rely on possible notes taken at the trial and his offer made to appellant's counsel to procure affidavits of his witnesses setting forth their recollection of what their testimony was—an offer which the appellant was certainly within his rights to reject."

The following statements in Weisbecker v. Weisbecker, 1945, 71 Cal.App.2d 41, 47, 161 P.2d 990, 994, also appear to be particularly apposite to the situation here presented:

"In the present case, it is difficult to see wherein the appellant's attorney acted in any manner different from that which might reasonably be expected under the existing circumstances. The appeal was initiated in customary and timely manner; there were the usual telephonic conversations with the reporter concerning progress; the attorney was advised that no rights were being prejudiced and that the opposing attorney consented to the delay. As soon as knowledge of the reporter's sudden death came to the attorney's attention, the motion for new trial was filed. If, then, the appellant has acted in a reasonable manner, and by the sudden death of the reporter has been denied the use of a stenographic transcript for use on appeal, it appears that the conditions described in Code of Civ.Proc. Section 953e, are present and that under the circumstances here existing a denial of the new trial provided for in that section must be deemed unreasonable.

"The respondent's principal contentions, as contained in a supplementary brief, are that a reporter's transcript was not needed, and that appellant exercised no diligence and has shown no good cause for the relief asked. In this connection it is asserted that 'defendant took no steps to secure a record under the provisions of Rule 4(e) on appeal.' Such rule provides that: 'If, without fault of the appellant, the reporter refuses or becomes unable or fails to transcribe all or any portion of the oral proceedings designated by the parties, the clerk shall mail notice' thereof to the parties, whereupon a motion may be made 'for leave to prepare a settled statement of such portions of the oral proceedings.' However, as pointed out by appellant, such rule provides that 'this remedy is in addition to any remedy given by law,' and therefore any failure to move for a settled statement should not be considered a penalizing circumstance in connection with appellant's motion for new trial under Code of Civ.Proc. Section 953e. Furthermore, it is difficult to see how the appellant could prepare an adequate statement of the evidence, or indeed, under any appellate precedure, intelligently present her contention that the judgment was contrary to the evidence, without the aid of a transcript or some other equivalent data non-existent in this case." And at page 49 of 71 Cal.App.2d, at page 995 of 161 P.2d: "Where, as in the present case, an appellant has proceeded in the customary manner to perfect an appeal, has acted with reasonable promptness upon learning of the reporter's death, and the contentions of appellant are dependent upon voluminous evidence taken during a three day trial, the emergency situation contemplated by Section 953e seems to be present. Under these circumstances a denial of the new trial provided for in such section exceeds the bounds of judicial reason and therefore must amount to an abuse of discretion."

In view of all of the circumstances in the case at bar: The diligence and promptness with which the appeal was taken, as well as the necessary steps to procure a reporter's transcript of the proceedings upon the trial, and the practical impossibility of proceeding by way of settled statement due not only to the lack of available data to enable counsel for appellants to prepare a statement on appeal, but to the fact that the judge who tried the cause had ceased to hold judicial office, we are impelled to conclude that the case is one within both the letter and spirit of section 953e and that the court erred in denying the motion for new trial. We are further confirmed in this view by an examination of the findings and judgment, a reading of which suggests that there may well be serious questions as to the correctness of at least some of the provisions therein contained.

The order appealed from is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

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160 Cal.App.2d 658

Cy MILLER and Billie Miller, Petitioners and Appellants,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; Alcoholic Beverage Control Appeals Board, Defendants and Respondents.

Civ. 22473.

District Court of Appeal, Second District, Division 3, California.

May 20, 1958.

Hearing Denied July 16, 1958.

Proceedings on application for writ of mandate to review order of liquor department revoking on-sale liquor license. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment to effect that licensees were not entitled to judicial review and they appealed. The District Court of Appeal, Patrosso, J. pro tem., held that where Appeals Board upheld action of liquor department in suspending liquor license but reversed department's action in revoking license and remanded proceedings for reconsideration of penalty, and liquor department rendered new decision which suspended license and revoked license and licensees failed to appeal again to Appeals Board, licensees had failed to exhaust administrative remedies and were not entitled to writ of mandate to review order of liquor department, even though allegation in petition to effect that licensees had exhausted administrative remedies, had not been denied.

Affirmed.

1. Administrative Law and Procedure ⚷229

Exhaustion of administrative remedy rule is applicable even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds.

2. Administrative Law and Procedure ⚷234
Mandamus ⚷13, 167

Where Appeals Board upheld action of liquor department in suspending liquor license but reversed department's action in revoking license and remanded proceedings for reconsideration of penalty, and liquor department rendered new decision which suspended license and revoked license and licensees failed to appeal again to Appeals Board, licensees had failed to exhaust administrative remedies and were not entitled to writ of mandate to review order of liquor department, even though allegation in petition to effect that licensees had exhausted administrative remedies had not been denied. West's Ann.Gov.Code, §§ 8401, 11505(c); West's Ann.Health & Safety Code, § 11500 et seq.

3. Mandamus ⚷154(7)

Allegation in petition for writ of mandate to review order of liquor department revoking petitioners' on-sale liquor license to effect that petitioners had exhausted all of their administrative remedies was a mere conclusion, and where conclusion was contrary to specific facts alleged and shown to exist by record of proceedings before liquor department, conclusion must be disregarded.

4. Evidence ⚷29

Court would take judicial notice of fact that licensees had right to appeal from an order of revocation.

5. Courts ⚷24

Parties may not by consent confer jurisdiction over subject matter of an action where none exists.

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Moore, Webster, Lindelof & Hughes, Los Angeles, by Prentiss Moore, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondents.

PATROSSO, Justice pro tem.

Appeal from a judgment denying petitioners' application for a writ of mandate to review an order of the Department of Alcoholic Beverage Control revoking petitioners' on-sale liquor license.

An accusation containing five counts was filed with the respondent department, four of which charged that petitioners sold alcoholic beverages to minors, and count V charging that petitioners permitted their licensed premises to be used as a place to which persons resorted in a drunken condition and used obscene, indecent and profane language within the hearing of the public, which created a condition contrary to public welfare and morals.

The accusation, accompanied by a form of notice of defense, was served upon petitioners by certified mail on March 22, 1956, addressed to their licensed premises. Service of accusation in this manner is authorized by Government Code, sections 8401 and 11505(c).

Petitioners did not file a notice of defense, and on June 4, 1956, a default hearing, at which petitioners did not appear, was held before a hearing officer of the department at which 25 police officers testified in support of the charges contained in the accusation.

After the hearing was concluded, petitioners' counsel informally requested the hearing officer to rehear the matter, which request was denied. On the same day, petitioners' counsel addressed a letter to the department requesting that the hearing be set aside and the matter reheard upon the ground that the petitioners had not received notice of the hearing. This request was likewise denied.

The hearing officer rendered a proposed decision in which counts I, III, and IV were dismissed and petitioners were found guilty of the charge in count II, for permitting a minor to consume an alcoholic beverage on their licensed premises, on which count a 30-day suspension was recommended. The hearing officer also found petitioners guilty of some 22 particulars of improper conduct charged in count V and recommended that their license be revoked.

On July 5, 1956, the department adopted the proposed decision as its own, imposed a 30-day suspension under count II and revoked their license under count V. Petitioners thereupon filed a petition for reconsideration upon the ground that they had not received notice of the hearing, which petition was denied.

Petitioners thereafter filed an appeal with the Appeals Board, upon which a hearing was had and the matter argued by counsel. On January 21, 1957, the Appeals Board mailed to the parties its decision upholding the suspension under count II and reversing the revocation under count V but resricting the reversal to the question of the penalty to be imposed under this count. The Appeals Board determined that a number, but not all, of the charges set forth in count V were supported by substantial evidence and that those charges so supported were sufficient to support an order of revocation by the department. The Appeals Board, in compliance with the decision in Bonham v. McConnell, 45 Cal.2d 304, 288 P.2d 502, remanded the proceedings to the department for a reconsideration of the penalty, either upon the facts found to be true or to conduct a further hearing to substantiate all of the facts set forth in the accusation.

Petitioners did not seek a review of the decision of the Appeals Board by a proceeding in mandate but on February 25, 1957, filed with the department a petition for further hearing in which to present evidence in mitigation. No affirmative action appears to have been taken upon this application, but it was apparently denied for on March 7, 1957, without further hearing or the taking of additional evidence, the department reconsidered the penalty to be imposed under count V in the light of the decision of the Appeals Board and rendered a new decision suspending petitioners' license for 30 days on count II and revoking their license on count V.

Petitioners failed to file an appeal to the Appeals Board from this last decision and order of the department but instead, on April 11, 1957, filed this proceeding for a writ of mandate. Upon the hearing of the petition and the return by way of answer thereto, the trial court ordered the alternative writ discharged and denied a peremptory writ.

The trial court made and filed findings of fact and conclusions of law wherein, among other things, it found that petitioners did not appeal to the Appeals Board from the decision of the department rendered on March 7, 1957, revoking their license and that the 40-day period within which such an appeal could be filed had expired. From this it concluded that petitioners had failed to exhaust their administrative remedies, as a consequence of which they were not entitled to a judicial review of the order complained of. Accepting this finding as true, there can be no doubt as to the correctness of the trial court's judgment. As said by this court in Fiscus v. Dept. of Alcoholic Beverage Control, 1957, 155 Cal. App.2d 234, 317 P.2d 993, 994:

"Prior to January 1, 1955, the agency with the power to license the sale of intoxicating liquor was the Board of Equalization. Marcucci v. Board of Equalization, 138 Cal.App.2d 605, 608, 292 P.2d 264.

There was no appeal from its decisions. The only remedy of an aggrieved party was to file a petition in the superior court for a writ of mandate within 30 days after the order of the board became final, seeking a review in accord with section 1094.5 of the Code of Civil Procedure. Since January 1, 1955, section 22 of article XX of the Constitution, implemented by sections 23080–23091 of the Business and Professions Code, has provided for an appeal from a decision of the department. Section 24301 of the Business and Professions Code reads:

" 'Subject to the provisions of Section 22 of Article XX of the Constitution, any ruling, order, or decision of the department is subject to review as provided by law in any court of competent jurisdiction in the county in which the person affected resides.'

" 'Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy must be exhausted before the courts will act. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715. Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. Abelleira v. District Court of Appeal, supra, 17 Cal.2d at page 293, 109 P.2d 942; United States v. Superior Court, 19 Cal.2d 189, 194, 120 P.2d 26. The doctrine of exhaustion of administrative remedies applies where a statute provides an administrative remedy, even though the terms of the statute do not make the exhaustion of the remedy a condition of the right to resort to the courts. First Nat. Bank of Greeley v. Board of Com'rs of Weld County, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784, 788–789.

In Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, where the Supreme Court issued a writ of prohibition restraining the District Court of Appeal from entertaining an application for a writ of mandate to review the action of the California Employment Commission, it is said (17 Cal.2d at page 291, 109 P.2d at page 949):

"Lack of jurisdiction in the District Court of Appeal to issue its writ of mandate is clearly established when the foregoing principles are considered in connection with a settled doctrine of administrative law. The Unemployment Insurance Act, summarized above, contains a complete administrative procedure, with provision for one original determination and two appeals, fulfilling every requisite of due process of law. Until that administrative procedure has been invoked and completed, there is nothing that the District Court of Appeal or any other court may review; it cannot interfere in the intermediate stages of the proceeding. The employers have no standing to ask for judicial relief because they have not yet exhausted the remedies given them by the statute. They still have their appeal to the commission, which appeal has not yet been decided adversely to them, and prior to the prosecution of this appeal they have no right to demand an extraordinary writ from a court."

And at page 293 of 17 Cal.2d, at page 950 of 109 P.2d, we find the following:

"Bearing in mind the analysis of jurisdiction which has heretofore been made, and examining the authorities dealing with the rule, we are necessarily led to the conclusion that exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts."

[1] The foregoing rule is applicable even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds. United States v. Superior Court, 1941, 19 Cal.2d 189, 195, 120 P.2d 26.

[2–4] Petitioners, while tacitly admitting that they did not appeal to the Appeals Board from the order of revocation, nevertheless contend that the trial court's finding that no such appeal was taken is unsupported by the evidence. This, by reason of the fact that in the petition in this proceeding it is alleged "That petitioners have exhausted all remedies provided them under the Alcoholic Beverage Control Act [Health & Safety Code, § 11500 et seq.] and the

Government Code and your petitioners have no plain, speedy, or adequate remedy at law or further right of appeal and no remedy under the laws of the State of California except to file this petition for Writ of Mandate," which allegation is admitted in respondents' return. They seek to support their contention in this regard by reference to those authorities in this State which declare that a finding which is contrary to a fact admitted by the pleadings must be disregarded. Hibernia Savings & Loan Society v. Dickinson, 1914, 167 Cal. 616–619, 140 P. 265. This is undoubtedly the general rule but it is inapplicable under the circumstances here. In their petition, petitioners specifically set forth all of the proceedings had and taken by them before the respondent department, and these do not include the taking of an appeal to the Appeals Board from the order of revocation sought to be reviewed herein. Moreover, the record filed with their petition, certified to be a true, correct and complete transcript of the proceedings had before the respondent department, does not disclose that any such appeal was taken. The allegation in the petition that the petitioners have exhausted all of their administrative remedies, is a mere conclusion, which is contrary to the specific facts alleged and shown to exist by the record of the proceedings had before the department. As a consequence the conclusion, being contrary to the specific facts alleged, must be disregarded. 39 Cal.Jur.2d p. 51, § 31; Kidwell v. Ketler, 1905, 146 Cal. 12, 17–18, 79 P. 514; Gosewisch v. Doran, 1911, 161 Cal. 511, 515–516, 119 P. 656. And the allegation that petitioners were without the right to appeal from the order of revocation being contrary to a fact of which the court takes judicial notice, must likewise be disregarded. 39 Cal.Jur.2d p. 35, § 22.

[5] As we have seen, the trial court was without jurisdiction to entertain petitioners' application for a writ of mandate to review the action of the respondent department absent the exhaustion by petitioners of their administrative remedies. Therefore, when it was made to appear to the trial court by suggestion or otherwise that petitioners had not availed themselves of the right to appeal to the Appeals Board, it became its duty to refuse to proceed further. And this despite the fact that the petitioners may have alleged by way of conclusion, which the respondents admitted, that they had exhausted their administrative remedies, for it is axiomatic that parties may not by consent confer jurisdiction over the subject matter of an action where none exists. In People v. Shaw, 1927, 81 Cal.App. 312, 316, 253 P. 747, 749, the following excerpt from 7 Ruling Case Law, p. 1043, section 75 is quoted with approval:

> "'A court will recognize want of jurisdiction over the subject-matter even if no objection is made, and therefore whenever a want of jurisdiction is suggested, by the court's examination of the case or otherwise, it is the duty of the court to consider it, for if the court is without jurisdiction it is powerless to act in the case. As heretofore shown, the jurisdiction of a court over the subject matter of a cause of action must be conferred by law, and it cannot under any circumstances be conferred on a court, as such, by the consent of the parties.'"

The judgment is affirmed.

PARKER WOOD, Acting P. J., and VALLÉE, J., coucur.

160 Cal.App.2d 560

The MOST WORSHIPFUL SONS OF LIGHT GRAND LODGE ANCIENT FREE AND ACCEPTED MASONS, a California corporation, J. S. Pough, J. V. Keene and T. E. Earle, Plaintiffs, Cross-Defendants and Respondents,

v.

SONS OF LIGHT LODGE NUMBER 9, and William H. Wilson and M. J. Jordan, Individually and as members of Sons of Light Lodge Number 9; Oriental Lodge Number 13; Pride of Richmond Lodge Number 14, and Cecil F. Burgess and Reedie Bonner, individually and as members of Pride of Richmond Lodge Number 14; Orange Grove Lodge Number 20, and Duffie Robinson and Willie Voltz, individually and as members of Orange Grove Lodge Number 20; and Pride of Richmond Lodge No. 14, Building Corporation, a non-profit corporation, Defendants, Cross-Complainants and Appellants.

No. 17558.

District Court of Appeal, First District,
Division 1, California.

May 19, 1958.

As Corrected on Denial of Rehearing
June 18, 1958.

Hearing Denied July 16, 1958.

Action against lodge members, who had taken assets of old lodge and formed new lodge, for declaration of a constructive trust based on fraud and for an accounting, wherein plaintiffs moved to amend complaint to include quiet title action against corporation to which new lodge had transferred real property of old lodge. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., permitted complaint to be amended and rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Bray, J., held that complaint alleging that fraternal lodge members who seceded from lodge and formed new lodge had taken all assets of old lodge including its properties and praying that property be restored and that title be quieted dealt with real property of lodge, and amending of complaint seven years later to include corporation which was alter ego of new lodge and to which real property of lodge had been conveyed, and to describe by metes and bounds that real property did not constitute allegation of new cause of action and was not barred by five-year statute of limitations.

Affirmed.

1. Pleading 🔑248(1)

A complaint cannot be amended to set up a new cause of action.

2. Limitation of Actions 🔑124

If statute of limitations has run against a particular party, a complaint may may not be amended to include that party.

3. Limitation of Actions 🔑124

Complaint alleging that fraternal lodge members who seceded from lodge and formed new lodge had taken all assets of old lodge including its properties and praying that property be restored and that titles be quieted dealt with real property of lodge, and amending of complaint seven years later to include as defendant a corporation which was alter ego of new lodge and to which real property of lodge had been conveyed, and to describe by metes and bounds that real property did not constitute allegation of new cause of action and was not barred by five-year statute of limitations. West's Ann.Code Civ.Proc. §§ 318, 455.

4. Beneficial Associations 🔑14

Where deed from one fraternal lodge to another lodge was signed by party who represented himself to be member and master of grantor lodge, but sometime prior to making of deed he had seceded from that lodge and was no longer a member or master, party had no authority to convey property for lodge and grantee lodge's deed purporting to convey property to building corporation carried no title.

5. Corporations 🔑1

In quiet title action against building corporation which held title to property allegedly taken by lodge members who seceded from old lodge to form new lodge which conveyed property to corporation evidence sustained finding that corporation was alter ego of new lodge and that if corporation were treated as an entity completely separate and apart from new lodge, a great fraud would be perpetrated.

6. Parties ⚷52

Where true title to real property allegedly taken from lodge by members, who formed new lodge and conveyed property to corporation, was in issue at all times in proceedings against new lodge, in view of fact that corporation was new lodge's alter ego, there could be no laches in delay in filing amended complaint to include corporation as defendant.

7. Venue ⚷15

Where action against new lodge which had been formed by lodge members, who seceded to form new lodge and who allegedly had taken assets of old lodge, was brought in one county to declare a constructive trust based on fraud and for an accounting, cause of action for quieting title to real property, which was in another county and which was also taken by members, was incidental to the action and court had jurisdiction notwithstanding constitutional provision that all actions for quieting title to real estate shall be commenced in county in which real estate is situated. West's Ann.Const. art. 6, § 5; West's Ann. Code Civ.Proc. § 392(1).

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Sol. A. Abrams, Anthony E. O'Brien, Bernheim Sugarman & Gilbert, Richmond, for appellants.

Lewis, Field, DeGoff & Stein, San Francisco, for respondents.

BRAY, Justice.

All defendants appeal from a judgment in favor of plaintiffs. However, it is the appeal of defendant Pride of Richmond Lodge No. 14 Building Corporation[1] which is solely urged.[2]

Questions Presented.

1. Propriety of court's action in permitting complaint to be amended seven years after its filing, and in overruling demurrer thereto and denying motion to strike the amended complaint.

2. Sufficiency of evidence to support judgment.

3. Is the action barred by statutes of limitation and laches?

4. Did the San Francisco Superior Court have jurisdiction?

Record.

In Most Worshipful Sons of Light Grand Lodge v. Sons, etc. Lodge, supra, 118 Cal.App.2d at page 80, 257 P.2d at page 465, we said "this case seems to be confusion worse confounded." This is the same case, and the confusion is more so. We there held, among other matters, that the members of Pride of Richmond Lodge No. 74, jurisdiction of the Most Worshipful Sons of Light Grand Lodge, who seceded therefrom and formed a new lodge, Pride of Richmond No. 14, jurisdiction of the Most Worshipful Hiram of Tyre Grand Lodge, had no right to take with them the assets of Lodge No. 74. The original complaint in this action was filed August 14, 1946. March 27, 1947, an amended complaint was filed which for the first time named Lodge No. 14 as a defendant. The case went to trial in 1948. Judgment went for all defendants. We reversed that judgment in 118 Cal.App.2d 78, 257 P.2d 464, supra. Neither at the time of trial in 1948 nor at the time of our determination of the appeal was defendant building corporation a party to the action. December 3, 1954, plaintiffs again amended their complaint bringing in the building corporation as a defendant and describing the real property, the title to which is the issue on this appeal. The record title to that property follows: November 27, 1944,[3] deed by Dave Amos and wife to five men. January 19, 1945, deed from them to Lodge No. 74. September 27, 1946, deed purporting to convey the property from Lodge No. 74 to Lodge No. 14. December 2, 1946, the building corporation was incorporated. December 31, 1948, deed from Lodge No. 14 to the building corporation.[4]

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[1] Hereafter referred to as the building corporation.

[2] The judgment requires the other defendants to restore to plaintiffs certain lodge paraphernalia, moneys, and other personal property which the court found had been illegally taken from plaintiffs. As the other defendants have not urged any invalidity of the judgment as to them and as we find from a study of the record that the judgment as to them is well supported, we deem it necessary to discuss only the appeal of the building corporation. For a detailed statement of the background and facts of this case see Most Worshipful Sons of Light Grand Lodge, etc. v. Sons, etc., Lodge, 118 Cal.App.2d 78, 257 P.2d 464. See also Most Worshipful Hiram of Tyre Grand Lodge, etc. v. Most Worshipful Sons, etc., Lodge, 94 Cal.App.2d 25, 210 P.2d 34; Most Worshipful Sons of Light Grand Lodge, etc. v. Sons, etc., Lodge, 91 Cal.App.2d 582, 205 P.2d 722; Most Worshipful Sons of Light Grand Lodge, etc., v. Sons, etc., Lodge, 140 Cal.App.2d 833, 295 P.2d 912.

The trial court found that the building corporation's sole business was to hold the real property for Lodge No. 14, that it was and is Lodge No. 14's alter ego, that in furtherance of the conspiracy to deprive Lodge No. 74 of its assets defendants unlawfully attempted to transfer to Lodge No. 14 said assets, including the real property, and that the deed purporting to transfer the real property from Lodge No. 74 to Lodge No. 14 and the one from Lodge No. 14 to the building corporation were void. Judgment was entered declaring, among other matters, that said deeds were void, requiring defendants to return to plaintiffs the other assets taken from Lodge No. 74, and requiring defendants to vacate said real property, turn its possession over to Lodge No. 74, and enjoining Lodge No. 14 from using the name Pride of Richmond.

1. Propriety of Amendment.

[1-3] A complaint cannot be amended to set up a new cause of action. (See 39 Cal.Jur.2d 364.) If the statute of limitations has run against a particular party, a complaint may not be amended to include that party. See Thompson v. Palmer Corporation, 138 Cal.App.2d 387, 291 P.2d 995; see Code Civ.Proc. § 318, 5-year statute of limitations. Seven years had expired from the time of the filing of the original complaint and the first amended complaint and over five years had expired from the date when the building corporation acquired the property before the second amended complaint was filed. Therefore the propriety of filing this amendment depends upon whether a new cause of action was set up and whether the building corporation was strictly a new party. The amended complaint as it stood at the time of the amendment in question alleged among other matters that defendants wrongfully and unlawfully attempted "to convert and transfer any and all *of the assets* of said Grand lodge and its subordinate lodge, *including* the seal, charter, ritual, *properties* and funds thereof to their own uses and purposes * * *" (Emphasis added.) In our opinion in 118 Cal. App.2d 78, 257 P.2d 464, supra, we said that the seceding members took with them "* * * and including the real property of Pride of Richmond Lodge No. 74." 118 Cal.App.2d at page 81, 257 P.2d at page 466. The prayer asked "That the plaintiffs be restored to the custody and possession of said property and that their title thereto be confirmed and quieted." Thus the complaint dealt with not only the personal property of Lodge No. 74 but also the real property. Therefore, amending to describe by metes and bounds that real property did not constitute the alleging of a new cause of action. Section 455, Code of Civil Procedure, which provides that in an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon exe-

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[3] The dates given are the dates the deeds were recorded.

[4] There were no revenue stamps attached to this deed. October 17, 1949, a deed from Lodge No. 14 to the building corporation was recorded bearing revenue stamps totaling $7.70.

cution, to identify it, does not change the situation. While the fact that the property was not fully described might make the complaint subject to demurrer for uncertainty, such fact did not make the cause of action concerning it any different from the one properly describing it. Moreover, if the failure to fully describe the property caused a failure to state a cause of action, a proposition with which we do not agree, the amendment did not state a new cause of action, as it has been held that where the original complaint does not state a cause of action, an amendment stating one is not precluded. Klopstock v. Superior Court, 17 Cal.2d 13, 20, 108 P.2d 906, 135 A.L.R. 318.

The situation here is different from that in Atkinson v. Amador & S. Canal Co., 53 Cal. 102. There an action was brought for damage to the plaintiff's described lands from the defendant's hydraulic mining operations. After the statute of limitations ran the plaintiff filed an amended complaint to include an additional ranch which had not been included or referred to in the original complaint. The court held that the injury to this ranch constituted a new cause of action which was barred by the statutes of limitation. There is a vast difference between leaving the property out completely and in referring as was done in our case to it as "properties" and "assets."

Taylor v. Newton, 117 Cal.App.2d 752, 257 P.2d 68, answers in effect defendant's contention that the statute of limitations had run against the building corporation and that hence it could not be brought in to the case by amendment of the complaint. There the plaintiff filed an action against one Newton, the N. H. Development Company, a corporation, and the Newton Company, a partnership, and alleged that the plaintiff had a judgment against Newton that he was unable to collect because Newton had transferred all his assets to the corporation and the partnership to avoid payment of the judgment. The complaint also alleged that both the corporation and the partnership were alter egos of Newton. It asked that the fact that the corporation and the partnership were the alter egos of Newton be established and that their assets be subjected to the lien of the plaintiff's judgment. On appeal from a judgment in the plaintiff's favor, one of the points especially urged was that between the making of the transfers complained of and the filing of the suit the statutes of limitation had run. In upholding the judgment the court said concerning this contention (117 Cal.App.2d at page 757, 257 P.2d at page 71): "Appellants seem to assume that the instant action is one to set aside a fraudulent conveyance but, as respondent correctly points out, she is not seeking to set aside any transfer, fraudulent or otherwise, but is merely seeking to have the fictitious identity of appellant corporation disregarded, and hence sections 337, 338 and 343 have no application here as the action is based on a 1948 judgment obtained by plaintiff against appellant Noel Newton, Sr." So in our case, the action as set forth in the amended complaint is to have established the fictitious identity of the corporation and the fact that by reason of fraudulent deeds executed by Lodge No. 14, the building corporation is holding property which actually belongs to plaintiffs.

In Craig v. San Fernando Furniture Co., 89 Cal.App. 167, 264 P. 784, it was held that where an action was brought against "San Fernando Furniture Company, a Corporation," and one other defendant, the complaint could be amended after the time provided by the statute of limitations to bring in as a party a copartnership doing business under the firm name and style of San Fernando Furniture Co. The court said (89 Cal.App. at page 171, 264 P. at page 786): "Where a group of people are conducting a business under a common name, the law recognizes that group in its entity as a legal entity, and whether the group of persons see fit to avail themselves of the provisions of the law and form a corporation, or whether they see fit to conduct that business under a common name without incorporating, the legal entity still exists and is designated by the common name adopted or used." See also Thompson v. Palmer Corporation, supra, 138 Cal.App.2d

387, 291 P.2d 995. While both cases held that where an action is brought against individuals only, a corporation may not be substituted for them as the corporation is a different entity from the individuals, this is not the situation in our case. While neither the Craig nor the Thompson case deals with the alter ego theory, the portions of each holding that a copartnership may be substituted for a corporation points up the fact that where, as here, there is reason to disregard the separate entity of the building corporation from Lodge No. 14, no new party was added by the amendment.

The building corporation appears on its face to be a distinctly different entity from any of the defendants. However, it was alleged and subsequently found by the court that it is the alter ego of Lodge No. 14. Therefore it was properly brought in to the action, and as hereafter set forth, the statute limitations did not run against it. Hence, the court properly overruled the demurrer to the amended complaint and denied the motion to strike it from the files.

2. Evidence.

[4] The evidence fully supports the judgment, both as to the finding that Lodge No. 14 and the building corporation never acquired title to the real property and as to the finding that the latter is the alter ego of the former. The evidence shows that the deed purporting to convey the property from Lodge No. 74 to Lodge No. 14 is void and carried no title. Hence the deed from Lodge No. 14 to the building corporation carried no title. The deed from Lodge No. 74 to Lodge No. 14 was signed by one Burgess who represented himself to be a member and master of Lodge No. 74, but sometime prior to the making of the deed he had seceded from that lodge, was no longer a member or master and had no authority to convey the property for the lodge.

The land was donated to the trustees by Amos for community and lodge purposes provided a nice building were built on it. He testified that another condition was that the Grand Lodge and its subordinate lodges were not to have anything to do with it. However, he made no protest when the trustees conveyed it to Lodge No. 74 and his other actions indicate that there was no such condition. The court so found. At the time of the secession, a building had been partially constructed on the property and was sufficiently completed to allow meetings to be held therein. Thirty-five hundred dollars had been spent on the building before the secession. This amount came from Lodge No. 74, Pough, the Grand Master, having loaned $478. Since that time $10,000 has been used. Most of that sum came from a deed of trust to the Bank of America to which the property is still subject. There is also an outstanding deed of trust to certain attorneys who represent the building corporation.

The following evidence shows the alter ego character of the building corporation: Burgess on seceding from Lodge No. 74 immediately set up a new lodge with the old title "Pride of Richmond Lodge," changing only the number. He organized the building corporation, giving it the same name as the new lodge, "Pride of Richmond Lodge No. 14 Building Corporation." There was testimony that the sole purpose of the formation of the building corporation was to hold the property for Lodge No. 14. At the prior trial Burgess testified that the property belonged to Lodge No. 14 although at that time it had been deeded to the building corporation. There is no evidence that the building corporation paid Lodge No. 14 any consideration for the property. Apparently to indicate that there was a consideration a second deed bearing revenue stamps from Lodge No. 14 to the building corporation was executed, the first deed bearing no revenue stamps. The lodge paid two installments of taxes on the building after title had been transferred to the building corporation and also paid for the janitorial service. The policy of operating the building was a matter discussed and decided by the lodge. For four or five years the lodge collected rent for the occupancy of the building by others. Thereafter some of the rent went to the lodge and some to the corporation. The membership of the corporation was the membership of Lodge No. 14. Later the corporation took in as members two women and two members of Lodge No. 74 who had not seceded, and who were not consulted as to such membership. The master of Lodge No. 14 determines who shall be president of the building corporation. The fact that the building corporation has a different attorney than Lodge No. 14 has, and that there is a slightly different membership in the building corporation from that of the lodge (at most four additional members), does not change the alter ego relationship between the two entities.

[5] The evidence fully supports the conclusion that if the building corporation is treated as an entity completely separate and apart from Lodge No. 14 a great fraud would be perpetrated. Lodge No. 74 would be deprived of property which the court has found to be fraudulently taken from it by Lodge No. 14. Applicable here is the following from Clark v. Millsap, 197 Cal. 765, 781, 242 P. 918, 924: "It is a well-recognized rule of law that a corporation may be considered a legal entity when used for the accomplishment of a legal purpose. Corporations, however, cannot be used as a cover under which wrongs may be committed and fraud perpetrated. In such a case the court will look through the form of the corporation to ascertain its actual purpose and intent. If the purpose and intent of the corporation are bad, its corporate entity will be no cover for wrong, fraud and bad faith." See also Wiseman v. Sierra Highland Mining Co., 17 Cal.2d 690, 698, 111 P.2d 646; Erkenbrecher v. Grant, 187 Cal. 7, 11, 200 P. 641.

In Shafford v. Otto Sales Co., Inc., 149 Cal.App.2d 428, 308 P.2d 428, we gave the tests for the application of the alter ego doctrine as: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." 149 Cal.App.2d at page 432, 308 P.2d at page 431. Both of those tests are met in this case. The unity of interest and ownership of the building corporation by Lodge No. 14 is such that there is no separate personality of the corporation from the lodge. Secondly, if the acts of the corporation are treated as those of the corporation alone, an inequitable result would necessarily follow.

Defendant contends that the original deed executed by Amos to the five men was given to them as trustees under certain oral conditions, one of which was that Lodge No. 74 was to have nothing to do with the property. His prior testimony, his actions and those of all concerned belie his later testimony to that effect. At most this made a conflict in the evidence which the trial court resolved against Amos' later version.

3. Statute of Limitations and Laches.

[6] It is apparent from the evidence at the first trial introduced at the later trial that the true title to the real property was in issue at all times. In view of the court's finding that the building corporation was Lodge No. 14's alter ego, there could be no laches in plaintiffs' delay in filing the amended complaint, nor could any statute of limitations run.

4. Jurisdiction.

[7] Defendant contends that the San Francisco Superior Court had no jurisdiction of the action because of section 5, article VI of the Constitution, which provides "all actions for the recovery of possession of, quieting the title to * * * real estate, shall be commenced in the county in which the real estate * * * is situated." It has been held that this section as well as section 392, subdivision 1, Code of Civil Procedure, to the same effect, only applies "when land or an interest therein is the exclusive subject-matter of the action * * *" Weygandt v. Larson, 130 Cal.App. 304, 308, 19 P.2d 852, 853. "In construing article VI, section 5 of the Constitution, and section 392 of the Code of Civil Procedure, the reviewing courts of California have

frequently determined that an action is transitory and that the court of the county where the defendants, or some of them reside, has jurisdiction to try the cause when the suit for possession of real property, or to quiet title thereto, or to enforce liens thereon, is joined in good faith with another cause involving personal obligations. [Citations.]" Vaughan v. Roberts, 45 Cal.App.2d 246, 253, 113 P.2d 884, 889. This action was brought to declare a constructive trust based on fraud and for an accounting. The quiet title relief was incidental to the action. In LeBreton v. Superior Court, 66 Cal. 27, 4 P. 777, it was held that in a proceeding to enforce a trust on both personal and real property the trustee may be sued wherever he may be found. San Francisco Superior Court had jurisdiction.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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160 Cal.App.2d 511

Frank LINDNER, Plaintiff and Appellant,

v.

Hyman FRIEDNASH, Defendant and Respondent.

Civ. 22533.

District Court of Appeal, Second District, Division 3, California.

May 15, 1958.

Rehearing Denied May 29, 1958.

Hearing Denied July 9, 1958.

Action to recover balance of purchase price for wine sold. The Superior Court of Los Angeles County, McIntyre Faries, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that joint adventurer could not escape liability, for price of goods sold to venture and title to which was taken in his name, merely by reason of fact that a portion of money which he had contributed for payment of purchase price had, by wrongful act of his coadventurer, been converted by latter to his own use, as was also a portion of wine so purchased.

Reversed.

1. Joint Adventures ⚷7

Joint adventurer could not escape liability for price of goods sold to venture and title to which was taken in his name merely by reason of fact that a portion of money which he had contributed for payment of purchase price had, by wrongful act of his coadventurer, been converted by latter to his own use, as was also a portion of goods so purchased.

2. Joint Adventures ⚷7

Even though joint adventurer only agrees to contribute a stated sum of money to venture, he may be held liable for debts contracted by venture in carrying out purposes for which it was formed.

3. Joint Adventures ⚷7

Where very purpose of joint venture was to acquire wine, adventurer had power to purchase wine and bind coadventurer to obligation incurred by reason of purchase.

4. Joint Adventures ⚷7

That seller might have relied upon promise of one joint adventurer that his coadventurer would pay for merchandise would not absolve latter from liability, as a member of venture, for debt incurred by it in thus promoting its purposes.

5. Joint Adventures ⚷7

That one adventurer did not know from whom his coadventurer had purchased, or was purchasing, wine would not absolve him from liability for price of wine sold to venture, whose purpose was purchasing of wine.

6. Estoppel ⚷75

That seller had caused warehouse receipt for goods sold to be issued in name of adventurer as pledgor and financier as pledgee would not estop seller from recovering from such adventurer for goods sold after a portion of money which such adventurer had contributed for payment of purchase price had, by wrongful act of his coadventurer, been converted by latter to his own use.

7. Estoppel ⟹72

Issuance of warehouse receipt in adventurer's name in advance of payment of purchase price for wine did not constitute such negligence on part of seller as would, under maxim burdening negligent one of two innocents with loss, entitle such adventurer to escape liability for price of goods sold to venture after a portion of money which such adventurer had contributed for payment of purchase price had, by wrongful act of his coadventurer, been converted by latter to his own use. West's Ann.Civ.Code, § 3543.

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Smallpage & Willis, Stockton, Hill, Farrer & Burrill, Los Angeles, Lafayette J. Smallpage, Stockton, and Carl M. Gould, Los Angeles, for appellant.

Benjamin T. Weinstein, Beverly Hills, and McLaughlin & Casey, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

Plaintiff as assignee of the Village Winery, Inc. instituted this action to recover from defendant the balance of the purchase price of 50,000 gallons of wine allegedly sold and delivered by said assignor to the defendant. Judgment was rendered in favor of the defendant and plaintiff appeals. Throughout this opinion we shall refer to the assignor as plaintiff or simply as "winery."

There is no substantial dispute with respect to the facts. Plaintiff was a processor of wine, having its place of business at Escalon, California. One Perenchio was a wine broker in Los Angeles and as such had acted from time to time as broker for the sale of wine by plaintiff. The defendant was engaged in the retail liquor business in Las Vegas, Nevada. On November 20, 1950, Perenchio and defendant entered into a written agreement of joint venture for the purchase and sale of 50,000 gallons of sweet wine. The agreement recites that Perenchio was the purchaser of 50,000 gallons of sweet wine of the 1949–1950 vintage, stored at his winery "known as the Village Winery, located in Escalon, California"; that the purchase price thereof was 77½ cents per gallon and that Perenchio had paid on account of such purchase price the sum of $6,750. Perenchio agreed to store and maintain the wine "at his winery" in a saleable condition without charge or cost to the joint venture or the defendant for such storage and maintenance. Perenchio likewise agreed to insure the wine against loss and pay the premium for such insurance, the proceeds of which insurance for any loss by reason of destruction of or damage to the wine, to be paid directly to the defendant, who should be entitled to first deduct "his investment and any expenses he may have and one-half of the profits, if any, and remit balance to" Perenchio. The latter also agreed to indemnify the defendant and save him free and harmless "of and from any loss by reason of this joint venture"; but any profits from the transaction were to be equally divided between Perenchio and the defendant. The agreement then provides as follows:

> "Second Party [defendant] agrees to invest Twelve Thousand Dollars ($12,000.00) in this joint venture, which funds are to be used to complete the purchase of the above described merchandise, the entire purchase price being arrived at and paid as follows:

Paid by First Party	$6,750.00
Paid by Second Party	$12,000.00
Loan from Bank	$20,000.00
Total purchase price of merchandise	$38,750.00

"Second Party agrees to use his credit and to arrange for the loan of Twenty Thousand Dollars ($20,000.00) above mentioned, with the understanding that warehouse receipts for said wine shall be used as security for said loans.

"It is mutually agreed that warehouse receipts for said merchandise shall be issued and same used as security for the above loan and Second Party shall be designated on said warehouse receipts as the owner of said wine."

The court found that neither plaintiff nor plaintiff's assignor knew of the contents of the joint venture agreement until after plaintiff's assignor had caused the warehouse receipt to be issued in the name of the defendant as hereinafter stated.

We pause here to point out that the recital in the agreement that the Village Winery was the winery of Perenchio, was untrue as was also the representation that Perenchio had paid on account of the purchase price of the 50,000 gallons of wine therein mentioned, the sum of $6,750. In truth and in fact Perenchio had not, as of the date of the agreement, agreed to purchase the wine nor had he paid anything on account of the purchase price thereon.

On, or immmediately prior to the date of the execution of the joint venture agreement above referred to, Perenchio stated to plaintiff's manager that he and defendant were going into a joint venture for 50,000 gallons of wine. When asked by plaintiff's manager how the wine was to be paid for, Perenchio stated that he would need a warehouse receipt covering the same on which to borrow money and that the receipt should be issued in the name of the defendant; Perenchio representing to the plaintiff that the defendant was reliable and that the purchase price would be paid. Pursuant to this request plaintiff caused to be delivered to Perenchio a nonnegotiable warehouse receipt issued by the Lawrence Warehouse in the name of defendant, covering 50,000 gallons of wine in the Lawrence Warehouse located within the premises of plaintiff's assignor. Thereafter this receipt was returned to plaintiff with the request that one be issued in the name of the Union Bank and Trust Company so that money could be borrowed upon it. In compliance with such request plaintiff caused a new warehouse receipt to be issued in the name of the defendant as pledgor and the Union Bank and Trust Company as pledgee. This receipt was forwarded to the bank which thereupon made a loan thereon to the defendant in the sum of $20,000, the proceeds of which loan the bank, at the direction of the defendant, remitted to the plaintiff and which amount was credited by the plaintiff on its books to the account of the defendant. At the same time defendant paid to Perenchio the additional sum of $12,000 pursuant to the terms of the joint venture agreement.[1] The trial court found "that in causing the second warehouse receipt to be issued by Lawrence Warehouse Company, plaintiff's assignor was completing its sale of such wine to the joint venture, composed of A. J. Perenchio and defendant, subject to the lien of the above-described pledge and to any such prior rights as defendant might have as against A. J. Perenchio by reason of the warehouse receipt being issued in the name of the defendant as pledgor." Later, defendant repaid the loan obtained from the Union Bank, and on January 29, 1951, the bank executed a written release of its interest in the warehouse receipt whereby it authorized the delivery to the defendant of the wine covered by the receipt issued in the name of the bank and defendant as heretofore stated.

Subsequently, Perenchio secured the delivery of some 37,919 gallons of wine by the Lawrence Warehouse to various persons to whom Perenchio had sold the same, Perenchio retaining the proceeds and neither the plaintiff nor the defendant received any part thereof. Defendant sold the balance of the wine in two lots and received from the sale thereof a total of $8,184.87 which he retained. Also at some later date, defendant instituted an action against the Lawrence Warehouse Company for damages as a result of the release by it of wine upon the order of Perenchio and secured a judgment in that action in the sum of $23,815.13, which judgment was affirmed upon appeal (Friednash v. Lawrence Warehouse Co., 121 Cal.App.2d 202, 263 P.2d 45.) The judgment was paid in due course to the defendant and the proceeds thereof were retained by him. As a consequence, defendant received on account of the purchase price of said wine, only the sum of $20,000.

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[1] Why defendant, knowing there was then a balance of at least $32,000 due upon the purchase price of the wine, paid the $12,000 to Perenchio rather than plaintiff does not appear.

[1] Inasmuch as the trial court found that the sale of the wine was made by plaintiff to the joint venture, the problem presented, reduced to its simplest terms, would appear to be this: May one joint venturer escape liability for the price of goods sold to the venture and title to which was taken in his name by reason of the fact that a portion of the money which he contributed to the venture for the payment of the purchase price thereof was, by the wrongful act of his coadventurer, converted by the latter to his own use, as was also a portion of the goods so purchased?

"The common definition of a joint adventure is, 'a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation, or as an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge.' 48 C.J.S. Joint Adventures § 1, pp. 801–802; see also Nelson v. Abraham, 29 Cal.2d 745, 749–750, 177 P.2d 931, and authorities there cited." Sime v. Malouf, 1949, 95 Cal.App.2d 82, 95–96, 212 P.2d 946, 953, 213 P.2d 788.

"The relationship of joint venturers is that of a mutual agency, akin to a limited partnership." Campagna v. Market St. Ry. Co., 1944, 24 Cal.2d 304, 308, 149 P.2d 281, 283.

In 48 C.J.S. Joint Adventures § 14, pp. 866–867, it is said: "Substantially the same rules with respect to principal and agent applicable to members of a partnership apply to members of a joint adventure with respect to contracts with third persons within the scope of the joint enterprise, and a joint adventurer may bind his associates by a contract which is in furtherance, or within the scope, of the joint enterprise."

In Larson v. Thoresen, 1951, 36 Cal.2d 666, 669, 226 P.2d 571, 573, it is said:

"Where the evidence clearly shows the parties' intention to engage in a joint enterprise for profit it has been held that the principles governing joint venture apply irrespective of how title to the property is taken. McNab v. Mills, 199 Cal. 231, 248 P. 657; Bastjan v. Bastjan, 215 Cal. 662, 12 P.2d 627; Swarthout v. Gentry, 62 Cal. App.2d 68, 144 P.2d 38."

A joint adventurer, holding or acquiring title to property for the joint adventure is a trustee for his coadventurers and this is so though he buys and pays for the property with his own funds. 28 Cal.Jur.2d 494.

In Lerner v. Sanderson, 1932, 126 Cal. App. 481, 484, 14 P.2d 564, it is held that where one joint adventurer purchases personal property pursuant to the joint venture agreement, the property belongs to the joint venture and there is liability for the purchase price against both adventurers, and further that delivery of the property to one joint adventurer constitutes delivery to both.

In light of the foregoing legal principles, it would appear clear that the defendant is liable to the plaintiff for the wine purchased and delivered to him on behalf of the joint venture. The sole and only purpose of the joint venture was to acquire by purchase 50,000 gallons of wine and to undertake to dispose of it at a profit. That the defendant knew that the purchase price of the wine had not been paid is apparent from the fact that the joint venture agreement expressly so states, and that it is expressly provided therein that $20,000 of the purchase price is to be obtained by a loan to be negotiated by the defendant upon the warehouse receipt covering the wine, to be issued in his name. Contrary to the assertion of defendant, the latter by the terms of the joint venture agreement did not agree to pay the sum of $32,000 to Perenchio, but to "invest" this sum in the joint venture in order to enable it to acquire the 50,000 gallons of wine in question. The fact that $12,000 was delivered by defendant to Perenchio does not detract from the fact that this was part of defendant's agreed contribution to the venture. It was presumably delivered to Perenchio in order that he, who had negotiated for the purchase of the wine on behalf of the joint venture, might remit the same to the one from whom the wine was being purchased by the venture.

The finding "That defendant did promise in the said joint venture agreement that he would furnish and supply to A. J. Perenchio $32,000.00, on account of the purchase price of said wine, which A. J. Perenchio represented in said joint venture agreement to be unpaid, and defendant did so furnish and supply to A. J. Perenchio such amount of money immediately upon delivery of the warehouse reciept showing Union Bank & Trust Company, as pledgee, and defendant as pledgor" does not operate to absolve defendant from liability. "A joint adventurer does not discharge his liability for the purchase price of a commodity purchased from a third person by payments made to the associate of such joint adventure." 48 C.J.S. Joint Adventures § 14, p. 869.

[2] Defendant argues that the general rule imposing liability upon joint venturers for debts incurred in carrying out the joint venture enterprise, is not applicable "with respect to a joint venture wherein one of the joint venturers agrees to contribute some specific thing to the joint venture." If by this statement defendant undertakes to assert that a joint venturer who agrees to contribute a stated sum of money to the capital of a joint venture is not liable for debts contracted by the venture for the purpose of carrying out the purposes for which it was formed, it is clearly erroneous. The only authorities cited by defendant in support of this contention are Hayward's v. Nelson, 143 Cal.App.2d 807, 299 P.2d 1013, and Hansen v. Burford, 212 Cal. 100, 297 P. 908. The inapplicability of these cases to the factual situation here is best illustrated by the following language of Mr. Justice Ashburn in Engineering Service Corp. v. Longridge Inv. Co., 153 Cal. App.2d 404, 314 P.2d 563, quoted with approval by this court in Bariffi v. Longridge Development Co., 1958, 156 Cal.App. 2d 583, 320 P.2d 192, 201:

"The cited cases of Hansen v. Burford, 212 Cal. 100, 111, 113, 297 P. 908 and Hayward's v. Nelson, 143 Cal.App.2d 807, 814, 299 P.2d 1013, are not opposed to these views. In the first instance it was found that a joint venture existed (212 Cal. at page 110, 297 P. at page 912), and in the second it was deemed unnecessary to pass upon the point (143 Cal.App.2d at page 814, 299 P.2d at page 1017). Both proceeded upon the assumption of existence of such a venture, with the fact of its existence and the identity of its members unknown to the creditors; also, a reliance by the creditor upon the responsibility of the member who incurred the debt and an excess of authority on his part in making the contract. In such circumstances it was held that the undisclosed venturers were not liable upon the contract. The Hansen case quotes from 33 Corpus Juris 872, as follows: '"One who is a member of a joint adventure but who is not known to be such at the time by a third person who enters into a contract with another member individually is not rendered liable to such third person for services rendered under such contract, or for damages for the breach thereof, by the fact that the contract relates to the business of the joint adventure, if the contracting member in making such contract exceeded his authority and had no power to bind his associates thereby."' 212 Cal. at page 111, 297 P.

at page 913. To this the later work adds the important qualification: '[B]ut as a general rule a member of a joint adventure can bind his undisclosed associates by such contracts as are reasonably necessary to carry on the venture.' 48 C.J.S. Joint Adventures § 14, p. 868. All this is under the caption 'Liability of undisclosed member.'"

[3] The case here is not one where plaintiff seeks to charge defendant as an undisclosed member of a joint venture upon a contract with respect to which the contracting member was without power to bind his associates. The evidence is uncontradicted that plaintiff knew of the joint venture and that defendant was a member thereof at the time it agreed to sell the wine to the venture, and the trial court expressly found that the sale was to the venture and not to Perenchio. Moreover, as the very purpose of the venture was to acquire 50,000 gallons of wine, it may not be said that Perenchio was without power to purchase the same from plaintiff and bind defendant thereby.

[4] Defendant in his brief stresses the fact that the trial court found that plaintiff, in authorizing the delivery of a warehouse receipt in the name of defendant, "did not then rely upon defendant as the party who was obligated to pay plaintiff's assignor for the purchase of said wine, but trusted and relied upon A. J. Perenchio and his assurance that defendant would pay for such wine." It is difficult to reconcile this finding with that to the effect "That in causing the second warehouse receipt to be issued by Lawrence Warehouse Company, plaintiff's assignor was completing its sale of such wine to the joint venture, composed of A. J. Perenchio and defendant." The fact that plaintiff in making the sale to the joint venture may have relied upon the promise of Perenchio that defendant would pay for the wine, does not serve to negate defendant's liability as a member of the joint venture for a debt incurred by it in promoting the business of the venture. Plaintiff may not be entitled to recover against defendant upon the basis of plaintiff's representation that defendant would pay for the wine, but this does not serve to preclude a recovery against defendant as a member of the joint venture. Plaintiff's right to recover against defendant is not dependent upon any promise made by Perenchio that defendant would pay for the wine but rather upon the liability of defendant as a member of the venture for the unpaid purchase price of the wine, which the court found was sold to the venture and title to which was taken in the name of the defendant.

[5] Nor is it of consequence that, as found by the trial court, defendant did not know from whom Perenchio had purchased or was purchasing the wine. As a member of the venture defendant became liable for the wine purchased by his coadventurer on behalf of the venture without regard to his lack of knowledge as to the identity of the seller. At the time he executed the joint venture agreement and before he contributed any money to the venture, he knew that Perenchio was purchasing the wine from someone and that the purchase price therefor had not been paid.

In respondent's brief it is said that "The trial court decided against plaintiff on the grounds of equitable estoppel, or by invoking the maxim that between two innocent parties the one whose act caused the loss should suffer," and so it appears from the findings. Seeking to justify the judgment upon this basis, defendant professes to rely upon those authorities which declare the familiar rule that where the owner of personal property clothes another with the indicia of ownership thereof or apparent title to it, such owner is estopped from afterwards asserting his title against an innocent third party who was induced to deal with the apparent owner in reference thereto.

[6] Defendant's argument upon this score is difficult to follow inasmuch as the issuance of the warehouse receipt in defendant's name vested title in him as trustee for the joint venture—not in some third person with whom defendant dealt in the

honest belief, engendered by the receipt, that such person was the owner of the wine. The situation here is not that envisaged by the rule upon which defendant relies. This is made evident by the very authorities cited in respondent's brief. Thus in Phelps v. American Mortgage Co., 40 Cal.App.2d 361, 104 P.2d 880, therein cited, the plaintiffs delivered a number of promissory notes owned by them, endorsed in blank, to the defendant for the purpose of collection. The defendant, in violation of its trust, sold the notes to bona fide purchasers for value, and it was held that the latter acquired good title thereto as against the plaintiffs. This holding does not suggest, however, as counsel's argument would seem to assume, that if the notes had been sold and delivered by the plaintiff directly to the parties who purchased them from the defendant upon their promise to pay plaintiffs therefor, the latter would be precluded from recovery simply because they had not demanded and received payment at the time of the delivery of the notes. We are at a loss to understand the statement in respondent's brief to the effect that by issuing the warehouse receipt in defendant's name, plaintiff knew that it "was vesting Perenchio with evidence of ownership before Perenchio had paid for the wine." By what process of reasoning may it be said that the issuance of a warehouse receipt for goods in the name of "A" vests "evidence of ownership" of the goods in "B"? And yet this is the sole basis upon which respondent's argument upon this score rests. There is, of course, no question but that plaintiff, when it caused the warehouse receipt to be issued in defendant's name, knew that the purchase price of the wine had not been paid, but this fact was likewise known to the defendant at the time. Indeed, the terms of the joint venture agreement pursuant to which Perenchio, upon behalf of the venture, negotiated with plaintiff for the purchase of the wine, contemplated that the transaction would be handled in precisely this manner.

[7] Neither does the factual situation here call into play the maxim that "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civil Code, § 3543. The only fact to which defendant points as constituting negligence upon the part of plaintiff, is the issuance of the warehouse receipt in defendant's name in advance of the payment of the purchase price of the wine. It would indeed be a strange doctrine which declared that a vendor of personal property who vested title thereto in his vendee in advance of the receipt of the purchase price thereof was guilty of negligence, and by virtue of this maxim precluded from recovery of the purchase price thereof from his purchaser. The complete answer to this argument is to be found in the following statement appearing in defendant's own brief: "The fact is that in the commercial world, title to merchandise passes every day before the purchase price has been paid." Surely, conduct conforming to such a universal practice may not be characterized as negligent. Moreover, defendant could not, by the issuance of the warehouse receipt in his name, have been deceived into believing that the purchase price of the wine had been paid, for he knew the contrary to be the fact.

If the maxim in question were here applicable and the loss could be said to be due to the negligence of any one, it would appear to be that of the defendant rather than the plaintiff. Defendant met Perenchio for the first time shortly before entering into the joint venture agreement. He testified that he knew nothing concerning him other than that he had been told by an attorney friend of the defendant who introduced him to Perenchio, that the latter was a wine broker and had a fine reputation. From the inception, defendant knew that the wine was stored on the premises of the Village Winery at Escalon; that there was unpaid upon the purchase price at least $32,000; that Perenchio claimed to have previously paid on account of the wine $6,750, and yet defendant made not the slightest inquiry to verify any of these facts. It appears to us that the necessity of some investigation with respect thereto would have suggested itself to a reasonably prudent person, which, if pursued, would have readily disclosed that Perenchio had not purchased or agreed to purchase the wine and had paid nothing on account thereof.

In truth, the loss which one of the parties to this proceeding must bear was occasioned solely by reason (1) of the failure of Perenchio to make his promised contribution to the capital of the joint venture in the form of a payment of $6,750 on account of the purchase price of the wine, and (2) Perenchio's wrongful act in converting to his own use money of the venture entrusted to his care by the defendant and designed to discharge the debt incurred by the venture for the purchase price of the wine. Each of these defaults was the act of the defendant's coadventurer and agent, and may not be attributed to the plaintiff. The venture having purchased and received the wine, the defendant, as a member thereof, may not escape liability for the unpaid balance of the purchase price thereof. Cf. Grant v. Weatherholt, 1954, 123 Cal.App.2d 34, 50, 266 P.2d 185.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

Jack A. SCHLAG, Petitioner,
v.
INDUSTRIAL ACCIDENT COMMISSION OF The State of CALIFORNIA, and the Subsequent Injuries Fund of the State of California, Respondents.
Civ. 9419.

District Court of Appeal, Third District, California.
May 23, 1958.
Rehearing Granted June 10, 1958.
Opinion Vacated July 18, 1958.
See 327 P.2d 609.

Proceeding on petition by injured employee seeking review and annulment of order of industrial accident commission denying him benefits from the Subsequent Injuries Fund. The District Court of Appeal, Warne, J. pro tem., held that where employer of employee, who sustained permanent injuries, had knowledge of only one pre-existing disability, other pre-existing disabilities and impairments from which employee suffered could not be included in determining his eligibility for benefits from the Subsequent Injuries Fund.

Order affirmed.

1. Workmen's Compensation 🔑1030

Where employer of employee, who sustained permanent injuries, had knowledge of only one pre-existing disability, other pre-existing disabilities and impairments from which employee suffered could not be included in determining his eligibility for benefits from the Subsequent Injuries Fund. West's Ann.Labor Code, § 4751.

2. Workmen's Compensation 🔑1030

Underlying policy of statute relating to benefits from Subsequent Injuries Fund for pre-existing disabilities is to encourage hiring of handicapped workers. West's Ann.Labor Code, § 4751.

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Harry A. Ackley and Lewis F. Shearer, Woodland, for Petitioner.

Everett A. Corten, Daniel C. Murphy, Melvin S. Witt, San Francisco, for respondent Industrial Acc. Comm.

Edmund G. Brown, Atty.Gen., by Frederick Girard, Deputy Atty.Gen., and Irving H. Perluss, Asst.Atty.Gen., Sacramento, for respondent, Subsequent Injuries Fund.

WARNE, Justice pro tem.

[1] Petitioner seeks a review and annulment of an order of the Industrial Accident Commission denying him benefits from the Subsequent Injuries Fund.

Petitioner, an iron worker, sustained an injury to his neck, arising out of and occurring in the course of his employment. It was determined by the Industrial Accident Commission, hereafter referred to as the commission, that he suffered permanent disability from that injury and he was given a permanent disability rating of 13¼ per cent. He then sought benefits from the Subsequent Injuries Fund under Labor Code, section 4751, for the preexisting disabilities.

At the hearing, petitioner testified that he had the following preexisting disabilities and impairments: A right thumb disability, a left leg disability, a right foot disability, a neck disability, a left foot disability, a right ankle disability, a jaw and chest and heart disability. Some of the disabilities were symptomatic and some were asymptomatic just prior to the industrial injury.

The commission found that the petitioner suffered from multiple preexisting disabilities and physical impairment prior to the industrial injury but that the only one known to the employer was a preexisting disability to the neck. A further finding was that the combined disability resulting from the injury of April 7, 1955, and the known preexisting disability amounted to a permanent disability of 51½ per cent, a minimum of 70 per cent disability being required by Labor Code, section 4751. It was determined and ordered that the petitioner take nothing from the Subsequent Injuries Fund.

Petitioner contends that an employer need only have knowledge of some preexisting partial disability in order to warrant inclusion of all preexisting permanent disabilities and impairments in determining an employee's eligibility for Subsequent Injuries Fund benefits. On the other hand, it is the contention of the commission that knowledge by the employer of a disability preexisting in industrial injury does not warrant inclusion (for determining eligibility of an employee for Fund benefits) of other disabilities and impairments preexisting the industrial injury which were unknown to the employer. We have concluded that the contention made by the commission is correct.

Section 4751 of the Labor Code provides:

> "If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 per cent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article."

[2] The underlying policy of this statute is to encourage the hiring of handicapped workers. Subsequent Injuries Fund v. Industrial Acc. Com., 39 Cal.2d 83, 244 P.2d 889.

Knowledge of preexisting disability and impairment has been considered by the appellate courts of this state in four cases.

In State of California, Subsequent Injuries Fund v. Industrial Accident Commission, 135 Cal.App.2d 544, 553, 288 P.2d 31, 37, the court said, in considering the statute: "We conclude that section 4751, Labor Code, was not intended to apply to asymptomatic disease processes which were unknown to both employee and employer and which in nowise interfered with the employee's ability to work."

The above case was followed by Urquiza v. Industrial Accident Commission, 144 Cal.App.2d 322, 300 P.2d 871. In that case the employee had a preexisting mental disability known to him which the court found symptomatic prior to the industrial injury. The commission had made an award against the Fund but there was no evidence that the employer knew of this preexisting impairment. The court annulled the award and remanded the case to the commission. It was pointed out that in order to bring the petitioner within the provisions of section 4751 of the Labor Code there must be proof of the employer's knowledge of the prior impairment.

The same rule was followed in State of California, Subsequent Injuries Fund v. Industrial Accident Commission and Marguerite Bachrach, 147 Cal.App.2d 818, 306 P.2d 64. There the employee had a preexisting arthritic condition and suffered an industrial injury. One of the grounds annulling the award against the Fund was that the employer had no knowledge of the arthritic condition.

And in State of California, Subsequent Injuries Fund v. Industrial Accident Commission, 150 Cal.App.2d 716, 717, 719, 311 P.2d 26, 27, the court cited the above cases and said: "In view of the recent cases cited, there can be no doubt as to the rule which should be applied, and that the Subsequent Injuries Fund would only be liable in those cases where the preexisting injury was known or would have been known to the employer."

Petitioner argues that the above cases are inapplicable to the facts in the instant case because the employer here knew of the preexisting disability to his neck. However, the employer did not know of petitioner's preexisting multiple disabilities or impairment and as to those disabilities he stood in no different position in obtaining his employment than if he had been under no disadvantage. While it is true that none of the above cases involved an employee who had multiple preexisting disabilities or impairments, nevertheless, in the light of what has been said in those cases, it seems clear to us that only those preexisting disabilities or impairments may be considered which are easily recognizable permanent disabilities or which are known to the employer. It is apparent that in the instant case none of petitioner's preexisting disabilities, other than the disability to his neck, were easily recognizable disabilities and they were found not to have been known to his employer. Obviously, those disabilities not being known to the employer were not considered by him in hiring the petitioner. Thus, section 4751 of the Labor Code did not have the effect of encouraging the employment of petitioner insofar as the multiple preexisting disabilities were concerned. We, therefore, by reason of the rule laid down in the above mentioned cases, conclude that the commission properly considered only those preexisting disabilities which were known to petitioner's employer or that were easily recognizable.

The order of the Industrial Accident Commission is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

160 Cal.App.2d 393

Johnny Lee BARNES, a minor, Donald Glenn Barnes, a minor, and Rebecca Barnes, a minor, by Mildred Louise Barnes, their Guardian ad litem, and Mildred Louise Barnes, Plaintiffs and Respondents,

v.

Joseph S. ROCKHOLD, Watson Bros. Transportation Company, Inc., Defendants and Appellants.

Civ. 22858.

District Court of Appeal, Second District, Division 1, California.

May 13, 1958.

Hearing Denied July 9, 1958.

Wrongful death action. From a judgment of the Superior Court of Los Angeles County, Jesse J. Frampton, J., defendants appealed. The District Court of Appeal, White, P. J., held that since upon timely objection, by demurrer or answer, and upon offer of instructions respecting Arizona law, alleged defects in complaint and instructions could have been remedied, it was unfair for defendants to proceed throughout trial without pointing out such defects and then to urge them as fatal errors, requiring reversal on appeal.

Affirmed.

1. Pleading ⚷408

Objection, that complaint did not state facts sufficient to constitute a cause of action, was not waived by appellants' failure to raise it before trial by demurrer or answer. West's Ann.Code Civ.Proc. § 434.

2. Appeal and Error ⚷1036(1)

Recovery under Arizona wrongful death statute, not being subject to debts or liabilities of decedent, is, in reality, for benefit of widow and children of decedent; and even though applicable Arizona law required action to be commenced by personal representative of decedent, no prejudicial error could have resulted from bringing of action in names of decedent's widow and his three minor children, since judgment in their favor had cast no greater burden upon defendants than would have been placed thereon by judgment in favor of personal representative for their benefit. West's Ann.Code Civ.Proc. §§ 377, 434; A.R.S. §§ 12-612, 12-613.

3. Parties ⚷80(1)

Objection because of alleged defect of parties plaintiff was waived when action was tried as though complaint were in all respects sufficient. West's Ann.Code Civ. Proc. §§ 430, subd. 4, 434.

4. Appeal and Error ⚷1067

In view of substantial equivalence of Arizona statute, providing that "the jury shall give such damage as it deems fair and just", and California statute, providing that such damages may be given "as under all the circumstances of the case may be just", error, if any, in failing to instruct jury, in wrongful death action, on question of damages according to applicable Arizona law, could not have been prejudicial. West's Ann.Code Civ.Proc. §§ 377, 430, subd. 4, 434; A.R.S. § 12-613.

5. Appeal and Error ⚷883

Where trial had been conducted as if California law applied, district court of appeal would assume that all of parties had agreed at trial that issues should be determined pursuant to law of California and that, consequently, issues on appeal should be determined under California law, even though accident giving rise to wrongful death action had occurred in Arizona.

6. Appeal and Error ⚷193(1), 216(1)

Law and good morals should be one and inseparable; and where, upon timely objection by demurrer or answer, and upon offer of instructions respecting Arizona law, alleged defects in complaint and instructions could have been remedied, it was unfair for defendants to proceed throughout trial without pointing out such defects and then to urge them as fatal errors requiring reversal on appeal.

◆

Parker, Stanbury, Reese & McGee, Robert W. Stanley, Los Angeles, for appellants.

Donkin & Kurlander, Santa Monica, Orlan S. Friedman, Beverly Hills, for respondents.

WHITE, Presiding Justice.

Defendants appeal from a judgment against them in favor of the widow and three minor children of Burl Donald Barnes, who died instantaneously as the result of injuries received by him when he was crushed between the front end of the truck he had been driving and the back of defendants' trailer.

Decedent and defendant Rockhold were each driving a semi-truck and trailer east from California. Before daylight on January 12, 1956, Rockhold drove into the Ehrenberg Inspection Station and stopped a few feet behind a truck and trailer which was already stopped in one of the lanes awaiting clearance. A minute or so later decedent stopped his semi-truck and trailer a few feet behind that of Rockhold. Defendant Rockhold, in preparing to depart, released the brake on his vehicle and it rolled back a few feet, crushing decedent against the front of his own vehicle.

Plaintiffs reside in Oklahoma and are the sole heirs at law of the decedent. Defendant Watson Brothers Transportation Company is a resident of Nebraska licensed to do business in California. Defendant Rockhold, an employee of Watson Brothers acting within the scope of his employment at the time of the accident, resides in California.

The action was tried before a jury and the judgment for $65,000 entered upon their unanimous verdict. Motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial were denied.

The only errors specified in the opening brief are: (1) that the complaint fails to state a cause of action under the law of the State of Arizona where the accident occurred; and (2) that the court failed to instruct the jury on the question of damages according to the law of Arizona.

[1] As urged by appellants, the objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by their failure to raise it before trial by demurrer or answer. Code Civ.Proc. sec. 434.

[2] In the instant action, it is conceded that the complaint states a cause of action under the law of California (Code Civ. Proc. sec. 377), and that, if the action had been commenced by the personal representative of the decedent, the complaint would not be faulty under the Arizona law. Arizona Wrongful Death Statute, A.R.S. sec. 12–612. Under the Arizona statute, in the absence of other estate in Arizona, the action could have been commenced and maintained by the surviving widow in her own name alone and on behalf of the estate, and in any case "the amount recovered in such action shall not be subject to the debts or liabilities of the deceased". Arizona Wrongful Death Statute, A.R.S. sec. 12–613.

The difference in parties plaintiff required by the Arizona and California statutes is more apparent than real. The recovery in Arizona not being "subject to the debts or liabilities of the decedent", is in reality for the benefit of the widow and children of the decedent, although under the statutes of Arizona they may not bring the action in their own names as in California. The result is the same. Under the statutes of both states, the defendants were obligated to pay damages for the benefit of decedent's family. The burden of the judgment in the instant action in favor of the widow and children of the decedent casts no greater burden upon the appellants than would a judgment in favor of the personal representative for the benefit of decedent's heirs, in this action his widow and minor children. If the judgment is erroneous in that respect, the error is not prejudicial to appellants.

[3] The appellants' specification of the respect in which the complaint fails to state a cause of action is actually an objection because of an alleged defect of parties plaintiff, which was waived by their proceeding to try the action as though the complaint were in all respects sufficient. Code Civ.Proc. § 430, subd. 4; § 434.

[4] Defendants acquiesced in the conduct of the entire trial pursuant to the California law. They requested no instruction as to the Arizona law of damages. The Arizona statute provides that "the jury shall give such damages as it deems fair and just", and the California statute that such damages may be given "as under all the circumstances of the case, may be just". We are persuaded that the error, if any was committed with respect to instructions, likewise was more apparent than real, and without prejudice to appellants.

[5] Considering the entire record on the appeal now engaging our attention, we must assume that all the parties agreed at the trial that the issues should be determined pursuant to the law of California, and consequently the issues on appeal should be determined under the California law although the accident occurred in Arizona. See Lein v. Parkin, 49 Cal.2d 397,

318 P.2d 1; and Lubin v. Lubin, 144 Cal. App.2d 781, 786, 302 P.2d 49.

[6] Where, as in the instant action, upon a timely objection by demurrer or answer, and upon the offer of instructions respecting the Arizona law, the alleged defects in the complaint and instructions could then have been remedied, it was unfair for the defendants to proceed throughout the trial without pointing out such defects and then urge them as fatal errors requiring reversal on appeal. Law and good morals should be one and inseparable.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

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160 Cal.App.2d 332

In the Matter of the ESTATE of Ethel May KUTTLER, Deceased.

Bertha McQUARRIE, Petitioner and Appellant,

Earl Hayter, also known as O. E. Hayter, Petitioner and Appellant,

v.

Michael M. KUTTLER, Guardian for William Brent Kuttler, Joan Perry Kuttler, and Nancy Ann Kuttler, Minors, Petitioners, Contestants and Respondents.

Civ. 22428.

District Court of Appeal, Second District, Division 2, California.

May 12, 1958.

Rehearing Denied June 6, 1958.

Hearing Denied July 9, 1958.

Proceeding to probate instrument tendered as a holographic will made by decedent. From order of Superior Court, Los Angeles County, Newcomb Condee, J., refusing to admit instrument to probate, proponents appealed. The District Court of Appeal, Ashburn, Acting P. J., held that instrument which, after disinheriting decedent's grandchildren, her sole heirs, provided that two named persons should be notified "to dispose of my belongings as they see fit" together with admissible extrinsic evidence, disclose that instrument was testamentary in character and phrase "my belongings" included decedent's realty.

Affirmed in part and reversed in part with instructions.

Kincaid, J. pro tem., dissented.

1. Wills 🔑72

To have "testamentary intention" testator must have intended by the particular instrument offered for probate to make a revocable disposition of property to take effect upon his death.

See publication Words and Phrases, for other judicial constructions and definitions of "Testamentary Intention".

2. Wills 🔑72

In determining whether instrument offered for probate disclosed testamentary intent, search for testatrix' intention does not involve a determination of whether she understood legal effect of directions found to have been expressed by her in will since effect of which she has provided is governed by the substantive law.

3. Perpetuities 🔑4(1)

Trusts 🔑12

War and National Defense 🔑12

If testatrix makes a bequest which violates rule against perpetuities, immunizes a trust beneficiary's income from claims of creditors to an extent not recognized by statute, or defeats claim of alien property custodian to a future interest, that intention although plainly shown cannot prevail.

4. Wills 🔑93

In proceeding to admit to probate instrument tendered as the holographic will, extrinsic evidence of testatrix' conversations with her attorney in respect to drafting a formal will as well as her statements to others to effect that she had drawn a will were admissible to show testamentary intent of instrument.

5. Wills 🔑93

In proceeding to admit to probate instrument tendered as decedent's holographic will, instrument which disinherited decedent's grandchildren, her sole heirs, and then provided that two named persons should be notified "to dispose of my belongings as they see fit" together with extrinsic evidence, disclosed a testamentary intent.

6. Evidence 🔑588

While there is no universal formula for determining weight to be accorded testimonial evidence, testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by trier of fact.

7. Evidence 🔑594

Where uncontradicted testimony is properly disbelieved, its rejection does not create affirmative evidence to contrary of that which was discarded.

8. Powers 🔑1
Wills 🔑689

"Power of appointment" which may be created by will or deed is generally defined as a power or authority given to a person to dispose of property, or an interest therein, which is vested in a person other than donee of power.

See publication Words and Phrases, for other judicial constructions and definitions of "Power of Appointment".

9. Powers 🔑8

No particular form of words is necessary to creation of a power of appointment.

10. Powers 🔑10

Powers of appointment are valid in this state.

11. Powers 🔑19

Donee of general power of appointment may exercise it in his own favor and legal effect is to give him an absolute ownership.

12. Wills 🔑689

Fact that will disinherited testatrix' sole heirs and gave a general power of appointment over testatrix' property to two named persons to dispose of as they saw fit, did not invalidate instrument as a will on ground that it constituted a delegation to another of authority to make a will.

13. Powers 🔑25

Underlying theory of property received through a power of appointment is that the subject matter passes from the donor's estate directly to the appointee and not from the donee or his estate.

14. Wills 🔑466

Word "dispose" is a broad and comprehensive term with many shades of meaning and is described as a nomen generalissimum, and while standing by itself without qualification it has been said to have no technical signification, it has a familiar meaning when used in wills.

See publication Words and Phrases, for other judicial constructions and definitions of "Dispose".

15. Wills 🔑130

Fact that testatrix executing a holographic will expected to later make a more formal will did not detract from testamentary character of holographic instrument in question.

16. Wills 🔑74

A document may be a will although it disposes of only part of testator's property.

17. Wills 🔑448, 449

Presumption against intestacy, total or partial, is very strong and in construing will it is proper for trial court to take this presumption into consideration.

18. Wills 🔑559

Where testatrix of holographic will expressly disinherited her grandchildren which were her sole heirs, and provided that two named persons should be notified "to dispose of my belongings as they see fit", under circumstances phrase "my belongings" would be construed as including testatrix' realty. West's Ann.Prob.Code, §§ 409, 422.

See publication Words and Phrases, for other judicial constructions and definitions of "My Belongings".

Kenneth C. Beatson, Los Angeles, for appellant Bertha McQuarrie.

William C. Rau, Los Angeles, for appellant Earl Hayter.

Wellborn, Barrett & Rodi, Frank C. Hubbard, Gyte Van Zyl, Los Angeles, for respondents.

ASHBURN, Acting Presiding Justice.

Several appeals are presented together in this court and cause. Of primary importance is the one taken from an order refusing to admit to probate a holographic document made by decedent, Ethel May Kuttler, on February 16, 1956.

Decedent died a widow on February 28, 1956, leaving three grandchildren as her sole heirs; two brothers and a sister survived her, as did Earl Hayter to whom she was engaged to marry. Her estate consisted of cash, stocks, bonds, trust deed notes, furniture and household and personal effects; also certain real property appraised at $52,500; the entire estate was valued at $143,000.

Her sister, Bertha McQuarrie, and her fiance, Earl Hayter, petitioned for probate of the holographic instrument; their application was opposed by Michael M. Kuttler as guardian for the three minor grandchildren. The objections were sustained and probate of the document was denied. It reads:

> "Los Angeles 15, Calif. February 16th,—56 To whom it may concern: If at any time I should pass on before I have a recorded Will: this is to certify that I do not want Mike Kuttler or Vera Kuttler, my deceased Sons' wives to have one thing or one cent of what I have: nor the children Joan, Bill or Nancy Ann as I never see them so I enjoy no pleasure from them.
>
> "Notify Earl Hayter or my sister Bertha McQuarrie DO-7-7821—for them to dispose of my belongings as they see fit. Signed Mrs. Ethel May Kuttler 2/16/56".

The trial judge ruled that the instrument is not testamentary in character, was not intended to be testamentary, was not intended to dispose of decedent's property and did not do so. From the order denying probate Hayter and McQuarrie appeal.

The effect of the instant ruling is to vest decedent's "belongings" in the three grandchildren whom she expressly disinherited.

[1] There is no escape from the conclusion that Mrs. Kuttler did intend this document to operate as her will. Testamentary intention is thus defined in Re Estate of Sargavak, 35 Cal.2d 93, 95, 216 P.2d 850, 851, 21 A.L.R.2d 307: "The testator must have intended, by the particular instrument offered for probate, to make a revocable disposition of his property to take effect upon his death." To this definition the court added this caution: "It bears emphasis that we are here concerned not with the meaning of the instrument, but with the intention with which it was executed." 35 Cal.2d at page 96, 216 P.2d at page 851.

[2, 3] It is also well to bear in mind the fact that the search for a testatrix' intention does not involve a determination that she understood the legal effect of the directions found to have been expressed by her in the will. The effect of what she has provided is governed by substantive law. If she makes a bequest which violates the rule against perpetuities (In re Estate of Fair, 132 Cal. 523, 60 P. 442, 64 P. 1000) or attempts to immunize a trust beneficiary's income from claims of his creditors to an extent not recognized by statute (Canfield v. Security-First Nat. Bank, 13 Cal.2d 1, 87 P.2d 830) or to defeat the claim of the Alien Property Custodian to a future interest (In re Estate of Zuber, 146 Cal.App.2d 584, 304 P.2d 247), that intention, though plainly shown, cannot prevail.

57 Am.Jur., § 1134, p. 729: "Contravention of Rule of Law or Policy.—Although all the arbitrary rules and canons of testamentary construction are subordinate to the intention of the testator, it is universally recognized that the testatorial intention, even where clearly ascertainable, must yield to an established rule of law or public policy if it is in conflict therewith.

Common examples of situations in which the testator's intention is overcome upon this theory are afforded by wills whose terms disregard the rule in Shelley's Case or the rule against perpetuities. In such cases the will must fail of effect, not because the intent of the testator does not control in its construction, but because the law will not permit his intent to be accomplished. It is to be remembered in this connection that the question in construing a will is not whether the testator intended to make a valid disposition of his property, but what provision he actually intended to make; when that intention is found, it is for the court to determine whether or not the intended provisions are valid or illegal."

[4, 5] Not only does the document at bar disclose unmistakable testamentary intent but extrinsic evidence, which was clearly admissible (In re Estate of Sargavak, supra, 35 Cal.2d 93, 97, 216 P.2d 850), explains the form which the document took. Mrs. Kuttler had talked to her attorney several times about preparing a will for her. She told him: "I don't want my grandchildren or my daughters-in-law to get their hands on anything I have got." He advised that she could not disinherit her grandchildren unless she gave the property to someone else; "[y]ou have to decide who you are going to give it to or they will take it against the will on any other part you are going to dispose of." The reply was: "I haven't decided, but I am thinking it over." The matter was left in this posture at the conclusion of a conversation of February 8, 1956. By February 16, 1956, she had devised a means of making a will which would serve her purpose until she arrived at a definite decision as to how she wanted to distribute her estate. She decided to give her sister, Bertha McQuarrie, and her fiance, Earl Hayter, a general power of appointment. Perhaps she did not think in such terms, but that is the legal effect of what she did. She died twelve days later, on February 28, 1956. The day after the writing was executed she spoke to Earl Hayter about it; he lived next door; saw her every day and they were engaged to be married on or about April 25, 1956. On this February 17th, "she told me that if anything should happen to her, 'I have my will lying there on the desk.'

> "Q. Did she point to the desk or indicate the desk at the time? A. She just nodded (illustrating).
>
> "Q. Nodded to it? A. Yes. And I started over there, and she said, 'Don't bother; it will be right there if you want it.'
>
> "Q. And what else did she say? A. She said, 'Call my sister, too.' And I said, 'What is her telephone number?' She said, 'It is on there' (indicating).
>
> "Q. Again nodding toward the desk? A. Yes. And I started to go pick it up and she said, 'Just leave it there.'"

The sister, Bertha McQuarrie, saw her on February 23rd: "I came in there and she was ill, and when I entered the room she said, 'I thought I was going to die last week. I left something for you on the desk.'" The combination of the oral evidence and the document shows an indubitable testamentary intent.

[6, 7] In our opinion there was no substantial basis for rejection of this testimony by the trial judge. "While no universal and immutable formula can be prescribed for determining the weight to be accorded testimonial evidence, it has frequently been said that testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by the trier of fact." Gomez v. Cecena, 15 Cal.2d 363, 366, 101 P.2d 477, 478. "It is the general rule that 'the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of the fact.' 10 Cal.Jur. § 362, p. 1143; In re Estate of Warner, 167 Cal. 686, 690, 140 P. 583; Hynes v. White, 47 Cal.App. 549, 552, 190 P. 836." Joseph v. Drew, 36 Cal.2d 575, 579, 225 P.2d 504, 507. But if that testimony were properly disbelieved, its rejec-

tion would not create affirmative evidence to the contrary of that which was discarded. In re Estate of Bould, 135 Cal.App.2d 260, 264, 287 P.2d 8, 289 P.2d 15.

Be that as it may, the writing in question affords irrefutable internal evidence of the requisite testamentary intent. First it disinherits in explicit language decedent's only heirs (she left no children and no other grandchildren); then it confers a power of appointment upon Hayter and McQuarrie with respect to her entire "belongings."[1]

[8, 9] "A power of appointment, which may be created by deed or by will, is defined, generally, as a power or authority given to a person to dispose of property, or an interest therein, which is vested in a person other than the donee of the power." In re Lidston's Estate, 32 Wash.2d 408, 202 P.2d 259, 265. No particular form of words is necessary to the creation of such a power. 3 Tiffany Real Property, 3d Ed., § 685, p. 20; In re Rowlands' Estate, 73 Ariz. 337, 241 P.2d 781, 784; In re Lidston's Estate, supra, 202 P.2d 266; 96 C.J.S. Wills § 1062 d, p. 702. Such a disposition of a testatrix' property satisfies the cases next cited, which hold that it is essential to a valid will disinheriting all or any of the heirs that it also make some valid disposition of decedent's property. Estate of Walkerly, 108 Cal. 627, 652, 41 P. 772; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 207, 92 P. 184; In re Estate of Fritze, 85 Cal.App. 500, 505, 259 P. 992; In re Estate of Mathie, 64 Cal.App.2d 767, 781, 149 P.2d 485; In re Estate of Heney, 66 Cal.App.2d 867, 869, 153 P.2d 427; In re Estate of Dunn, 120 Cal.App.2d 294, 295, 260 P.2d 964; 2 Page on Wills (3d Lifetime Ed.) § 929, pp. 857, 858.

[10] Powers of appointment have been recognized as valid in this State ever since the decision of In re Estate of Sloan, 7 Cal.App.2d 319, 46 P.2d 1007. See, In re Estate of Carter, 47 Cal.2d 200, 207, 302 P.2d 301; In re Estate of Masson, 142 Cal.App.2d 510, 512, 298 P.2d 619; In re Estate of Elston, 32 Cal.App.2d 652, 659, 90 P.2d 608; In re Estate of Kalt, 16 Cal.2d 807, 812, 108 P.2d 401, 133 A.L.R. 1424.

Though urged upon him, the trial judge ignored the proposition that the writing created a valid power of appointment. The question considered below was whether there was an outright gift to Hayter and McQuarrie followed by precatory words. But solution of the question of existence of a power of appointment is the proper approach to this case. The language of In re Estate of Sloan, supra, 7 Cal.App.2d 319, 341–342, 46 P.2d 1007, 1018, is pertinent: "As has been announced in numerous decisions the word 'precatory' is properly applied to an expression by a trustor wherein a hope, a wish, a desire, a recommendation, or a request is indicated by him. Necessarily, the words by which a precatory trust is created constitute an entreaty, and is beseeching, or suppliant, or prayerful in its nature. * * * Considering the language employed by the donor of the power in the instant matter, even by viewing it in the light of the most auspicious authorities to which the attention of this court has been directed, it is impossible to give to such language a construction which would admit of a conclusion favorable to the suggestion made by appellants to the effect that it is precatory in character. The donor's required disposition of his estate was plain, direct and conclusive. It constituted not an entreaty, nor a wish, a desire, a request, a recommendation, or anything of that sort. It is most apparent that the power created by its donor was mandatory."

[11] The donee of a general power of appointment may exercise it in his own favor. In legal effect such a power gives

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[1] The question of whether the phrase "my belongings" included decedent's real property as well as personalty does not arise on petition for probate (In re Estate of Parsons, 196 Cal. 294, 237 P. 744; In re Estate of Neubauer, 49 Cal.2d 740, 321 P.2d 741); it arises only upon petition for distribution or some intermediate occasion such as determination of the right to letters of administration, a matter discussed *infra*.

him an absolute ownership. In re Estate of Carter, supra, 47 Cal.2d 200, 207, 302 P.2d 301; In re Estate of Kalt, supra, 16 Cal.2d 807, 812, 108 P.2d 401, 133 A.L.R. 1424; In re Estate of Masson, supra, 142 Cal.App.2d 510, 512, 298 P.2d 619; Dallapi v. Campbell, 45 Cal.App.2d 541, 547, 114 P.2d 646.

[12, 13] Respondents argue that a power such as the one at bar is invalid because it delegates to another the authority to make a will for the testatrix, thus evading the statutes relating to the making of wills. The California cases above cited involve the distribution of a part of the property or less than the entire estate in decedent's property, and hold such a power to be valid. The underlying theory is that the subject matter passes from the donor's estate directly to the appointee and not from the donee or his estate. In re Estate of Baird, 120 Cal.App.2d 219, 227, 260 P.2d 1052; In re Estate of Masson, supra, 142 Cal.App.2d 510, 512, 298 P.2d 619; 39 Cal.Jur.2d § 3, p. 613. In one sense a power to dispose of a part of testatrix' property through an appointment to a third person does amount to the making of a will for her *pro tanto*. But the legal concept is to the contrary. There appears to be no difference in principle between a power to appoint the taker of a part of testatrix' property and a power to so dispose of all of it.

Respondent cites and quotes a discussion of "Delegation of Will-making Power" by D. M. Gordon, 69 Law Quarterly Review (1953), page 334. The author definitely concludes that the English cases have not held invalid a power such as the one now under consideration, although the language of certain decisions is critical of same. At page 335 he says:

> "But let us consider this situation: A makes a will that simply says: I appoint B my executor and give all my property to such persons as he shall appoint. It seems hard to claim that this would be a compliance with the Wills Act, Probate Code, § 20 et seq. A does not express his own will at all; he leaves that to B. What A signs is a mere shell; the real will is made for him by B after A's death. So such a will seems unsustainable; but actually no such will has ever been invalidated by the courts; and unless delegation per se is a fatal objection, which has never been expressly decided, there is no principle that can be laid hold of as showing the will could be successfully attacked.
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> "True, there are cases in which wills not differing greatly from A's have been held bad; but in each of these the court laid hold of some factor not to be found in A's will, as a pretext for so holding. These factors were held to make the wills uncertain; but there would be no real uncertainty in A's will; and nothing but a rule against delegation *per se* would make it bad."

At 344: "So no good reason has ever been offered why, if general powers of appointment are bad as delegation of will-making, special powers should be treated otherwise. It cannot seriously be argued that exercise of a special power of appointment is not will-making, even if the delegation is slightly narrower than that under a general power."

At 345: "We have already seen that if the courts should break with the past and recognize a general rule that testators cannot delegate will-making, then logically they cannot compromise between (a) holding against all powers of appointment in wills, and (b) allowing the most unrestricted use by testators of both special and general powers, provided only that these are not uncertain. There can be no middle course if neither general nor special powers can be exceptions to a general rule against the use of powers."

Most courts in this country which have been confronted with our present inquiry have held the general power to be valid though covering all or substantially all of decedent's estate. In In re Tinsley's Will, 187 Iowa 23, 174 N.W. 4, 5, 11 A.L.R. 826, the entire content of the will was as follows: "In case of any serious accident, after my just debts are paid, I direct that my aunt Miss Mary E. Clark, take entire charge of my estate for disposal as she sees fit. J. Clark Tinsley." The sixth objection to its probate was: "[I]t leaves the disposal of property to another person. The decedent did not by said instrument, and could not, delegate to an agent the power to make a will for him." It was held that this document was testamentary in character, the court saying at page 6 of 174 N.W.: "Any writing by which a person undertakes to make disposition of his property or estate to take effect after his death is testamentary in character, and, if duly signed, witnessed, and published, is entitled to admission to probate. * * * Unrestricted power of disposal is an attribute of absolute ownership. Quite in point, also, is Cheney v. Plumb, 79 Wis. 602, 48 N.W. 668, where the instrument was in form as follows: 'When I have done with my property, I want John R. Cheney and his wife to pay all my debts and collect my dues and dispose of my things as they think best, only I want Sarah A. Williams to have my silver spoons * * * (and after several legacies) and the remainder to keep and dispose of as they think best.' This was held sufficient to vest the property absolutely in the persons named. See also, Benz v. Fabian, 54 N.J.Eq. 615, 35 A. 760. And the trial court was justified in holding the instrument testamentary in form, and not a mere trust or power expiring with the death of Mary E. Clark, there is no room to doubt."

Baldwin v. Davidson, 37 Tenn.App. 606, 267 S.W.2d 756, 757, involved this clause of a will: "'B. W. Davidson, Sr. shall turn over to my Sister Mrs. O. P. Brakefield my share to be distributed as she shall see fit.'" The word "share" referred to his interest in a certain business. This language was held to create a power of appointment which could be exercised in the donee's own favor; also held that it amounted to an absolute gift of the property to her (267 S.W.2d at pages 757–758).

Appeal of Richburg, 148 Me. 323, 92 A.2d 724. The will contained this provision: "'I direct my executor to dispose of my clothing and other personal articles and effects as he in his sole discretion may deem best.'" 92 A.2d at page 725. This language was held to create a valid power of appointment. At page 726 of 92 A.2d the court said: "The appellant argues that assuming the executor would not take whatever property might pass under the Second Paragraph of the will to his own use, and for his own benefit, it cannot be doubted that the language thereof gives him a power of appointment over it. This Court said very recently, In re Estate of Meier, 144 Me. 358, 362, 69 A.2d 664, 666, 'that the power of disposition of property "is the equivalent of ownership"', and it cannot be doubted that under the terms of the Second Paragraph, the executor was given 'power of disposition' over such articles as might fit the description of property therein. The title thereto would vest in him, under the will, and remain with him until he passed it elsewhere. * * * Conceivably, he may have used the words 'dispose of' in the sense of 'destroy', assuming the property in question had no monetary value, but this Court cannot rewrite the document for him, and his words have the very definite, well-established meaning in testamentary use which the appellant ascribes to them."

In re Lidston's Estate, supra, 32 Wash.2d 408, 202 P.2d 259, 261: "'I further direct my Executor dispose of any balance after the aforementioned gifts have been paid according to his wise discretion.'" The executor proposed to distribute the property to his own wife and two other persons. The lower court held that this part of the will was not testamentary and the ruling was reversed. The difference between a power and a trust was explained at page 266, of 202 P.2d, where it was said: "No technical, special, or particular form of words is necessary for the creation of a power of appointment; if the testator's intention to confer the power appears from the entire will, full effect will be given to such intention. In Thompson, Wills, 588, § 394, the rule as supported by the authorities is stated as follows: 'No particular form of words is necessary for the creation of a power; any expression, however, informal, being sufficient if it clearly indicates an intention to give a power. All that is necessary is an indication of a clear intention to accomplish some proper purpose by the donor through the donee. It may be conferred by express words, or may be necessarily implied. * * *'" It was also remarked on that same page that: "It seems to us that as a layman the testator could hardly have used more appropriate language to express his intention to confer upon his executor the power to dispose of the residuum of the estate in a manner determinable by him."

[14] Respondents cannot prevail upon the argument that the use of the word "notify" or the giving of Mrs. McQuarrie's telephone number in the second paragraph of the writing indicates a sense of urgency, or that deceased used the words "dispose of my belongings" in the sense of authorizing Hayter and McQuarrie to transfer her personal effects, jewelry and removable objects to a place of safekeeping in order to protect them from falling into the hands of the daughters-in-law. Nothing but speculation underlies that argument. It is true that the word "dispose" is: "A broad and comprehensive term, with many shades of meaning, described as 'nomen generalissimum,' and standing by itself, without qualification, * * * has been said to have no technical signification." 27 C.J.S. p. 345. But it has a familiar meaning when used in wills, as is evident from the quotations of the Richburg, Tinsley and Lidston cases, supra.

[15] What Mrs. Kuttler obviously desired was that her donees have the power to distribute her "belongings" if she should die before executing a new and formal will. To say that she wanted something less is to deny the obvious. Of course, the fact that she expected to make a later and more formal will would not detract from the testamentary character of the one in question. Richberg v. Robbins, 33 Tenn.App. 66, 228 S.W.2d 1019, 1022; Henderson v. Henderson, 183 Va. 663, 33 S.E.2d 181, 183; 1 Page on Wills (Lifetime Ed.) § 50, p. 112; 94 C.J.S. Wills § 129, p. 905.

[16] Upon the issue of whether the writing should be probated, it is unnecessary to consider whether the term "belongings" as used therein would include decedent's real estate, because a document may be a will although it disposes of only part of the testator's property. Intestacy as to a portion of the decedent's estate is a familiar situation.

However, this question must be determined in connection with the appeals involving the right to letters. (All matters on appeal are included in a written order signed by the judge and filed on October 23, 1956.) Appellant Hayter applied for letters testamentary; that petition was denied and he appeals from the ruling. Appellant Bertha McQuarrie applied for letters of administration with-the-will-annexed and appeals from the portion of the said order which denies her application. Michael M. Kuttler, as general guardian for minor grandchildren Joan Perry Kuttler and William Brent Kuttler, and as guardian ad litem for the other grandchild, Nancy Ann Kuttler, petitioned for letters of administration; this petition was granted and Hayter and McQuarrie appeal from that ruling.

The will names no executor, nor does it appoint one according to the tenor. See 20 Cal.Jur.2d § 115, p. 166. Moreover, a holding that the second paragraph of the document confers a power of appointment upon Hayter and McQuarrie precludes a further ruling that they were thereby appointed executors; the two interpretations are mutually exclusive. The denial of Hayter's petition for letters testamentary must be affirmed.

The conflicting petitions of McQuarrie and of Michael M. Kuttler, as guardian, for letters of administration require solution of the question whether the phrase "my belongings" embraces decedent's entire estate, including her real property. This follows from the fact that Probate

Code, §§ 409 and 422 give the grandchildren priority of right over a sister and over Hayter ("any person legally competent"), provided that the grandchildren "are entitled to succeed to the estate or some portion thereof" (20 Cal.Jur.2d § 122, p. 175). If the will does not dispose of the realty the grandchildren do succeed as heirs to that portion of the estate, and their guardian is entitled to letters c. t. a. in preference to Mrs. McQuarrie (20 Cal.Jur. 2d § 122, p. 176), for he stands in the same position with respect to letters as do his wards. 20 Cal.Jur.2d § 102, p. 150, § 140, p. 204. But if the phrase "my belongings" includes realty, the grandchildren take nothing and appellant McQuarrie has the better right to letters of administration. In order to solve this problem a present construction of that phase of the will is inescapable.[2]

The phrase "my belongings" may take on varied hues of meaning according to its matrix. Here there is nothing to indicate an intention to limit it to a portion of decedent's assets. She doubtless recognized, after the explanation made by her lawyer that she could not disinherit her grandchildren without giving the property to someone else, that they would take any part of her property that the will did not dispose of. Her obvious intent in making this stop-gap will was to prevent inheritance by the grandchildren or their mothers. The document must be so read as to effectuate that intent, if possible.

In Re Estate of Schuster, 137 Cal.App.2d 125, 289 P.2d 847, this court had under consideration the phrase "any and all the rest of my effects," as used in a holographic will. It affirmed a ruling that this was a bequest of the residuary estate rather than a disposition of clothing, furniture, paintings and other purely personal items not specifically bequeathed. At page 129 of 137 Cal.App.2d, at page 849 of 289 P.2d, it is said: "While the primary meaning of 'effects' is personal property, it is a very general term and may include real property where that appears to be the intent of the testator. Whether it includes the latter class of property depends on the context of the will and the surrounding circumstances."

In Re Estate of Olson, 144 Cal.App.2d 694, 301 P.2d 501, 502, the holographic will said: "I want Inez my Daughter to have all My Personal belongings." A finding that this language made effective disposition of all of decedent's estate remaining after payment of a legacy of one dollar to decedent's son was affirmed. The court said, at page 696 of 144 Cal.App.2d, at page 503 of 301 P.2d:

> "It is apparent from the instrument that the words of the testatrix specifically disinherited her son, and it was her desire and intent to avoid intestacy and leave her entire estate to her daughter by the words 'all My Personal belongings'. The very fact that the testatrix made a will raises a presumption that she intended to dispose of all of her property. Sec. 102, Probate Code; In re Estate of Akeley, supra [35 Cal.2d 26, 215 P.2d 921, 17 A.L.R. 2d 647]; In re Estate of Olsen, 9 Cal. App.2d 374, 50 P.2d 70. Whenever a disputed word or phrase may be reasonably given either of two meanings, that meaning should be given which will prevent intestacy, either entire or partial. In re Estate of Soulie, 72 Cal. App.2d 332, 164 P.2d 565.
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> "In examining the will by its four corners and in the light of these rules, it does appear that the words 'all My Personal Belongings', as used in it, were susceptible of meaning 'all of my own property.'
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> "In Re Estate of Kruger, 55 Cal. App.2d 619, 624, 131 P.2d 619, 622, in discussing a will where the word 'belongings' was used, the court said:

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[2] What its effect will be upon later proceedings, such as petition for distribution, is not before us. See In re Estate of Nicoll, 79 Cal.App.2d 48, 53, 179 P.2d 95.

> "'The word "belongings" used by the testator with reference to the bequest to his wife, is generally understood as including the property that one owns, and it is not infrequently used in that broad sense; and in the instant case we feel that the word may reasonably be used to include all of the testator's remaining property when we consider how the word "belongings" is ordinarily understood by the lay mind.'"

At page 697 of 144 Cal.App.2d at page 503 of 301 P.2d: "Ballantine's Law Dictionary [Supp.1954] in discussing the word 'belongings' says: 'Although the word (belongings) as used in a will, has, on occasion, been restricted to such chattels as are peculiarly attached to the person, it has more frequently been construed broadly, under the language of the particular wills involved, to include personal property of every nature and even real estate.'"

In re Churchfield's Will, 99 Misc. 682, 165 N.Y.S. 1073, the will said: "I request all my belongings, money, bonds and insurance to be left to my wife, Marian Churchfield, and my two children, William H. Churchfield and Mary Margate Churchfield." After it was executed decedent acquired real property and the question was whether it passed by this testament. "The common usage of the word 'belongings,' at least by a lay mind, includes all property, whether real or personal, and there is nothing in this will to show a contrary intent. By giving all the balance of his 'belongings' to his wife, testator meant to give all the remainder of his property to her; the words 'belong' and 'belongings' having been used several times in the will. * * * There can be no doubt but that this testator intended in language plain and simple to make his wife and two children the recipients of his bounty, share and share alike. The will in question is a valid will, both as to realty and personalty, and should be admitted as such." In re Churchfield's Will, supra, 165 N.Y.S. at page 1074.

[17, 18] If the phrase "my belongings" were construed as excluding realty, Mrs. Kuttler would have died intestate as to more than one-third of her holdings, according to probate valuation. There is a presumption against intestacy, total or partial, which is very strong. "There is a presumption that a testator intends to dispose of all of his property in the absence of controlling language in the will to the contrary. [Citations.] In construing the will it was proper for the trial court to take this presumption against partial intestacy into consideration. [Citations.]" In re Estate of Schuster, supra, 137 Cal.App.2d 125, 130, 289 P.2d 847, 849. "With respect to such a situation, many decisions of this state provide authority for the rule that where by the terms of a will it is not made clear nor certain that intestacy—whether partial or total—was intended, an interpretation which will avoid intestacy will be adopted. [Citations.] Also, it has been judicially declared that 'The very fact of making a will raises a presumption that the testatrix intended to dispose of all of her property'. [Citations.] And in the case last cited, the court reiterated the rule that 'Whenever a disputed word or phrase may be reasonably given either of two meanings, that meaning should be given which will prevent intestacy. * * * [citations].' Constructions which lead either to total or partial intestacy are not favored. [Citation.]" In re Estate of Northcutt, 16 Cal.2d 683, 689–690, 107 P.2d 607, 610. Of course, this presumption amounts to evidence of the absence of any intention to die intestate as to the realty. There is nothing in the instant record to contradict it and it therefore must prevail. Appellant McQuarrie is entitled to letters of administration with-the-will-annexed and the order appointing Kuttler as administrator is erroneous.

The order of October 23, 1956, is affirmed with respect to the denial of appellant Hayter's petition for letters testamentary; in all other respects it is reversed with instructions to admit to probate the holographic document of February 16, 1956, to vacate the order appointing Kuttler as administrator, and to make an order granting to appellant McQuarrie letters of administration with-the-will-annexed.

HERNDON, J., concurs.

KINCAID, Justice pro tem.

I dissent. I cannot agree that we are compelled to conclude that Mrs. Kuttler intended the document in question to operate as her will over the contrary finding of the trial court.

Appellants assume and the majority opinion seems to hold that because no conflicting testimony was introduced by respondents the trial court must accept appellants' testimony at the value placed upon it by appellants, and if the trial court did not do so it was "disregarding" that evidence. Such is not necessarily the case. In evaluating appellants' testimony the trial court was entitled to, and did, consider the manner in which the witnesses testified, the character of their testimony and their motives, and to weigh the testimony against words in the document in question, and other facts in the record. The fact that there was no conflicting testimony introduced by respondents did not prevent the trial court from disbelieving part or all of appellants' testimony. Code Civ.Proc. § 1847; Huth v. Katz, 1947, 30 Cal.2d 605, 608–609, 184 P.2d 521; Odenthal v. Lee, 1952, 113 Cal.App.2d 666, 669, 248 P.2d 937.

Where such testimony was susceptible of different inferences, the trial court was entitled to draw the inference it thought applicable and, unless clearly arbitrary, such inference so drawn by the trier of fact is binding on the appellate court. Juchert v. California Water Service Co., 1940, 16 Cal.2d 500, 508, 106 P.2d 886.

While no particular words are necessary to show testamentary intent it is well established that before an instrument is entitled to be admitted to probate, excepting as hereinafter noted, it must satisfactorily appear from the instrument offered as the last will and testament that the decedent intended, by the very paper itself, to make a disposition of his property after his death in favor of the party claiming thereunder. In re Estate of Wunderle, 30 Cal.2d 274, 280, 281, 181 P.2d 874. The exception to this rule is that the mere nomination of an executor, without making disposition of the estate by giving any legacy or devising any part of the property, constitutes a will that, if it otherwise qualifies, is entitled to be admitted to probate. "It may often occur that, subject to the payment of his just debts, a testator is quite willing that his property shall be succeeded to as provided by law, while the selection of the minister through whom the settlement is to be made and the distribution is to be had is not only a matter of deep interest to him, but of vital interest to the estate; and, as the law accords to him the privilege of making the selection of his executor, it must be upheld, when duly made". In re Hickman's Estate, 101 Cal. 609, 613, 36 P. 118, 119. See In re Estate of Selditch, 91 Cal.App.2d 62, 67, 204 P.2d 364.

A document may be entirely dated, written and signed by a person and yet not be his holographic will. Even though an instrument is intended to be effective upon the death of the author thereof, if on its face it disposes of no property and nominates no executor, it is not testamentary in character and is not entitled to be admitted to probate. In re Estate of Meade, 118 Cal. 428, 430, 431, 50 P. 541.

It is also well settled that in order for an heir to be disinherited, the testator must leave a will which not only evidences an intent to disinherit but which also makes a valid disposition of his property. Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 207, 92 P. 184; In re Estate of Heney, 66 Cal.App.2d 867, 869, 153 P.2d 427; In re Estate of Dunn, 120 Cal.App.2d 294, 295, 260 P.2d 964.

An analysis of the document in question discloses that it is entirely written, dated and signed by the decedent and is addressed: "To whom it may concern:" This heading is not necessarily inconsistent with a proper form of will if testamentary provisions follow. The document then reads: "If at any time I should pass on before I have a recorded will this is to certify that I do not want Mike Kuttler or Vera Kuttler, my deceased sons' wives to have one thing or one cent of what I have: nor the children Joan, Bill or Nancy Ann as I never see them so I enjoy no pleasure from them." This paragraph is clearly intended to disinherit the persons named and might be effective for this purpose if the decedent later in the document makes a valid disposition of her property.

Then follows: "Notify Earl Hayter or my sister Bertha McQuarrie Do. 7–7821—for them to dispose of my belongings as they see fit. Signed Mrs. Ethel May Kuttler 2/16/56."

The first paragraph wherein the decedent indicates her desire to disinherit certain of her heirs is specific, positive and inclusive. She recognized the meaning of the words "to have" to indicate the taking of possession by way of ownership when she declared she did not want these persons "to have one thing or one cent of what I have." In contrast the last paragraph is unclear as to meaning and is not inclusive. There is no word or indication of gift, bequest, devise or valid disposition to Hayter, McQuarrie or anyone. Instead of the inclusive words "one thing or one cent of what I have" the decedent uses the term "belongings." The nebulous "To whom it may concern * * * Notify Earl Hayter or my sister Bertha McQuarrie * * * —for them to dispose of my belongings as they see fit," is lacking in dispositive verbiage.

If the decedent had finally made up her mind how she wanted her property to go and had decided to give it to McQuarrie and Hayter by the instrument in question, intending it to be a will, decedent would undoubtedly, in the light of her language in the first paragraph, have said that she wanted Hayter and McQuarrie to have everything she had, or all her property, or words importing a gift or bequest to them.

The paragraph requesting notification to Hayter or McQuarrie to dispose of her belongings as they see fit may have been an afterthought prompted by a desire to have someone transfer her personal effects, jewelry and removable objects about the house to a safe place immediately upon her death to keep them from falling into the hands of the daughters-in-law until an administrator had been appointed to take them over. Such an inference gives a logical explanation for the presence of McQuarrie's telephone number in the request to notify. Hayter lived next door to decedent. The presence of the telephone number indicates urgency. It is inseparably tied in with notification to dispose of belongings. There could be no urgency if decedent meant by that paragraph to give the "belongings" to Hayter or McQuarrie, or for them to give them to anyone else. But urgency could be called for if she used the word "dispose" in the sense of "transfer" or "remove" until an administrator had been appointed. That urgency might relate only to personal effects because real estate would already be safe, thus explaining the use of the word "belongings."

When the language used is coupled with the testimony that just eight days before she wrote the instrument she had not yet decided how she wanted her property to go, the most logical explanation for the instrument seems to be that it was intended only to exclude the daughters-in-law and the children from a share in her estate if decedent died before she made a will; that otherwise she was content to have her property go by intestacy. In furtherance of that interpretation the evidence showed that decedent had two brothers besides her sister, Bertha McQuarrie. There is nothing in the record to indicate that decedent had any preference for her sister Bertha over those two brothers; to suggest any reason why McQuarrie should have been favored over those equally natural objects of decedent's bounty, or to suggest that decedent was contemplating excluding those brothers from a share in her estate.

Under those circumstances the inference is logical that until she had a "recorded" will decedent was content to let her estate pass by intestate succession, after excluding the daughters-in-law and children from any share in her estate.

As far as respondent grandchildren are concerned, that purpose was, of course, frustrated by the rule of law heretofore stated that, in order for an heir to be disinherited a will must be left which additionally makes a valid disposition of the property of the testator.

The words in the document before us and which appellants contend are dispositive in meaning and effect may be compared to some extent with those in a holographic will in Re Estate of Maloney, 27 Cal.App. 2d 332, 80 P.2d 998. There the decedent made specific bequests and concluded the will as follows (27 Cal.App.2d at page 333, 80 P.2d at page 999): "I wish for Mrs. Sarah Collins to doe wat she know I like done if any is left." The will was admitted to probate but upon distribution the probate court held there was an intestacy as to the residue. Sarah Collins appealed claiming that the above quoted language made a gift of the residue to her. The court upheld the decision of the probate court that a trust was intended but that it failed for uncertainty. The appellant cited rules to the effect that an interpretation which favors testacy is preferred over one which results in intestacy, and that the intention of the testator must be given effect as far as possible and contended that in view of those rules the language of the residuary clause quoted was effective to give her the residue. This contention was answered by the court as follows (27 Cal. App.2d at page 336, 80 P.2d at page 1000): "We are of the opinion, however, that to so hold would be to enter the field of conjecture and amount to a rewriting of the testatrix's will; and it is well established that neither indulgence in speculation nor conjecture as to what a testatrix's intention was affords proper basis for a decree of distribution (citation); nor is a court permitted to adopt a construction founded on conjecture or to supply an omission by rewriting a will in order to avoid a conclusion of partial intestacy. (Citation.)"

The rule of law that favors testacy as against intestacy only operates when the existence of testamentary intent has already been ascertained and the subject matter of the doubt is one of construction. "Where there is a doubt as to the existence of the *animus testandi,* the rule in favor of testacy is not applicable." In re Estate of Anthony, 21 Cal.App. 157, 161, 131 P. 96, 98; In re Estate of Blain, 140 Cal.App.2d 917, 922–923, 295 P.2d 898.

"When words which may be construed as testamentary are used in an informal document such as a letter, and it is not entirely clear that the writer intends thereby to control the disposition of his property at his death, the courts have been very liberal in admitting extrinsic evidence to show intent." In re Estate of Golder, 31 Cal.2d 848, 850, 193 P.2d 465, 466; see In re Estate of Sargavak, 35 Cal.2d 93, 96, 97, 216 P.2d 850, 21 A.L.R.2d 307. Extrinsic evidence was here received by the court for the purpose of ascertaining the intent with which the instrument was executed. That this evidence, in addition to the terms of the instrument itself, was fully considered is conclusively indicated by the written findings of fact and conclusions of law of the court wherein it is stated: "Documentary and oral evidence was introduced * * * and the court having duly considered the evidence * * * and having ordered a judgment in favor of contestants, now makes the following Findings * * *." Here there is a specific finding after evidence taken of a lack of testamentary intent and from that, as well as the terms of the document in question, I feel that we are not justified in assuming the existence of such an intent.

Nor do I agree that by the use of the words contained in the last paragraph of the document a power of appointment was conferred upon McQuarrie and Hayter with respect to her "belongings" or at all. There are no words of conferral of a power of appointment. Nor are there any words of gift or similar import to any possible appointee under any power. The language does not transfer title to anything to appellants. It does not say they may keep or dispose. It does not even say they "may" dispose. Appellants apparently imply such words from the direction to "dispose."

The instrument is not even addressed to appellants, but is addressed to "whom it may concern" as a direction to "notify" Earl Hayter or Bertha McQuarrie for them to dispose of decedent's "belongings" as they see fit.

The object to be searched for in interpreting an instrument is the intention of the writer of the instrument. Appellants assert that the intention was to give them the property absolutely. But if that be so, why didn't the decedent say that? In the ordinary and normal course of events, a testator, if he wants to leave property to A and B, does not leave a writing addressed to "whom it may concern" directing that A or B be notified for them to "dispose" of the property as they see fit. The language of the instrument shows that the decedent had no difficulty in expressing herself in writing. And, as heretofore pointed out, the tenor of the first paragraph indicates that had she intended to leave all her property to Bertha McQuarrie and Earl Hayter, she would have used language in the same vein, leaving "everything I have," or words of similar import, to them. In the light of that uncertainty, the words of the Supreme Court of Alabama in a somewhat similar case, Parrish v. Gamble, 234 Ala. 220, 174 So. 303, are of interest. The instrument in that case was as follows:

> "Feb. 10, 1934.
>
> "My last Will and Testament:
>
> "To my beloved Nephew Joseph Parrish, I give full authority to divide my small estate, as requested in a separate paper, not to be probated. He will give no bond, and be guided only by his unfailing good judgment, and unquestioned integrity.
>
> "Grace B. Evans
>
> "Dollie Twilly
> "Carrie Sanders".

Since the instrument was headed as it was, unlike the one before us, there was no question as to the testamentary intent. The contention was made that the will clothed Joseph Parrish with an absolute power of disposition. In rejecting that contention the court said (174 So. at pages 306–307):

> "We concur in the view of the trial court that this will, on its face, or with the aid of the documents mentioned, cannot be construed to vest an absolute power of disposition in Joseph Parrish, either to be performed as executor, or under a power apart from the office of executor; nor a power of appointment, carrying authority to name the beneficiaries among the heirs as a class, or to prescribe what share each shall take.
>
> "Such powers, virtually substituting the donee of the power for the testator, in naming the objects of his bounty, or the shares each shall take, is not to be inferred except from clear and unequivocal language, or evidence admissible to make such intent clear. Pearce v. Pearce, 199 Ala. 491–506, 74 So. 952. The will makes no disposition of the estate; it descended as in case of intestacy."

The Restatement of the Law of Property under the subject of "Powers of Appointment," section 323, comment e, says:

> "Occasionally a testator provides that certain property shall pass to his executors and adds 'to be distributed by them as they deem advisable' or 'to be disposed of as they think will be in accordance with my wishes,' or some similar clause. Such a clause may have one of several legal effects. (1) If, as a matter of construction, it is determined that the testator intended the executors to benefit personally from the gift, such a clause may be held (a) to be an outright gift to the executors, or (b) to create in the executors a general power of appointment presently exercisable. The former holding is rarely justified since it necessarily treats as surplusage the words of the will which provide for distribution and

> hence violates the canon of construction that all words of a will are to be given effect if possible. (2) If, as a matter of construction, it is determined that the testator did not intend the executors to benefit personally from the gift, such a clause is an attempted trust for indefinite beneficiaries and hence void (see Restatement of Trusts, § 122). Conceivably such a clause could be held to create a power to appoint the property to any persons other than the executors; *but it is on the whole preferable to allow the property to pass as a part of the residue or by intestacy rather than to attempt to carry out a highly doubtful testamentary intent by any such unusual device.*" (Emphasis added.)

It is highly doubtful that the instrument in question was intended to be testamentary in character. How much more uncertain as to intent then is this instrument as compared with the one in the Parrish case where there was expressed testamentary intent, or the clauses mentioned in the Restatement of Property quotation where such clauses are assumed to be part of an admitted will.

Hayter contends that the document under consideration appoints appellants as executors. He argues that the last paragraph serves to name appellants as both beneficiaries and as executors by the exact same language.

The word "executor" does not appear in the instrument offered. Since no person is expressly named as executor, the question must be decided upon the evidence as a whole and on principles of law relating to the appointment of an executor according to the tenor of the instrument. As was said in Re Estate of Clary, 98 Cal.App.2d 524, 526, 220 P.2d 754, 756:

> "Whether a writing purporting to be the last will of a decedent has with sufficient clarity designated a specific person to act as executor of his will must be determined by familiar rules for the interpretation of such documents. A holographic will must be perused for the purpose of determining the intention of the testator. In order to ascertain such intention, the document must be read in view of the circumstances under which it was written, the words must be given their ordinary grammatical sense and all parts of the writing must be considered in relation to one another. (Citation.)
>
> "The appointment of an executor 'according to tenor' is not regarded with favor. While the decision of any case must be based upon its own facts, unless the court can conclude from the words of the testator that the latter intended for his devisee to take charge of the estate, collect its assets, pay its debts and perform the usual functions of an executor, it is error to appoint such devisee. * * * The foregoing rule is firmly established by the decisions of California and other jurisdictions." See also In re Estate of Dern, 114 Cal.App.2d 799, 800, 801, 251 P.2d 28.

Appellants are not directed by the instrument in question to "take charge of the estate," to "collect the assets of the estate," or "liquidate indebtedness of the estate" or to "do what is necessary to distribute the estate."

Indeed, the instrument is not even addressed to appellants but "To whom it may concern." The word "notify" may properly be construed to infer that the decedent intended the instrument to be only instructions to her friends and not a testamentary appointment of them as her executors.

In a contested proceeding in probate the limitations imposed upon an appellate court's review of the facts are the same as in any other civil case. In reviewing the evidence all conflicts must be resolved in favor of respondents, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. In re Estate of Blain, supra, 140 Cal.App.2d 917, 920, 295 P.2d 898. Viewed in this light, I feel that there is substantial evidence to support the trial court's findings and I would therefore vote to affirm the judgment.

160 Cal.App.2d 494

The PEOPLE of the State of California: City of Manhattan Beach, a municipal corporation; and City of Hermosa Beach, a municipal corporation, Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES et al., Defendants,

City of Los Angeles, a municipal corporation, Respondent.

Civ. 22450.

District Court of Appeal, Second District, Division 3, California.

May 15, 1958.

Rehearing Denied June 10, 1958.

Hearing Denied July 11, 1958.

Action by cities of Manhattan Beach and Hermosa Beach for abatement of nuisance created by reason of alleged pollution of waters of Santa Monica Bay in such cities through the discharge of sewage in the Bay by the City of Los Angeles and for other relief. The Superior Court of Los Angeles County, Joseph W. Vickers, J., sustained general demurrer to each of the six causes of action set forth in the amended complaint and rendered judgment dismissing the action. The plaintiffs appealed. The District Court of Appeal, Nourse, J. pro tem., held that City of Manhattan Beach could not sue to enforce prior judgment restraining City of Los Angeles from discharging sewage into the Bay, where the prior action was brought by the people through the attorney general of the state and the City of Manhattan Beach was not a party to such action, and that in other respects the complaint stated cause of action.

Affirmed in part and reversed in part.

1. Judgment 🔑855(1)

Where action against the City of Los Angeles was brought by the people through the attorney general of the state and injunction was issued restraining such city from discharging sewage of a defined character into waters of Santa Monica Bay and City of Manhattan Beach was not a party to the prior action, the city attorney of Manhattan Beach and City of Manhattan Beach could not enforce that judgment under statute pursuant to which city council of Manhattan Beach or its city attorney could bring action to abate public nuisance within that city. West's Ann.Code Civ. Proc. § 731; West's Ann.Gov.Code, §§ 12512, 12513.

2. Municipal Corporations 🔑816

In enacting the Dickey Act it was not the legislative intention to place in the state water pollution control board or in any of its regional boards the exclusive power to determine whether a nuisance exists and to abate a nuisance created by pollution of waters of the state, and consequently the cities of Manhattan Beach and Hermosa Beach could seek by injunction to abate nuisance allegedly existing by pollution of waters of Santa Monica Bay through discharge therein by City of Los Angeles of sewage and the deposit thereof on lands in the latter cities above and below the mean of high tide. West's Ann.Water Code, §§ 13000–13064; West's Ann.Health & Safety Code, §§ 5414, 5415(a, d), 5460; West's Ann.Civ.Code, §§ 3479, 3480.

3. Municipal Corporations 🔑837

The fact that the City of Los Angeles may have been authorized to dispose of its sewage in Santa Monica Bay does not show any authority on the part of the city to create a nuisance.

4. Municipal Corporations 🔑838

Where jurisdiction is in the courts to determine, in a suit by cities of Manhattan Beach and Hermosa Beach, the fact of the existence of a nuisance by reason of pollution of water of Santa Monica Bay through discharge therein of sewage by City of Los Angeles, the question of exhaustion of remedies before the state and regional water pollution control boards established by the Dickey Act becomes irrelevant. West's Ann.Water Code, §§ 13000–13064.

5. Municipal Corporations 🔑714

Complaint by City of Manhattan Beach seeking abatement of nuisance by reason of alleged pollution of waters of Santa Monica Bay through discharge of sewage in the Bay by the City of Los Angeles, and alleging that deposit of sewage effluent upon the lands of the City of Manhattan Beach was in violation of ordinance of latter city was not defective on any theory that City of Manhattan Beach was seeking to give extraterritorial effect to its ordinance. West's Ann.Health & Safety Code, § 5415; West's Ann.Water Code, § 13001(a).

6. Municipal Corporations ⚷597, 714

The City of Manhattan Beach, under its police power, has the right to set up standards reasonably designed to safeguard the health of its inhabitants, and this right is not impaired but is affirmed by the provisions of the Dickey Act relating to water pollution and the Health and Safety Code relating to sewage and industrial wastes. West's Ann.Health & Safety Code, § 5415; West's Ann.Water Code, § 13001(a).

7. Municipal Corporations ⚷846

In action by cities of Manhattan Beach and Hermosa Beach for abatement of nuisance created by reason of alleged pollution of water of Santa Monica Bay in such cities through the discharge of sewage in the Bay by the City of Los Angeles, the plaintiff cities could seek to recover damages suffered by reason of the creation and existence of the nuisance. West's Ann.Civ. Code, § 3494; West's Ann.Code Civ.Proc. § 731.

8. Municipal Corporations ⚷846

Any proper item of damage which is direct result of creation of nuisance by reason of alleged pollution of waters of Santa Monica Bay in cities of Manhattan Beach and Hermosa Beach through the discharge of sewage in the Bay by City of Los Angeles and which is incident to any equitable relief that may be granted in action by cities of Manhattan Beach and Hermosa Beach for abatement of nuisance may be recovered in such action even though no claim therefor was filed against the City of Los Angeles prior to the institution of the action.

9. Action ⚷53(2)

In action by cities of Manhattan Beach and Hermosa Beach for abatement of nuisance created by reason of alleged pollution of waters of Santa Monica Bay in such cities through the discharge of sewage in the Bay by the City of Los Angeles, the plaintiff cities, by separate cause of action, could seek to prevent the City of Los Angeles from doing certain acts which would allegedly aggravate the nuisance, notwithstanding that such cause of action was repetitious in that in fact there was but one cause of action arising out of the single wrong, the public nuisance, both existing and threatened.

10. Municipal Corporations ⚷846

In action by cities of Manhattan Beach and Hermosa Beach for abatement of nuisance created by reason of alleged pollution of waters of Santa Monica Bay in such cities through the discharge of sewage in the Bay by the City of Los Angeles, the court could not indicate or prescribe the means or facilities that the City of Los Angeles should use in treating and disposing of its sewage and could not enjoin the city from entering into contract for the construction of facilities for the treatment and disposal of its sewage; however the court could enjoin the City of Los Angeles from aggravating the nuisance by further threatened acts.

11. Nuisance ⚷32

In action for abatement of niusance, the fact that by the prayer of the complaint the plaintiffs asked relief beyond the power of the court to award did not detract from the sufficiency of the complaint to state a cause of action.

◆

Walter N. Anderson, City Atty., of Manhattan Beach, and Edwin L. Searle, Sp. Counsel, Los Angeles, for appellants.

Roger Arnebergh, City Atty., Bourke Jones, John L. Flynn, Asst. City Attys., Weldon L. Weber, Deputy City Atty., Los Angeles, for respondent.

NOURSE, Justice pro tem.

This is an appeal from a judgment dismissing the subject action pursuant to the order of the superior court sustaining the general demurrer of the defendant city of Los Angeles to each of the six causes of action set forth in plaintiffs' amended complaint.

We have reached the conclusion that the judgment of the trial court must be affirmed as to the second cause of action and reversed as to the remaining causes of action.

In the first cause of action set forth in the amended complaint the plaintiffs seek by injunction to abate a nuisance created and alleged to exist by reason of the pollution of the waters of Santa Monica Bay through the discharge therein by the defendant city of Los Angeles of sewage and the consequent deposit thereof upon the lands of the city of Manhattan Beach both above and below the line of mean high tide.

By the second cause of action the plaintiffs acting through the city attorney of plaintiff city of Manhattan Beach seek to enforce a judgment entered against the city of Los Angeles which action was brought by the People through the attorney general of the State and in which action an injunction was issued against the city restraining it from the discharge of sewage of a defined character into the waters of Santa Monica Bay. In the third cause of action it is sought to abate the same nuisance alleged in the first cause of action, it being further alleged that the deposit of the sewage effluent upon the lands of the city of Manhattan Beach is in violation of an ordinance of that city. In the fourth cause of action the city of Hermosa Beach alone is plaintiff. It alleges facts which show the existence of a public nuisance created by the city of Los Angeles within the boundaries of Hermosa Beach, and facts purporting to set forth the basis for a judgment for damages against the defendant city. In the fifth cause of action the city of Manhattan Beach alone is plaintiff and what we have said as to the fourth cause of action is equally applicable to this one with the exception that the damages alleged are for damages to that city and its property rather than the property of Hermosa Beach. By the sixth cause of action the plaintiff cities of Hermosa Beach and Manhattan Beach seek an injunction to prevent defendant city of Los Angeles from doing certain acts which it is alleged would aggravate the nuisance created within the limits of each city, as described in the first, third and fourth causes of action.

[1] *The second cause of action.* This cause of action, asserted on behalf of the People of the State of California, seeks to restrain the city of Los Angeles from violating a judgment entered against the city, in an action brought by the attorney general of the state on behalf of the People of the state, and on behalf of the State Board of Health, the Division of Fish and Game and the State Park Commission, and entitled People of the State of California v. City of Los Angeles. The judgment sought to be enforced was entered on February 1, 1946, and on appeal by certain defendants therein was affirmed in February 1948 (See People v. City of Los Angeles, 83 Cal.App.2d 627, 189 P.2d 489).

The facts in the prior action and the scope of the injunction against the defendants therein are set forth in the opinion of a District Court of Appeal and it would not serve any purpose to repeat them here; reference being made to the opinion of Mr. Justice White in the case above cited.

The present action is not prosecuted by the attorney general nor on behalf of any of the departments of the state on whose behalf the prior action was brought. To the contrary, the city attorney of Manhattan Beach and the plaintiff city of Manhattan Beach assert the right to enforce that judgment under the provisions of section 731 of the Code of Civil Procedure.

We are convinced that the city of Manhattan Beach could not authorize such action by its city attorney and that he is not authorized to bring an action to enforce the judgment in question. The only authority given to the city council of Manhattan Beach or to its city attorney by section 731, Code of Civil Procedure is to bring an action to abate a public nuisance existing within that city. No authority is given to sue upon a judgment to which the city is not a party.

The city of Manhattan Beach was not a party to the prior action. The prior action was prosecuted by the attorney general on behalf of the particular departments of the state heretofore mentioned pursuant to the provisions of section 12512 of the Government Code and he, and he alone had the power to direct the issuing of the process to carry that judgment into effect. Gov.Code, § 12513.

While undoubtedly the city of Manhattan Beach would benefit by the enforcement of the judgment in the prior action, so also would every other person adversely affected by a violation of the injunction granted therein and it cannot be thought that every person to whose advantage it would be to have the judgment enforced could bring an action upon that judgment or cite the defendant for contempt of it.

What we have just said makes it unncessary to consider the contention of respondent that it is only by contempt proceedings that the question of violation of the injunction may be raised and that a separate action upon the judgment does not lie.[1]

[2] *The first cause of action.* The facts alleged in the first cause of action, if true, disclose the existence of a public nuisance of the most serious character, endangering the health and comfort of the inhabitants of the plaintiff cities, created by the city of Los Angeles, and the respondent does not attack the sufficiency of the complaint to allege the existence of that nuisance. By its general demurrer the respondent attacked the first cause of action upon but two grounds; First, upon the ground that by the enactment of the Dickey Act (Statutes of 1949, chapter 1549, now §§ 13000–13064, Water Code), the Legislature placed the entire control over public nuisances created by the pollution of the waters of the state in the State Water Pollution Control Board and the Regional Water Pollution Control Boards established by the act; and second, that the complaint failed to show that the plaintiffs had exhausted their administrative remedies under that act. The learned judge of the court below sustained the general demurrer to this cause of action upon the first ground above stated. We are convinced that it was not the legislative intent to place in the State Water Pollution Control Board or in any of its Regional Boards the exclusive power to determine whether a nuisance exists and to abate a nuisance created by the pollution of waters of this state.

The Regional Control Boards, among other things, are given power to prescribe requirements relative to any condition of pollution or nuisance created thereby, existing or threatened in the region in which they have jurisdiction (Water Code, § 13053) and any person proposing to discharge sewage within any region is required to file with the board of that region a report of such proposed discharge and upon the filing thereof it is made the duty of the board, after hearing, to prescribe "requirements as to the nature of such discharge with relation to the conditions existing from time to time in the disposal area or receiving waters." Water Code, § 13054.

When it appears to a regional board that a discharge of sewage is taking place contrary to the requirements prescribed by the board, the board is required to hold a hearing and serve notice thereof *upon the persons creating the condition*[2] (Water Code, § 13060) and after the hearing make findings as to whether pollution or nuisance exists and if it finds the existence of pollution or nuisance, to order its correction (Water Code, § 13062). If the person ordered to correct the nuisance or pollution fails to comply with the order of the board *then*, and *only then it is the duty* of the regional board to certify the facts to the district attorney of the county in which the discharge of sewage originates and it is the duty of the district attorney to seek an injunction against the persons causing the pollution or nuisance (Water Code, § 13063). If a regional board fails to take appropriate action against an existing or threatened condition of pollution or nuisance it is the duty of the state board to take action (Water Code, § 13025).

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[1] The question is not before us and we do not decide whether the judgment in the prior action is res judicata in the present action as to the questions there decided.

[2] All italics herein are ours unless otherwise noted.

As to the contamination of water, the only power given a regional board is to report the fact of contamination to the state board and to the appropriate local health officer (Water Code, § 13052(g)), and the only power given the state board as to contamination, is to direct any state agency having jurisdiction, to take action (Water Code, § 13025).

There is no provision in the act which requires any county, or municipality damaged by a public nuisance or the health of whose inhabitants is endangered by such a nuisance to institute any proceedings before either a regional board or the state board, nor is any provision made for them so to do. There is nothing in the act which expressly or impliedly places in the state board or any regional board the exclusive power to declare that a nuisance exists or to take action to abate a nuisance. To the contrary the power of any city or county to declare, prohibit or abate nuisances is expressly reserved to them by Water Code section 13001. This section reads in part as follows: "No provision of this division or any ruling of the State Water Pollution Control Board or a regional water pollution control board is a limitation: * * * (b) On the *power of any city* or county to *declare, prohibit*, and *abate nuisances*." This express reservation of the rights of the plaintiff cities to prosecute the subject action clearly negatives any intent to give the control boards the exclusive right to determine either what does or does not constitute a nuisance or to invoke the equity powers of the courts of this state to abate a public nuisance.

That it was not the intent of the Legislature to vest exclusive control of the pollution of waters and the abatement of a nuisance created by such pollution or by contamination of water, is further demonstrated by the fact that there is expressly reserved to municipalities and counties the right to adopt and enforce regulations imposing further conditions, restrictions or limitations with respect to the disposal of sewage or industrial waste which might result in the pollution or contamination of waters, and to any individual the right to prosecute an action against a private nuisance or for relief against contamination or pollution (Water Code, § 13001(a) and (d); Health & Safety Code, § 5415(a) and (d)).

The right of a regional board to initiate an action pursuant to section 13063 of the Water Code, to enforce its orders relative to the pollution of the waters of the state or to abate a nuisance, as "nuisance" is defined by section 13005 of the Water Code, is not inconsistent with the right of plaintiff cities to prosecute this cause of action to abate a public nuisance, as such nuisance is defined in section 3479 of the Civil Code. Truck Owners, etc. v. Superior Court, 194 Cal. 146, at pages 154–155, 228 P. 19; California Oregon Power Co. v. Superior Court, 45 Cal.2d 858 at page 869, 291 P.2d 455; Yolo Water & Power Co. v. Superior Court, 43 Cal.App. 332, at page 342, 185 P. 195.

While in each of the cases just cited, the court was acting upon a petition for a writ of prohibition and thus had before it only the question of the jurisdiction of the superior court over the subject matter of the action, the present case presents the same question, for in reality it is the claim of the defendant city of Los Angeles here that it is only the State Control Board and the regional boards which have jurisdiction to determine whether pollution and nuisance exist, order their abatement and prosecute actions to enforce their orders. In each of the cases cited it is held that the fact that the petitioner therein was subject to control by an administrative body and that that administrative body had the power to order the petitioner to desist from the acts which were complained of in the civil action and to enforce its orders by action in the courts, did not deprive the courts of the jurisdiction to enjoin at the suit of a municipality or private person those same acts.

Assuming arguendo that the control of pollution of the waters of the Santa Monica Bay, and nuisances as defined in section 13005 of the Water Code, created by such pollution, is vested in the Regional Control Board, that board does not have exclusive control over the conditions shown by the complaint to exist. The facts alleged in this count of the complaint to exist, show not only a pollution of the waters of the Santa Monica Bay, but the contamination thereof and the creation and existence of a condition constituting a public nuisance both in those waters and on the shore of the Bay, detrimental to the health of the inhabitants of the plaintiff cities. In other words, the fact alleged, show the existence of a public nuisance as a public nuisance is defined in sections 3479 and 3480 of the Civil Code.

While a Regional Control Board may act in cases where there is a pollution of waters and a nuisance created thereby and consequently may act even though the pollution may also result in contamination, if contamination and public nuisance endangering the health of the inhabitants of any city or county exists, the statutes clearly place the power to control in other public agencies including the State Department of Health, local health officers, counties and municipalities.

By section 13005, Water Code, "nuisance" is defined as: "'Nuisance' means damage to any community by odors or unsightliness resulting from unreasonable practices in the disposal of sewage or industrial wastes." [3] By section 13005, pollution is defined: "'Pollution' means an impairment of the quality of the waters of the State by sewage or industrial waste to a degree which *does not create an actual hazard to the public health* but which does adversely and unreasonably affect such waters for domestic, industrial, agricultural, navigational, recreational or other beneficial use, or which does adversely and unreasonably affect the ocean waters and bays of the State devoted to public recreation." Contamination is defined as: "'Contamination' means an impairment of the quality of the waters of the State by sewage or industrial waste to a degree which creates an *actual hazard to the public health* through poisoning or through the spread of disease. 'Contamination' shall include any equivalent effect resulting from the disposal of sewage or industrial waste, whether or not waters of the State are affected."

As to contamination, the regional board's only power is to report it to the state board and to the local health authorities and the only power of the state board is to direct action by any state agency having jurisdiction. Water Code, §§ 13052(g), 13025. The state agencies having jurisdiction are the State Department of Health and a local health officer, either of whom may order the contamination abated and may prosecute an action for an injunction in the proper superior court (§ 5460 of the Health & Safety Code), but neither is compelled to act but may accept the action taken by a county, a *municipality*, an officer or agency to abate the nuisance. § 5414, Health & Safety Code.

Thus, it is clear that not only has the statute failed to give exclusive jurisdiction of public nuisances affecting health to the state board or the regoinal boards, but that a right to abate such nuisances is expressly given to others.

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[3] By section 3479 of the Civil Code a nuisance is defined as follows: "[Nuisance, what.] Anything which is injurious to *health*, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal or basin, or any public park, square, street, or highway, is a nuisance."

Respondent cites us a number of cases from outside this jurisdiction to the effect that tidal waters may be used for the disposal of sewage effluent, and that any damage caused thereby is *damnum absque injuria.*[4]

These cases are not applicable for in none of them is it held that if the right to dispose of sewage effluent in tidal waters creates a public nuisance, that nuisance may not be abated under the equity powers of the courts. In County Sanitation Dist. No. 2 v. Averill, 8 Cal.App.2d 556–562, 47 P.2d 786, 788, this court speaking through Mr. Justice Shinn stated: "The oceans and other navigable salt waters under state control may be used for public purposes as the state may see fit, and the owner of abutting lands must suffer without compensation such damage as his lands sustain *so long as the acts which are the cause of the damage do not constitute a nuisance.*" See cases cited in annotations to 40 A.L.R.2d 1182–3.

[3] Assuming that the state may authorize acts by the defendant city which would create a nuisance, the complaint here does not show that the state has so done and the fact, if it be a fact, that it might, does not make the complaint deficient. The fact that the defendant city has been authorized to dispose of its sewage in Santa Monica Bay does not show any authority to create a nuisance. People v. City of Reedley, 66 Cal.App. 409, at page 412, 226 P. 408.

[4] What we have just said, disposes of respondents' contention that the complaint fails to state a cause of action because it fails to allege that the plaintiffs exhausted the administrative remedies before the board under the Dickey Act, for if jurisdiction remains in the courts to determine the fact of the existence of a nuisance and order its abatement, the question of the exhaustion of the remedies before the board becomes irrelevant. California Oregon Power Co. v. Superior Court, 45 Cal.2d 858, at page 869, 291 P.2d 455. Further, the Dickey Act grants no remedy before the board to a county or city within whose boundaries a public nuisance exists by reason of the contamination of the waters or the deposit of contaminated substances upon the shores of those waters. It contains no provisions through which the city or county may institute proceedings before a regional board or the state board and it does not even require that a city in which a public nuisance exists by reason of the pollution by others, of waters within its boundaries, shall be made a party to any proceedings instituted by the board of its own motion. There were, therefore, no administrative remedies before the board available as a matter of law to the plaintiff cities.

[5] *The third cause of action.* This cause of action incorporates all of the allegations of the first showing the existence of a public nuisance within the boundary of the city of Manhattan Beach and the responsibility of the defendant city of Los Angeles for the creation of that nuisance. It further alleges the enactment of an ordinance by the city of Manhattan Beach which prohibits any person, including a municipal corporation, from causing ocean waters containing sewage and industrial waste or "effluent of treated sewage", to flow on or upon the land of the city and which defines "effluent of treated sewage" by setting forth what such effluent may not contain. It is further alleged that the de-

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[4] Lovejoy v. City of Norwalk, 112 Conn. 199, 152 A. 210; Mayor etc. of City of Newark v. Sayre, 60 N.J.Eq. 361, 45 A. 985, 48 L.R.A. 722; Darling v. Newport News, 249 U.S. 540, 39 S.Ct. 371, 63 L.Ed. 759; City of Hampton v. Watson, 119 Va. 95, 89 S.E. 81; Cityco Realty Co. v. Mayor, Counselor, and Aldermen, 159 Md. 148, 150 A. 273, 277; Grey ex rel. Simmons v. Mayor, etc. of City of Paterson, 60 N.J.Eq. 385, 45 A. 995; Dupont Rayon Co. v. Richmond Industries, 4 Cir., 85 F.2d 981; Attwood v. City of Bangor, 83 Me. 582, 583, 22 A. 466.

fendant city of Los Angeles has caused sewage effluent as defined in the ordinance, to flow upon the lands, tide lands, submerged lands, shores and water of the defendant city and will continue so to do unless restrained.

Respondent attacks this cause of action upon the grounds that by it, the city of Manhattan Beach seeks to give extraterritorial effect to its ordinance and therefore does not state a cause of action. This contention cannot be sustained.

The third cause of action, as does the first, states facts sufficient to constitute a cause of action in the plaintiff city of Manhattan Beach to abate a public nuisance and the allegations as to the ordinance in question are only allegations of additional facts showing the existence of that nuisance.

[6] Undoubtedly the city of Manhattan Beach, under its police power, had a right to set up standards reasonably designed to safeguard the health of its inhabitants, and this right is not impaired but is affirmed by the provisions of the Dickey Act and the Health and Safety Code. § 5415, Health & Safety Code, § 13001(a), Water Code.

We are not here called upon to decide whether the ordinance, by its terms, purports to control the defendant city of Los Angeles in the manner or method of the disposal of sewage in the Santa Monica Bay outside the limits of the city of Manhattan Beach, for the ordinance clearly operates upon conditions caused to exist upon the lands of the city. The gravamen of this cause of action is the existence of a public nuisance within the city of Manhattan Beach and not that the city of Los Angeles is polluting and contaminating water in the Pacific ocean at a point outside of the limits of the city. The allegations of the complaint are that the acts of the city have resulted in the public nuisance by contaminating the water and the lands of the city. If this be proven, it matters not that the source of contamination was outside the city limits. People v. Selby Smelting & Lead Co., 163 Cal. 84, at page 88, 124 P. 692.

[7] *The fourth and fifth causes of action.* By these causes of action, the city of Hermosa Beach and the city of Manhattan Beach respectively reallege the same facts as to the existence of a public nuisance within their boundaries, as are alleged in the first cause of action, and the allegations of each are sufficient to support a judgment, as we have in our discussion of the first cause of action demonstrated, to abate that nuisance. In addition, to the allegations of the existence of nuisances, each of the cities alleges facts purporting to show the damage suffered by it, by reason of the creation and existence of the nuisance.

The defendant city of Los Angeles attacks each of these causes of action upon the theory that they are causes of action for damages not incidental to the action to abate the nuisance and that inasmuch as there is no allegation that any claim was filed against the city in accordance with the provisions of the Charter of the city of Los Angeles (Los Angeles City Charter §§ 363 and 376), a cause of action is not stated.

[8] Each of the cities has the right to abate a nuisance existing within its boundaries (Civ.Code, § 3494) and may by injunctive relief, accomplish such abatement. People v. Selby Smelting & Lead Co., 163 Cal. 84, at page 90, 124 P. 692, and in any action brought to abate the nuisance, may not only enjoin its continuance, but recover damages. Code Civ.Proc. § 731. Inasmuch as each of these causes of action, although repetitious insofar as injunctive relief is concerned, is sufficient to state a cause of action for an injunction, it was error to sustain a general demurrer to either. We are not called upon to decide whether any of the facts alleged as constituting damage to the respective cities, do in fact show damages which are recoverable against the city, for this is a question to be decided upon a motion to strike from the pleadings, or upon objections to the

evidence thereof when offered. We may say, however, that any proper item of damage which is a direct result of the creation of the nuisance and incident to any equitable relief that may be granted, may be recovered in this action even though no claim therefor was filed against the city prior to the institution of the action. Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 60 Cal.App.2d 478, at page 486, 141 P.2d 46; Ingram v. City of Gridley, 100 Cal.App.2d 815, at page 818, 224 P.2d 798.

[9] *The sixth cause of action.* The plaintiffs in this cause of action again reallege all of the facts as to the creation by the defendant city of Los Angeles of a public nuisance and the present existence of that nuisance. They further allege that the defendant city of Los Angeles threatens to aggravate the existing nuisance by depositing in the waters of the Santa Monica Bay within the limits of the plaintiff cities, greatly increased amounts of untreated sewage which will contaminate the water within the boundaries of those cities and contaminate the beaches and lands of those cities and thus create an additional hazard to the health of the inhabitants of those cities. It is difficult to understand why counsel for the plaintiff has set forth these additional facts in a separate cause of action. All of them are properly a part of the allegations of the first cause of action, as there is but in fact one cause of action arising out of a single wrong, the public nuisance both existing and threatened. Wulfjen v. Dolton, 24 Cal.2d 878, at pages 895–896, 151 P.2d 840. However, the fact that this sixth cause of action is repetitious, does not effect its sufficiency standing alone to plead a cause of action. What we have just said is applicable to the third, fourth and fifth causes of action set forth in the complaint.

This cause of action is attacked by the defendant city upon the ground that thereby the plaintiffs seek to control the defendant city as to the manner in which it shall treat and dispose of its sewage. It is true that by the prayer of the complaint, plaintiff seeks a decree which, in addition to enjoining the defendant city from creating the public nuisance in question, also seeks to enjoin the city from the construction of additional sewage disposal facilities and which would in effect, prescribe the means the defendant city shall take in constructing its sewage disposal facilities and treating its sewage.

[10] Undoubtedly the court could not, in the subject action, indicate or prescribe the means or facilities that the city should use in treating and disposing of its sewage, nor enjoin the city from entering into contracts for the construction of facilities for the treatment and disposal of its sewage. People v. City of Los Angeles, 83 Cal.App.2d 627, 189 P.2d 489. On the other hand however, it may enjoin the defendant city from, through the use of its facilities, creating a public nuisance endangering the health and comfort of the inhabitants of the plaintiff cities, and where as alleged here, the defendant has by its past acts, invaded the rights of the plaintiffs by the creation of a nuisance and now actually threatens by further acts, to aggravate that nuisance, the plaintiffs need not await the doing of the threatened acts, but may enjoin them. More v. Massini, 32 Cal. 590, at page 594; Island Reclamation Dist. No. 776 v. Floribel Alfalfa Syndicate, 167 Cal. 467, at page 471, 140 P. 4; Smith v. Wheeler, 107 Cal.App.2d 451, at page 455, 237 P.2d 325.

[11] The fact that by the prayer of the complaint, plaintiffs ask relief beyond the power of the court to award them, does not detract from the sufficiency of the complaint to state a cause of action, for we may not assume that the trial court will grant relief beyond that which it is authorized to give under its equity powers. The objection raised by the defendant to the sufficiency of this cause of action, goes to the scope of the relief which the court may give in the action, and not to the sufficiency of the complaint to state a cause of action for equitable relief within the power of the

court to grant. California Oregon Power Co. v. Superior Court, 45 Cal.2d 858, at page 870, 291 P.2d 455.

The judgment is affirmed insofar as it dismisses the second cause of action set forth in the complaint and is reversed insofar as it dismisses the first, third, fourth, fifth and sixth causes of action.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

160 Cal.App.2d 471

Fred E. KEELER and Laurine L. Keeler, Plaintiffs and Appellants,

v.

Leon HAKY and Elsie Haky et al., Defendants and Respondents.

Civ. 22825.

District Court of Appeal, Second District, Division 1, California.

May 15, 1958.

Rehearing Denied June 11, 1958.

Hearing Denied July 9, 1958.

Action by owners of servient estate against owners of dominant estate to determine rights of parties in easement. From adverse judgment of the Superior Court, Los Angeles County, Burnett Wolfson, J., the owners of the servient estate appealed. The District Court of Appeal, Lillie, J., held that deed describing private alleyway and granting to grantee, its successors and assigns, full and free right for it, its tenants, servants, visitors and licensees, in common with all others having like right, to pass over and upon said private alleyway until a certain date, did not create an easement for sole use and benefit of grantee, and use of alleyway by grantee's successors in interest for a parking lot was a violation of rights of grantor's successors in interest.

Judgment reversed and cause remanded with directions.

1. Easements 🔑12(1)

In construing an instrument conveying an easement, rules applicable to construction of deeds generally apply.

2. Contracts 🔑152

A written agreement, unless it is ambiguous, must be construed by a consideration of its own terms.

3. Appeal and Error 🔑842(1)

Meaning and intent of a written agreement is a question of law, unless it is ambiguous, and reviewing court is not bound by trial court's findings and conclusions regarding such intent and meaning.

4. Evidence 🔑450(3)

Language of grant deed describing an alleyway and giving grantee full and free right to pass and repass along and over said alleyway in common with all others having like right until a certain date for all purposes connected with use of grantee's land was clear and free from ambiguity and did not create such a condition as to require or authorize court to consider extrinsic evidence as to meaning of written agreement between the parties.

5. Easements 🔑50, 52

Deed describing private alleyway and conveying to grantee, its successors and assigns, full and free right for it, its tenants, servants, visitors and licensees, in common with all others having like right, to pass over and upon said private alleyway until a certain date did not create an easement for the sole use and benefit of grantee, and use of alleyway by grantee's successors in interest for a parking lot was a violation of rights of grantor's successors in interest.

6. Easements 🔑12(1)

An easement deed does not "grant" anything to servient estate since it retains all that which the deed does not give away.

7. Easements 🔑12(1)

Where an easement is founded on a grant, only those interests expressed therein and necessary for its reasonable and proper enjoyment pass from owner of fee. West's Ann.Civ.Code, § 806.

8. Estoppel ⚷95

Where owners of servient estate purchased property in 1954 and were advised in June or July that owner of dominant estate intended to use alleyway for parking purposes and owners of servient estate objected and in January 1955 defendants, as prospective buyers, inspected lot and observed parking signs but easement deed covering alleyway had been recorded for some years previously, recordation of easement deed conveyed constructive notice of its terms to defendants and owners of servient estate, by their silence, were not estopped to assert their claims arising out of exclusive use of alley by defendants nor were they guilty of laches in bringing an action in October 1955.

9. Estoppel ⚷95

An estoppel may arise from silence, but only where there is a duty to speak, and where party upon whom such duty rests has an opportunity to speak and, knowing circumstances requiring him to speak, remains silent.

10. Easements ⚷55

Where owners of dominant estate overburdened easement by using alleyway for parking of automobiles, depriving owners of servient estate from use of alleyway, owners of servient estate were entitled to an injunction to prevent continued occupation of alleyway in violation of easement.

◆

L. Dean Petty, Beverly Hills, Jean Wunderlich, Los Angeles, for appellants.

John E. Sisson, Guy T. Graves, Los Angeles, for respondents.

LILLIE, Justice.

An action for declaratory relief, injunction and damages was brought by plaintiffs, successors to the grantors and owners in fee of the servient estate, Lot 1, against defendants, successors to the grantees and owners in fee of the dominant estate, Lot 11, and the appurtenant easement thereto, to determine the rights of the parties in the easement created over Lot 1 under a grant deed dated April 17, 1934. The matter was heard before the court sitting without a jury. The trial judge found that the easement was created for the sole use and benefit of the defendants' predecessors in interest and that the exclusive use thereof by defendants was not a violation of the rights of the plaintiffs. From a judgment in favor of defendants, plaintiffs appeal.

The primary question is whether the instrument granting the easement to defendants' predecessors in interest conveyed to them an easement to the exclusion of the owners of the servient tenement.

The deed, among other things, provided: "Whereas, there is on the northerly twenty (20′) feet of said first herein described parcel of real property, a private road, or alleyway, extending from the east to west a distance of one hundred forty (140′) feet, as shown on the plan hereto annexed and made a part thereof by this reference." After reciting the consideration therefor, it continued: "hereby grant unto said Security First National Bank of Los Angeles, a national banking association, its successors and assigns, the full and free right for it and them, its and their tenants, servants, visitors and licensees, in common with all others having like right, at all times hereafter to and including the 31st day of July, 2027, with or without horses, carts, carriages, motors or other vehicles, for all purposes connected with the use of said grantee's land, to pass and repass along, over and upon said private road or alleyway hereinbefore described. To have and to hold said easement to the said Security-First National Bank of Los Angeles, a national banking association, its successors and assigns, as appurtenant to its said land herein described."

Defendants have been and are now using the easement, surfaced with concrete and marked off by painted white lines for parking stalls, as a permanent parking lot for ten or eleven cars owned by tenants in defendants' apartment building. These stalls have been assigned to defendants' tenants by name and apartment number.

[1-3] There is no claim of right by prescriptive use. The easement was created by a grant deed and the nature and extent of the respective rights are governed by its terms. In construing an instrument conveying an easement, the rules applicable to the construction of deeds generally apply. Eastman v. Piper, 68 Cal.App. 554, 229 P. 1002. If the language is clear and explicit in the conveyance, there is no occasion for the use of parol evidence to show the nature and extent of the rights acquired. A written agreement, unless it is ambiguous, must be construed by a consideration of its own terms. The meaning and intent thereof is a question of law and the reviewing court is not bound by the trial court's findings and conclusions regarding such intent and meaning. Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13; Buehler v. Reilly, 157 Cal.App.2d 338, 321 P.2d 128.

[4, 5] The language of the grant deed, dated April 17, 1934, is clear and free from ambiguity and uncertainty and does not create such a condition as to require or authorize the court to consider extrinsic evidence as to the meaning of the written agreement between the parties. The terms clearly show that until 2027, the grantees, in common with others having like right, have the unrestricted right to pass and repass over a private alleyway of explicit description and location, for all purposes connected with the use of their land. We cannot hold in line with the trial court's ruling that by the employment of the terms "full and free" and "all purposes" the use was intended to be exclusive to the grantees and for all purposes connected with their property. The document clearly indicates that the right which is unrestricted, or "free and full" is the right to "pass and repass" across the easement, and even the extent of this right is limited by the use of others who have the same, or like, right. The phrase "all purposes" as used in the instrument does not imply that all rights in connection with the use of the dominant estate are conveyed, but only the right to pass and repass for all purposes connected with the use of grantees' land. A fair interpretation of the language of the conveyance permits the grantees to pass and repass for all purposes connected with the use of their estate.

[6] Any claim that the deed makes no reservation or exception in favor of the grantors is without merit. First of all, a reservation or exception is stated, and in positive terms, that all others having the same right may also pass and repass. Secondly, there is little question that the grantors retained this right with others, for an easement deed does not "grant" anything to the servient estate since it retains all that which the deed does not give away. City of Pasadena v. California-Michigan Land and Water Co., 17 Cal.2d 576, 110 P.2d 983, 133 A.L.R. 1186.

Obviously, the parties had in mind an "alleyway" or "road" that others might use, but which was to be "private," not dedicated to public use, and which was to be used for moving vehicular traffic. No mention was made of storage of vehicles or a permanent parking lot to be used exclusively by the owners of the dominant estate. Instead, the deed expressly gives the right to "pass and repass," which implies movement and transfer from one place to another, to the grantees in common with all others having a like right.

[7] The extent of a servitude is determined by the terms of the grant creating it. Sec. 806, Civil Code. Where an easement is founded on a grant, only those interests expressed therein and necessary for its reasonable and proper enjoyment pass from the owner of the fee. City of Pasadena v. California-Michigan Land and Water Co., supra. The interest expressed in the instant deed is only the right to pass and repass for all purposes connected with the use of the grantees' land. If permanent parking were permitted for defendants' tenants the effect would be to make the use exclusive to them. This cannot be implied from the clear language of the deed. In City of

Pasadena v. California-Michigan Land and Water Co., 17 Cal.2d 576, at page 578, 110 P.2d 983, at page 985, the Supreme Court, speaking of such an implication, said: "Furthermore, an 'exclusive easement' is an unusual interest in land; it has been said to amount almost to a conveyance of the fee. 2 Thompson, Real Property 1939, § 578; Jones, Easements, § 378, p. 302. No intention to convey such a complete interest can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention. See Reiver v. Voshell, 18 Del.Ch. 260, 264, 158 A. 366; Jones, supra, § 379, p. 303."

If we are to hold that this easement includes the right to permanently park vehicles thereon, we must find that it is necessarily incident to the right to pass and repass for all purposes connected with defendants' land. This we cannot do. It is obvious that any permanent occupation by way of parking, or otherwise, which excludes the use of plaintiffs and others having a like right to pass and repass, is entirely foreign to the grant. The right to pass and repass conveyed by the deed in the case at bar is not unlike an easement of ingress and egress. The record herein excludes any evidence of the occasional or temporary parking that normally accompanies the movement of vehicles in and out of, or over, a location such as that found in various cases cited by respondents. On the contrary, the undisputed evidence establishes parking of a permanent nature by tenants who live on the dominant estate. Certain tenants have been assigned stalls created on the concrete surface of the easement by painted white lines. The entire area accommodates ten or eleven cars. As between the tenants and defendants, the right to use parking facilities there is created by lease of an apartment in the building owned by the defendants. Defendants, by nine signs painted on the wall of the plaintiffs' building abutting the easement, reserved this area exclusively for parking for their tenants. The signs read: "Private Parking," "For Tenants Only, Police Tickets Issued to Violators," and "Private Parking, Violators Prosecuted." Clearly, this is not a use compatible with the terms of the grant. It does not constitute a reasonable and proper enjoyment of an easement to pass and repass, and prevents and interferes with the passing and repassing of the vehicles of others, including plaintiffs, who have a like right with defendants.

A similar grant was construed in Gillespie v. Weinberg, 148 N.Y. 238, 42 N.E. 676, in which the court held that a deed giving the grantee a right to use a specified portion of an adjoining lot as "an alley in common for the purpose of passing and repassing," gives a right to use the alley for passage of vehicles but does not authorize the grantee to erect any permanent structure in the alley. Likewise, the courts in other jurisdictions have refused to construe the right of ingress and egress as embodying the right to park permanently. Penn Bowling Recreation Center v. Hot Shoppes, 86 U.S.App.D.C. 58, 179 F.2d 64, 16 A.L.R.2d 602; Feld v. Young Men's Hebrew Ass'n of Vicksburg, 208 Miss. 451, 44 So.2d 538.

Based on the authorities cited and the clear terms of the conveyance, we hold that no exclusive easement was granted and that it did not give defendants the right to use it as a permanent parking lot excluding the plaintiffs from its use.

[8] The next issue arises out of the trial court's application of the doctrine of estoppel and laches. Max Berlin, defendants' predecessor in interest, started construction of a 36-unit apartment building and garage on lot 11 in January, 1954. Plaintiffs acquired Lot 1 on January 29, 1954. In May or June of 1954, after construction was completed, Berlin surfaced the easement with concrete and in June or July, 1954, advised plaintiffs that he intended to use it for parking purposes. Plaintiffs objected and a controversy arose. Shortly thereafter, with plaintiffs' permission, Berlin painted the north side of plaintiffs' building in order to improve the ap-

pearance of Lot 11; but without the knowledge or permission of plaintiffs he painted nine signs on the wall reading: "Private Parking," "For Tenants Only, Police Tickets Issued to Violators," and "Private Parking, Violators Prosecuted," which signs plaintiffs first discovered in December of 1954. Berlin also painted lines dividing the surface of the easement into parking stalls. Thereafter in June, July and August, 1954, plaintiffs' attorney and Berlin, and Berlin's partner, had several conversations regarding the use of the area for parking. Negotiations were suggested. During this time, cars continued to park on the easement.

In January, 1955, defendants, as prospective buyers, inspected Lot 11 and observed the signs on the plaintiffs' north wall, the white lines on the concrete surface of the easement and the cars parked thereon. Defendants claimed before the trial court that in reliance on this observation, they purchased Lot 11 on March 8, 1955. However, the record also discloses that the easement deed had been recorded for some years prior, that the deed to Lot 11 given to defendants contained a full description of the easement, and that prior to the consummation of the sale, defendants asked Berlin about parking and he told them they had the right to park in the area. There is no evidence in the record that plaintiffs ever knew that Berlin was a speculator-builder. Plaintiffs did not know defendants, or of them, until several days after March 8, 1955, when they first learned Berlin had sold Lot 11. They did not previously know Lot 11 was for sale nor that defendants or anyone else were prospective buyers. Plaintiffs did not know of Berlin's sale of Lot 11 to defendants until several days after the sale was consummated, at which time plaintiffs contacted their counsel who thereafter, by telephone, communicated with defendants about the easement, and wrote three letters to defendants beginning May 11, 1955, resulting in this action which was filed October 28, 1955.

The trial court found that defendants had no notice of plaintiffs' claims to the easement; that plaintiffs did nothing to change the physical condition of the easement, brought no action to assert their claims, and filed no notice of lis pendens to notify prospective buyers of the controversy; that defendants relied on the condition they observed and believed they were purchasing Lot 11 and the easement with the right of tenant parking; that plaintiffs, by their silence, induced the defendants to change their position to their detriment and plaintiffs are now estopped to assert their claims.

At the outset, defendants had constructive notice of the nature and extent of the easement from the fact that the easement was of record in the office of the county recorder. Recordation of the easement deed conveyed constructive notice of its terms to defendants. Sec. 1213, Civ.Code; 17 Cal.Jur. 2, Easements, Sec. 33, p. 140; Farmer v. Ukiah Water Co., 56 Cal. 11; Hohenshell v. South Riverside Land & Water Co., 128 Cal. 627, 61 P. 371.

As to plaintiffs' alleged silence between January, 1955, when defendants first inspected Lot 11, and March 8, 1955, it is clear from the evidence that defendants apparently were not convinced that the appearance of Lot 11 and the easement conveyed the true facts because before they acquired title to the property, they inquired of Berlin if the right of tenant parking was included; to which he replied in the affirmative. It is obvious that it was not alone on the appearance of lot 11 that the defendants relied.

[9] The rule of estoppel by way of silence is discussed by the Supreme Court in the case of People v. Ocean Shore Railroad, 32 Cal.2d 406, at page 421, 196 P.2d 570, at page 580, 6 A.L.R.2d 1179: "An estoppel may arise from silence, but only where there is a duty to speak, and where the party upon whom such duty rests has an opportunity to speak and, knowing that the circumstances require him to speak, remains silent. Merry v. Garibaldi, 48 Cal.App.2d 397, 401, 119 P.2d 768." To invoke this rule there must

be a duty on one to speak, an opportunity to do so and the knowledge that circumstances require him to speak.

As to Berlin, plaintiffs immediately objected when they first learned of his proposed use of the area for parking; continued to further protest; and were in the process of considering further negotiations suggested by Berlin when he sold the property. Up to then there was no occasion for plaintiffs to file suit against Berlin, As to defendant Haky, plaintiffs did not know Lot 11 was up for sale, did not know the sale was consummated until several days thereafter when plaintiffs had their counsel communicate with defendants. The defendants, before buying Lot 11, had constructive notice of the easement, received a description thereof with their deed, did not communicate with plaintiffs regarding the easement and elected to take Berlin's word concerning the right to park. If there was any duty on the part of plaintiffs to disclose their claims to the easement, then it must have been one toward a class of unknown persons (prospective buyers of Lot 11). We think such a duty did not exist. It is also clear from the evidence that plaintiffs did not know that the circumstances were such between January, 1955, and March 8, 1955, that might have required them to speak.

Under the authorities cited and the record in this case, we are satisfied that plaintiffs are not estopped to assert their claims nor guilty of laches in bringing this action.

On the issue of damages, this court is bound by the trial judge's finding that defendants obtained no revenues from the parking spaces and that plaintiffs' property had not been damaged.

[10] However, on the matter of injunctive relief, the trial court's refusal to grant an injunction was predicated on its finding that no violation of the easement by defendants had occurred. In holding that the easement is not an exclusive one and that a violation exists, the reviewing court may determine if an injunction will lie. The record discloses a lack of evidence to support a finding of damages, but it is clear that the defendants have and are continuing to overburden the easement by acts not contemplated by the grant deed. This, in effect, constitutes a trespass and if the owner of the dominant estate is permitted to continue obstructing the easement, the effect will be to take from the owner of the servient estate the fee of the easement by prescriptive use.

In the case of Danielson v. Sykes, 157 Cal. 686, at page 691, 109 P. 87, at page 89, 28 L.R.A.,N.S., 1024, the Supreme Court stated: "The rule is that if an obstruction to a private easement is continuous, exclusive, and under claim of right, so that it will eventually destroy the easement by adverse possession thereof, an injunction will be granted against such obstruction, although substantial damage has not yet been caused by the obstruction. In such a case the damage will be substantial when the adverse occupation has extinguished the right of way. This is sufficient to justify the injunction to prevent the continued occupation which would eventually operate to take a right in real property from the true owner. Mendelson v. McCabe, 144 Cal. 230, 232, 77 P. 915, 103 Am.St.Rep. 78, and cases there cited. This case also decides that where such trespasses are of a continuing nature, and the damage for each day's obstruction is insignificant, the remedy of successive actions at law for such damages is inadequate, and equity will interpose by injunction."

A similar holding is found in Bartholomew v. Staheli, 86 Cal.App.2d 844, at page 856, 195 P.2d 824, at page 832, in which the court discussed the overburdening of the easement by the owners of the dominant estate and stated: "The injunction properly issued to prevent a continuation of unlawful acts which would deprive plaintiffs of full enjoyment of their property rights and to preclude such excessive and unwarranted use of the roadway from ripening into defendants' prescriptive use thereof. Vestal v. Young, 147 Cal. 715, 719, 82 P. 381; Lindsay-Strathmore Irr. Dist.

v. Superior Court, 182 Cal. 315, 327, 187 P. 1056."

We hold that an injunction is proper in the case.

The judgment is reversed and the cause remanded with directions to issue an injunction as prayed and to make appropriate findings in conformance with this opinion.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

Fern T. DALLMAN, Plaintiff, Respondent and Cross-Appellant,
v.
Lloyd H. DALLMAN, Defendant, Appellant and Cross-Respondent.

Lloyd H. DALLMAN, Cross-Complainant, Appellant and Cross-Respondent,
v.
Fern T. DALLMAN, Cross-Defendant, Respondent and Cross-Appellant.*
Civ. 9158.

District Court of Appeal, Third District, California.
May 23, 1958.

Rehearing Granted June 20, 1958.

Wife was granted an interlocutory decree of divorce upon grounds of extreme cruelty and adultery and from a decree of the Superior Court, Sacramento County, J. O. Moncur, J., cross-appeals were taken. The District Court of Appeal, Warne, J. pro tem., held that an award of money in lieu of specific interest in community property to the wife was a proper method of distribution; that the trial court had no power to determine the value of community property prior to the final decree; that substantial evidence sustained determination respecting character and value of community property but that a division in kind rather than a monetary award against the husband would be better for all concerned.

Judgment modified and as modified affirmed.

1. Divorce 🔑249(1)

In divorce action, an award of money to the wife in lieu of a specific interest in community property is the proper method of distribution of property and is within the sound discretion of the trial court.

2. Divorce 🔑254

In wife's action for divorce, while it was proper for the trial court to determine in its interlocutory decree the status of the property of the spouses and how it ought to be assigned upon entry of the final decree, the trial court had no power to require the payment of money by the husband to the wife nor to determine the value of the community property prior to the final decree of divorce.

3. Divorce 🔑253
Husband and Wife 🔑264

In wife's action for divorce, substantial evidence sustained determination of the trial court finding that all of the property involved was community property and that its value immediately prior to trial was $800,000.

4. Appeal and Error 🔑989, 996

Power of an appellate court begins and ends with a determination as to whether there is any substantial evidence which will support the conclusion reached by the trier of facts and when two or more inferences can reasonably be deduced from the facts reviewing court cannot substitute its determination for those of the trial court.

5. Divorce 🔑286

In action for divorce, the appellate court has the power to revise the trial court's determination of community property upon the granting of a divorce even where the trial court's action does not amount to an abuse of discretion. West's Ann.Civ.Code, § 148.

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* Opinion vacated 331 P.2d 245.

6. Divorce ⚷252

Where wife was granted a divorce, provision of decree awarding a money judgment of more than $95,000 to the wife which the husband was required to pay in less than two years was improper under the circumstances where a division in kind would work out better for all concerned. West's Ann.Civ.Code, § 148.

7. Divorce ⚷252

Where a divorce is granted on the grounds of extreme cruelty or adultery, the innocent spouse must be awarded more than one-half of the community property and what percentage may be is left to the sound discretion of the trial court in the first instance and when on appeal the award is changed by the reviewing court, the division likewise rests in its sound discretion.

◆

John L. Brannely, Sacramento, and Roy A. Sharff, San Francisco, for plaintiff.

David Livingston, San Francisco, and Desmond, McLaughlin & Russell, Sacramento, for defendant.

WARNE, Justice pro tem.

These are cross appeals. Plaintiff was granted an interlocutory decree of divorce upon the grounds of extreme cruelty and adultery. The decree, in so far as material to defendant's appeal, provides that plaintiff shall have judgment against the defendant for the sum of $396,651.25 in lieu of her interest in the community property to be paid as follows: $50,000 upon the entry of the interlocutory decree; the further sum of $50,000 on or before 90 days from the entry of the interlocutory decree; the further sum of $75,000 on or before 180 days after the last payment of $50,000; the further sum of $75,000 on or before 180 days after the date of the last preceding payment; the balance, if any remaining, to be paid on or before 180 days after the date of the last preceding payment; that if any of said payments be not paid at the time specified, such payments shall bear interest at the rate of five per cent per annum compounded semiannually; also, that on the payment of $396,651.25, defendant shall hold as his sole and separate property all of the community property not awarded to plaintiff by the judgment in this case. The property awarded to plaintiff consisted of an interest in the contract of purchase covering two lots of land at Apple Valley, California; a 1951 Buick Roadmaster automobile; and certain jewelry, clothing, furs, and other articles of a personal nature worn or used by plaintiff and in her possession and under her control. The court found the value of the community property to be $800,000. The principal asset consisted of a 22 per cent interest in a partnership, the Dallman Supply Company, which in turn owned all of the capital stock of a corporation known as the Dallman Company. A lien was imposed upon the partnership interest in the Dallman Supply Company and all other community property of the parties to secure the payment of the $396,651.25.

On motion of the defendant an order was made supplementing and implementing the interlocutory decree whereby defendant was permitted and authorized to transfer, by mortgage or deed of trust, all of the community right, title and interest in the partnership, and the real property was subject to the interlocutory decree lien as security for a loan not to exceed $150,000 on condition that of said amount $100,000 be paid to plaintiff on account of the cash award of $396,651.25. Additional conditions contained in the order are: "(b) That without regard to the outcome of defendant's appeal herein he shall have no right to recover said One Hundred Thousand Dollars ($100,000.00); (c) That in the event of affirmance of said provision of said decree, said payment shall constitute partial satisfaction thereof; (d) That in the event that the interlocutory decree herein should, as the result of further proceedings, be modified, or if a different decree is made herein which is inconsistent with respect to any of its terms with the interlocutory decree heretofore made, defendant shall be given credit for said payment against, and the same shall be deemed an advance with respect to, any obligation on the part of defendant under any decree entered herein; and if such decree is modified, or such different decree contains provisions for division of community property, then said payment of One Hundred Thousand Dollars ($100,000.00) shall be deemed a charge against the share of plaintiff in the community property * * *." (At argument the court was told Mrs. Dallman had received the said sum of $100,000.)

There is no appeal from that portion of the interlocutory decree granting the wife a divorce.

[1] Defendant first contends that the trial court exceeded its jurisdiction in entering a judgment requiring him to pay cash for his wife's share of the community property; and second, that aside from the lack of power to award a money judgment, the trial court's action in so doing constituted an abuse of discretion. Although we have concluded to make a different disposition of the community property for reasons hereinafter stated, we do not agree with either contention. An award of money in lieu of a specific interest in community property is a proper method of distribution of the property and is a matter to be determined by the sound discretion of the trial court. Webster v. Webster, 216 Cal. 485, 488, 14 P.2d 522; Bailey v. Bailey, 60 Cal.App.2d 291, 140 P.2d 693; Pope v. Pope, 102 Cal.App.2d 353, 227 P.2d 867; Clark v. Clark, 130 Cal.App.2d 685, 279 P.2d 822; Phillips v. Phillips, 152 Cal.App.2d 582, 587, 313 P.2d 630; Wuest v. Wuest, 72 Cal.App.2d 101, 109, 164 P.2d 32.

[2] Defendant next contends that the trial court had no power to require the payment of any sum of money nor to determine the value of the community property prior to the final decree.

The case of Wilson v. Wilson, 76 Cal.App.2d 119, 132, 172 P.2d 568, 576, is an answer to defendant's contention and a solution of the problem. We quote therefrom: "In the present case we are faced with the problem expressly left open in the Leupe case [Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697]. Here the appeal is from the interlocutory decree. In Remley v. Remley, 49 Cal.App. 489, 193 P. 604, and Strupelle v. Strupelle, 59 Cal.App. 526, 211 P. 248, and by implication in other cases (see Peis v. Mohr, 126 Cal.App. 300, 14 P.2d 878; Abbott v. Superior Court, 69 Cal.App. 660, 232 P. 154; Webster v. Webster, 216 Cal. 485, 14 P.2d 522), it has been held to be error to make a present and absolute disposition in the interlocutory. It would appear that a proper solution of this problem would be to hold that the interlocutory may make a present disposition of the community property, but that the title thus conveyed is limited and conditional until the entry of the final decree * * * In the present case it was, of course, proper for the trial court to determine in its interlocutory the status of the property and how it ought to be assigned upon the entering of the final decree." In the present case justice will be best served by amending the decree so as to provide that the disposition of the property and the judgment relating thereto shall become effective upon the entry of the final decree.

[3, 4] Defendant next contends that the trial court erred in finding that all of the property involved in the case was community property, and that its value immediately prior to the date of trial was $800,000. The findings concerning these matters were based upon conflicting evidence, and the factual issues have been determined adversely to the defendant. The record in the case is a lengthy one, consisting of over 3,000 pages of transcript, and 256 exhibits. No good purpose would be served by detailed statements of the evidence. Suffice it to say we have carefully examined the record and find that there is substantial evidence to sustain the trial court's determination respecting the

character and value of the property. Where the defendant argues as a ground for reversal of the judgment the insufficiency of the evidence to sustain the findings, such contention requires him to demonstrate that there is no substantial evidence to support the general findings. As stated in the oft-cited case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184: "* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." See, also, Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660; Fischer v. Keen, 43 Cal.App.2d 244, 248, 110 P.2d 693; Laherty v. Connell, 64 Cal.App.2d 355, 357, 148 P.2d 895; Wuest v. Wuest, supra.

[5] Although the record herein amply supports the conclusion of the trial court as to the character and value of the property, we cannot approve of the manner of disposition thereof as set forth in the decree. Under the provisions of Civil Code, section 148, "* * * this court has the power to revise the trial court's disposition of community property upon the granting of a divorce, even in cases where the trial court's action does not amount to an abuse of discretion." Nelson v. Nelson, 100 Cal.App.2d 348, 351, 223 P.2d 636, 638; Hill v. Hill, 150 Cal.App.2d 34, 35, 36, 309 P.2d 44.

[6] In the present case, the defendant is faced with a money judgment of more than $395,000, which, according to the provisions of the decree, he must pay in less than two years. In view of the record, the question immediately arises as to how the defendant can satisfy such a judgment, under the provisions set forth in the decree, from any source indicated by the record. The judgment in effect requires him to buy his wife's community interest in the partnership which in turn owns the corporation. Hence, he has no shares of stock to sell. For all practical purposes his only means of satisfying the judgment is to obtain money from the partnership, but again it appears from the record that this cannot be done. The record in this regard shows that the corporation has, from time to time, since 1950, been heavily indebted to the Wells Fargo Bank, and at the time of the hearing the indebtedness amounted to $850,000. It also appears as pointed out by counsel for defendant, that in 1950, the partnership executed a written guarantee of the company's debt; that this was superseded by a similar guarantee dated February 24, 1954; that the partnership had advanced $500,000 to the corporation and that by an agreement executed by the partnership, its claim is subordinate to that of the bank. Additionally, there was testimony by a bank official that there was no way in which the Dallman organization, i. e., both the corporation and the partnership, could obtain the sum of $400,000 in cash (the amount of the judgment); that for this purpose the bank would not permit the sale of any real estate belonging to the partnership unless it could be satisfied that funds in an equivalent amount could be accumulated by the organization, and that on the basis of its current operating record, which shows large losses, there was no way in which the money could be so accumulated. There was also proof that the Dallman share of the partnership cannot be liquidated. Defendant's interest therein is 22 per cent. The remainder is owned by a brother and a sister, and four trusts which were created by defendant's mother for the benefit of her grandchildren and to which she transferred her 25 per cent of the partnership. Such being the state of the record, it appears obvious that the defendant cannot satisfy this judgment as ordered. Further, if the judgment is permitted to stand, and a levy and execution were to issue, it might well wreck the business, leaving the defendant with no assets whatsoever. It is not the

intent of the law, even though defendant be guilty of extreme cruelty and adultery, that he be punished in the division of property. Under the facts in this case, it seems far better that there be a division in kind so that the financial difficulties may in the long run work out for the betterment of all concerned.

Before attempting to revise the decree previously entered, it should be noted that we accept the various values as found by the trial court, since such were all questions of fact presented for the court's determination upon conflicting testimony. In other words, we have accepted the $800,000 valuation placed upon the community property. We have also taken into consideration the $71,231.63 appraised value of the real property (the ranch home) awarded to the defendant; the $5,698.94 cash surrender value of certain life insurance policies upon the life of defendant; the value of the defendant's 22 per cent interest in the partnership as determined by the trial court; the $11,000 bank deposit which the defendant received; the property of the value of $12,348.75 which the plaintiff has received; and the $100,000 which has been paid to her and the fact that she is receiving no alimony. Here it should also be noted that the conclusions of law and the decree purport to deduct the sum of $12,348.75 from $408,000, and show a balance of $396,651.25. However, the correct balance should be $395,561.25.

[7] It should further be noted that in revising this award, we are not too concerned if the award to plaintiff exceeds the 49–51 per cent division attempted by the trial court. The rule is too well established to warrant citation of authority that when a divorce is granted on the grounds of extreme cruelty or adultery the innocent spouse must be awarded more than one-half of the community property. What the percentage may be is left to the sound discretion of the trial court in the first instance, and when on appeal the award is changed by the reviewing court, the division likewise rests in its sound discretion.

Since the award in this case has been revised by this court, the question raised concerning the rate of interest to be allowed on the judgment as entered by the trial court now becomes moot.

It is therefore ordered that the decree and judgment in so far as it makes an award of $395,651.25 to the plaintiff, and the provisions for the payments of said amount in installments, together with interest on any delinquent amounts, be vacated and set aside. In lieu thereof, this court orders that the community property be awarded as follows: To the plaintiff: (a) All interest of any of said parties under a contract of purchase covering two lots located at Apple Valley, California; (b) a 1951 Buick Roadmaster automobile; (c) all jewelry, clothing, furs and other articles of a personal nature worn or used by plaintiff; (d) a 40 per cent interest in the 22 per cent of the community partnership interest in the copartnership known as the Dallman Supply Company; (e) and that plaintiff shall have judgment against the defendant for the further sum of $30,000 to be paid by defendant to plaintiff in lieu of her remaining one-half of the said copartnership interest; that said sum be paid within 30 days from the date of entry of judgment, and if not then paid, to bear interest at the legal rate of seven per cent per annum; that the defendant's partnership interest in the Dallman Supply Company be charged with the payment of said $30,000, and a lien is hereby impressed upon said partnership interest and all other community property of the parties to secure the payment of said $30,000. It is further ordered that the defendant be awarded the remaining 60 per cent of the 22 per cent community interest in the copartnership known as the Dallman Supply Company, and all other community property of the parties not awarded to the plaintiff by the judgment in this case. This division of community property is to become effective on the entry of the final decree herein.

Defendant's application for leave to produce additional evidence is denied.

As modified, the judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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160 Cal.App.2d 718

Margarette Thompson KELLY, Cleo Thompson Watts and Charlotte Thompson Martin, Plaintiffs and Appellants,

v.

JOHNSON PUBLISHING COMPANY, Incorporated, a corporation, Doe I, Doe II, Doe Corporation I, Doe Corporation II, John H. Johnson, Defendants,

Johnson Publishing Company, Incorporated, Defendant and Respondent.

Civ. 22585.

District Court of Appeal, Second District, Division 3, California.

May 22, 1958.

Action by sisters against owner and publisher of magazine for wrongful invasion of right of privacy or for libel. The Superior Court, Los Angeles County, Leon T. David, J., entered an order sustaining the owner's general demurrer to the complaint and the sisters appealed. The District Court of Appeal, Vallée, J., held that sisters' complaint filed against owner and publisher of magazine which published article concerning their brother was insufficient to state a cause of action for wrongful invasion of right of privacy or for libel.

Affirmed.

1. Torts 🔑8, 26(2)

Right of privacy is a purely personal one and to state a cause of action for invasion of right of privacy, one must allege and prove an invasion of his own right of privacy before he can recover.

2. Torts 🔑8

Gist of cause of action in privacy case is not injury to character or reputation but a direct wrong of a personal character resulting in injury to feelings without regard to any effect which publication may have on property, business, pecuniary interest, or standing of individual in the community.

3. Libel and Slander 🔑1
Torts 🔑8

The right of privacy concerns one's own peace of mind, while right of freedom from defamation concerns primarily one's reputation.

4. Torts 🔑20

Right of privacy cannot be asserted by anyone other than him whose privacy is invaded.

5. Torts 🔑26(1)

Sisters' complaint filed against owner and publisher of magazine which published an article concerning their brother was insufficient to state a cause of action for wrongful invasion of right of privacy.

6. Libel and Slander 🔑73

Defamation of a deceased person does not give rise to a civil right of action at common law in favor of surviving spouse, family, or relatives, who are not themselves defamed. West's Ann.Civ.Code, § 45; West's Ann.Code Civ.Proc. § 460.

7. Libel and Slander 🔑73

A libel on memory of a deceased person is not deemed to inflict on surviving relatives of deceased any such legal damage as will sustain a civil action for the defamation. West's Ann.Civ.Code, § 45; West's Ann.Code Civ.Proc. § 460.

8. Libel and Slander 🔑85

Complaint filed by sisters against owner and publisher of a magazine in which appeared an article allegedly containing false and libelous statements concerning their deceased brother, was insufficient to state a cause of action for libel. West's Ann.Civ.Code, § 45; West's Ann.Code Civ. Proc. § 460.

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Wilson, Carter, Flournoy & Matthews, and Rafus J. Carter, Los Angeles, for appellants.

Loeb & Loeb, Los Angeles, Allen E. Susman, Beverly Hills, and Sanford M. Ehrmann, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment entered on an order sustaining defendant's general demurrer to the complaint without leave to amend. The question is: Does the complaint state facts sufficient to constitute a cause of action for wrongful invasion of the right of privacy or for libel?

The complaint alleges:

1. Defendant is the owner and publisher of "Ebony," a magazine circulated in the County of Los Angeles and throughout the world.

2. Plaintiffs are the surviving sisters and only heirs at law of Cecil Lewis Thompson who died in Los Angeles on April 11, 1946.

3. At the time of his death and for many years prior thereto Thompson had received and enjoyed international recognition and acclaim as a fighter and boxer in the prize ring, and had attained a status as a boxing champion under the name "Jack Thompson."

4. Thompson was of good reputation and character, and had and enjoyed a good general reputation among the members of the community in which he lived and performed.

5. Thompson was the sole brother of plaintiffs and his memory is held by plaintiffs with deep reverence and respect.

6. On October 1, 1956 in Los Angeles city and county defendant, for the purpose of exploiting its publishing business and of increasing its gains, did invade plaintiffs' "right of privacy by wilfully and maliciously publishing and using in said magazine the following libelous matter in the following manner of and concerning the said Cecil Lewis Thompson, also known as Jack Thompson, in large type and in capital letters:

" 'No Champ Has Been Able to Retire on Ring Earnings', and then in smaller letters;

" 'Of the 31 Negroes who held world boxing championships, five are still very much on the scene as title holders, six other are still boxing although over the hill, eight are dead and 12 have hung up their gloves for good. While many won fame, none quit the ring with enough money to live on. Young Jack Thompson, the handsome, slashing boxing master master [sic] who roared out of his native Los Angeles in 1931 to capture the welterweight title from Jackie Fields, wound up a dope-sodden derelict on the shadowy San Francisco waterfront where one morning his knife-scarred body was fished from the Bay.' "

7. All of said statements were false and published without any foundation whatever, and "the same was done without consent of the plaintiffs."

8. The "publication was done falsely, maliciously, wrongfully and unlawfully, and unprivileged and without occasion or excuse and has caused plaintiffs great mental pain and anguish, humiliation and mortification, and has caused an evil opinion of their deceased brother, Jack Thompson, in the minds of his former associates and the public generally; that in truth and in fact at the time the said Jack Thompson retired from his vocation as a boxer, he did have sufficient 'money to live on'; that in truth and in fact he did not wind up a 'dope-sodden derelict on the San Francisco waterfront' nor was his 'knife-scarred body fished from the Bay'."

9. By the publication of the article defendant intended to convey the meaning, and it was understood by the persons reading it to mean, that Thompson was a person outside of respectable society; that

he was a "human wreck"; and that he met his death through the excessive use of opiates, and that he was a dope addict. The publication was wholly false and defamatory.

10. By reason of the premises, plaintiffs have been "generally" damaged in a specified amount.

Plaintiffs first contend the complaint states facts sufficient to constitute a cause of action for wrongful invasion of the right of privacy.

[1] The right of privacy is a purely personal one. Prosser on Torts, 2d ed., 641, § 97; Mau v. Rio Grande Oil, Inc., D.C., 28 F.Supp. 845, 846. "A right of action for violation of one's right of privacy being purely a personal one, appellant must allege and prove an invasion of his own right of privacy before he can recover." Metter v. Los Angeles Examiner, 35 Cal.App.2d 304, 310, 95 P.2d 491, 495.

[2, 3] The gist of the cause of action in a privacy case is not injury to the character or reputation but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133, 138; Continental Optical Co. v. Reed, 119 Ind.App. 643, 86 N.E.2d 306, 88 N.E.2d 55, 14 A.L.R. 2d 743, 747. The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation. Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133, 139; Pound in 28 Harv.L.Rev. 343, 362–363. The injury is mental and subjective. It impairs the mental peace and comfort of the person. Pound in 28 Harv.L.Rev. 343, 363; Fairfield v. American Photocopy Equipment Co., 138 Cal.App.2d 82, 86, 291 P.2d 194; Annotation, 14 A.L.R.2d 750.

Dean Prosser says: "The right [of privacy] is a personal one, and it does not extend to the plaintiff's dog. The action cannot be maintained by a relative of the person concerned, unless that relative is himself brought into unjustifiable publicity. The cause of action does not survive the individual, and cannot exist after death." (Prosser on Torts, 2d ed., 641, § 97.)

Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876, was in part an action by the parents of William L. Mock for the alleged violation of their right of privacy. William had been arrested, tried, and acquitted of a public offense. The claimed violation of his parents' right of privacy was predicated on the publicity attendant on William's arrest and trial. The court stated (38 Cal. 2d at pages 322, 323, 239 P.2d at page 880):

> "While the right of action for the invasion of one's privacy is recognized in California [citations], it is clear that the principles which govern the right to recover on such theory do not encompass the facts asserted herein. [Citation.] The gravamen of the tort is ordinarily the unwarranted publication by defendant of intimate details of plaintiff's private life. * * *
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> "So far as the briefs and independent research have revealed, there have been no instances wherein courts have allowed recovery on this theory, where defendant's alleged wrongful act was directed toward a third person, and only as an incident to that act was it claimed that plaintiff's privacy had been invaded. Neither reason nor authority indicates that there should be an extension of liability to cover such a situation. Such a rule would open the courts to persons whose only relation to the asserted wrong is that they are related to the victim of the wrongdoer and were therefore brought unwillingly into the limelight. Every defamation, false imprisonment, and malicious prosecution would then be an actionable invasion of the privacy of the relatives of the victim." Also see Wright v. R.K.O. Radio Pictures, D.C., 55 F.Supp. 639, 640–641; Schu-

mann v. Loew's Incorporated, Sup., 135 N.Y.S.2d 361, 365–368.

[4, 5] The authorities appear to be uniform that the right of privacy cannot be asserted by anyone other than him whose privacy is invaded. The publication did not invade plaintiffs' privacy in any respect. There was nothing in it which brought plaintiffs into unjustifiable or any publicity.

What is said in Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E.2d 286, at page 287, is appropriate:

> "The law does not provide a remedy for every annoyance that occurs in everyday life. Many things which are distressing or may be lacking in propriety or good taste are not actionable. Moreover, if the parents had a cause of action in a case like the present there would seem to be no reason why other members of the immediate family, the brothers and sisters, whose sensibilities may also have been wounded should not also be permitted to sue. The only reference to the plaintiffs was that the girl whose body appeared in the photograph was their daughter. This can hardly be said to interfere with their privacy."

We find nothing in Smith v. Doss, 251 Ala. 250, 37 So.2d 118, or in Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22, 31 L.R.A. 286, contrary to the views we have expressed. Plaintiffs get more out of those cases than the courts put in. Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194, and Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849, 42 L.R.A.,N.S., 386, also relied on by plaintiffs, are not analogous. They were distinguished in Metter v. Los Angeles Examiner, supra, 35 Cal. App.2d 304, 310, 95 P.2d 491; Bazemore, on the ground there was a violation of a confidential relation in the publication of a photograph; Douglas, on the ground there was a breach of contract also in the publication of a photograph. They were also distinguished in Schumann v. Loew's Incorporated, Sup., 135 N.Y.S.2d 361, 366–367.

Plaintiffs also argue the complaint states facts sufficient to constitute a cause of action for libel.

[6, 7] "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Civ.Code, § 45. Defamation of a deceased person does not give rise to a civil right of action at common law in favor of the surviving spouse, family, or relatives, who are not themselves defamed. A libel on the memory of a deceased person is not deemed to inflict on the surviving relatives of the deceased any such legal damage as will sustain a civil action for the defamation. Skrocki v. Stahl, 14 Cal.App. 1, 110 P. 957; Saucer v. Giroux, 54 Cal.App. 732, 202 P. 887.[1] The defamatory matter must be published concerning the plaintiff. Code Civ.Proc. § 460; 30 Cal.Jur.2d 699,

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[1] Also see Hughes v. New England Newspaper Pub. Co., 312 Mass. 178, 43 N.E. 2d 657, 658–659; Bradt v. New Nonpareil Co., 108 Iowa 449, 79 N.W. 122, 45 L.R.A. 681; Fleagle v. Downing, 183 Iowa 1300, 168 N.W. 157; Houston v. Interstate Circuit, Tex.Civ.App., 132 S.W.2d 903, 906; Renfro Drug Co. v. Lawson, Tex.Civ.App., 144 S.W.2d 417; Rose v. Daily Mirror, Inc., 284 N.Y. 335, 31 N.E.2d 182, 132 A.L.R. 888; Wellman v. Sun Printing & Pub. Ass'n, 66 Hun 331, 21 N.Y.S. 577; Sorenson v. Balaban, 11 App.Div. 164, 42 N.Y.S. 654; Eagles v. Liberty Weekly, 137 Misc. 575, 244 N.Y.S. 430; Clere v. E. W. Edwards & Son, 166 Misc. 26, 1 N.Y.S.2d 244, 246; Marinelli v. News Syndicate Co., Sup., 83 N.Y.S.2d 857; Hurst v. Goodwin, 114 Ga. 585, 40 S.E. 764; Atlanta Journal Co. v. Farmer, 48 Ga.App. 273, 172 S.E. 647; Benton v. Knoxville News-Sentinel Co., 174 Tenn. 658, 661, 130 S.W.2d 105; Rest.,Torts, § 560; 53 C.J.S. Libel and Slander §§ 11, 145, pp. 53, 229; 33 Am. Jur. 42, § 7; 30 Cal.Jur.2d 684, § 41, 686, § 44; annotations, 132 A.L.R. 891; 146 A.L.R. 739; 10 Cal.L.Rev. 362–3.

§ 62. Skrocki v. Stahl, supra, 14 Cal.App. 1, 110 P 957, was an action for libel. The newspaper article complained of stated in part that a brother of the plaintiff had commitied suicide, leaving a letter setting forth the race track and slot machines as the reasons for ending his life, and that the deceased was an anarchist. The court stated (14 Cal.App. at page 5, 110 P. at page 959):

> "As a matter of sound public policy, the malicious defamation of the memory of the dead is condemned as an affront to the general sentiments of morality and decency, and the interests of society demand its punishment through the criminal courts, but the law does not contemplate the offense as causing any special damage to another individual, though related to the deceased, and therefore it cannot be made the basis for recovery in a civil action. This probably is a necessary incident to the theory of the social relations entertained here where one is supposed to stand or fall upon his own merits, and where success or failure is entirely independent of the accidents of rank or family connection. It necessarily follows that, theoretically, at least, no man's success can be aided or retarded by the character of his relative. The defamation of such character, therefore, however grievous or disturbing, can afford no injury that can be measured by a pecuniary standard."

The facts in Saucer v. Giroux, supra, 54 Cal.App. 732, at page 733, 202 P. 887, are stated in the opinion: "The action is based upon the alleged act of defendant in causing to be published in a newspaper false and libelous statements that the deceased adult brother of plaintiff Virginia Saucer was an illegitimate son of her deceased mother, which false statements, it is alleged, have caused plaintiff grievous mental and physical suffering, for which she asked judgment for $500,000." The court held (54 Cal.App. at page 733, 202 P. at page 888):

> "While the publication of malicious defamatory statements 'tending to blacken the memory of one who is dead' is made a crime (section 248, Pen. Code), punishable as provided in section 249, Penal Code, it gives rise to no cause of action in favor of a relative of such deceased for the recovery of damages. While section 460, Code of Civil Procedure, provides that in an action for libel it is not necessary to state in the complaint any extrinsic facts for the purpose of showing application to the plaintiff of the defamatory matter out of which the cause of action arose, it must contain an allegation to the effect that the libelous statements were published *concerning the plaintiff*. Not only is there an absence from the complaint of such allegation so required by this section, but it is manifest that such fact could not be alleged. The charge concerning the deceased mother and brother of Virginia Saucer could have no reference to the latter. There was nothing in the article published which tended in any manner to reflect on the plaintiffs, or either of them, and the alleged grievous mental sufferings of Virginia Saucer were of the same kind as that produced by the publication upon any of the other relatives of the deceased. Hence, if a cause of action exists in her favor, then manifestly any relative, or even friend, of the deceased who had likewise suffered might maintain a cause of action for damages."

To the same effect, Bradt v. New Nonpareil Co., 108 Iowa 449, 79 N.W. 122, 45 L.R.A. 681. Other courts give as a reason for the rule that the right of action is not based on the injury to one's feelings but is intended to redress the attack on his reputation with others. Sorenson v. Balaban, 11 App.Div. 164, 42 N.Y.S. 654, 656.

Dean Prosser says: "Any living person may be defamed. The civil action is personal to the plaintiff, and cannot be founded on the defamation of another. * * * Likewise, no civil action will lie for the defamation of one who is dead, unless there is a reflection upon those still living, who are themselves defamed. Statutes in several states have made defamation of the dead a crime, but they are construed to create no civil action." (Prosser on Torts, 2d ed., 578, § 92.) The Restatement says: "One who falsely, and without a privilege to do so, publishes defamatory matter of a deceased person is not liable either to the estate of such person or to his descendants or relatives." (3 Rest., Torts, 143, § 560.)

[8] The article did not make reference to plaintiffs in any way; it was not of or concerning plaintiffs. The specific allegation is that the publication was "of and concerning the said Cecil Lewis Thompson." The false statement that Thompson "wound up a dope-sodden derelict on the shadowy San Francisco waterfront where one morning his knife-scarred body was fished from the Bay" did not constitute a libel on his sisters. The publication did not expressly or impliedly cast any personal reflection on them. The fact that the article was false as to Thompson does not operate to give plaintiffs a right of action. Hughes v. New England Newspaper Pub. Co., 312 Mass. 178, 43 N.E.2d 657, 658. Plaintiffs were not charged with any misconduct or wrongdoing, or with any connection with Thompson's habits, status, or death. The article was not directed against plaintiffs and did not tend to expose them to hatred, contempt, ridicule, or obloquy.

We hold the complaint does not state facts sufficient to constitute a cause of action for either a wrongful invasion of the right of privacy or for libel. The demurrer to the complaint was correctly sustained without leave to amend.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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160 Cal.App.2d 671

William E. MUIR, individually, and David Berry Muir, a minor, by and through his guardian ad litem, William E. Muir, Plaintiffs and Appellants,

v.

Norman Cotton GRIER et al., Defendants,

Norman Cotton Grier and Grier Machine Shop, Respondents.

Civ. 22616.

District Court of Appeal, Second District, Division 3, California.

May 20, 1958.

Hearing Denied July 16, 1958.

Action by husband and minor child of deceased automobile driver against another automobile driver and others for death which occurred as result of a T-intersection collision. The Superior Court of Los Angeles County, William P. Haughton, J., entered judgment for other automobile driver and others and husband and minor child appealed. The District Court of Appeal, Patrosso, J. pro tem., held that husband and child, at trial of automobile collision case, could not show that at coroner's inquest other automobile driver, had availed himself of privilege of not testifying and could not complain that other driver had waived privilege by answering in affirmative the single question put to him by coroner as to whether he was a party to accident.

Affirmed.

1. Automobiles ⚷244(43)

In action by husband and minor child of deceased automobile driver against driver of another automobile for death of automobile driver in collision at a T intersection, evidence established that deceased automobile driver was guilty of negligence in failing to observe approach of other driver's automobile before entering intersection and undertaking to make a left hand turn by "cutting" corner. West's Ann.Vehicle Code, § 540(b).

2. Evidence ⚷591

Although a plaintiff is not bound by testimony elicited from defendant under statute authorizing examination of adverse party and others, as if under cross-examination, such evidence is nonetheless substantive evidence in case for all purposes to which it is relevant, and therefore testimony of defendant in automobile collision case to effect that plaintiffs' deceased was "cutting the corner" given under statute did not have to be disregarded leaving presumption of due care on part of deceased not dispelled. West's Ann.Code Civ.Proc. § 2055.

3. Appeal and Error ⚷216(2)
Trial ⚷256(9)

Where trial court did not in so many words state burden of proof to establish contributory negligence was upon defendants, but gave a number of instructions upon subject of burden of proof and preponderance of evidence and to effect that a party asserting affirmative of an issue must carry the burden of proving it, trial court did not err in not giving an instruction concerning burden of proof of contributory negligence and if plaintiffs desired a further or more specific instruction upon subject, it was incumbent upon them to request the same, and they could not complain on appeal absent such a request.

4. Appeal and Error ⚷216(1)

In action by husband and minor child of deceased automobile driver against another automobile driver for death which occurred as a result of collision at T intersection, even if instruction on subject of last clear chance might possibly have been given under circumstances, where no such instruction was requested by husband and minor child they could not complain of absence of instruction, on appeal.

5. Evidence ⚷359(2)

In action by husband and minor child of deceased automobile driver against another automobile driver for death which occurred as result of a collision at a T intersection, trial court, in exercise of sound discretion, properly refused to admit photographs which showed the position of deceased's body in automobile after it had been righted.

6. Witnesses ⚷245, 252

In action by husband and minor child of deceased automobile driver against another automobile driver for death which occurred as result of a collision at a T intersection, trial court properly sustained objection to direct examination question, which was asked prior to time an exhibit was identified, as to whether police officer could state whether black spot on exhibit, which purported to be a drawing of a section of street, would indicate some relationship to where oil was left on pavement after collision, since officer had not seen the exhibit and question would have been cumulative with respect to oil spots.

7. Witnesses ⚷309

Plaintiffs, at trial of automobile collision case, could not show that at coroner's inquest defendant had availed himself of privilege of not testifying, and could not complain that defendant had waived privilege by answering in affirmative the single question put to him by coroner as to whether he was a party to accident.

8. Evidence ⚷552

In action by husband and minor child of automobile driver against another automobile driver for death which occurred as result of a T-intersection collision, where expert witness testified that he could not state what the minimum reaction time would be for anyone, trial court did not err in sustaining objections to questions propounded as to the reaction time it takes a driver to apply his brakes after realizing he should do so.

9. Automobiles ⚷243(17)

In action by husband and minor child of deceased automobile driver against another automobile driver for death which occurred as a result of a T-intersection collision, trial court did not err in admitting testimony to the effect that the average speed at which vehicles traveled on street was 55 miles per hour for the express limited purpose of informing jury as to facts and circumstances existing at time and place of accident and which facts were known to deceased so as to permit jury to pass on question whether deceased conducted herself as an ordinary and reasonable person would have in light of all the circumstances.

Morris Lavine, Los Angeles, Hanifin & Hanifin, El Monte, for appellants.

Moss, Lyon & Dunn, Gerold C. Dunn, and Henry F. Walker, Los Angeles, for respondents.

PATROSSO, Justice pro tem.

Action for wrongful death. The plaintiffs are the surviving husband and minor child of Thelma Olive Muir. In a trial before a jury a verdict was rendered in favor of the defendants and plaintiffs appeal from the ensuing judgment.

Stated in the light most favorable to the respondents, the facts are these: The death of the decedent resulted from injuries sustained as a result of a collision between an automobile driven by the deceased and one driven by the defendant Norman C. Grier. The accident occurred at about 9:30 A.M. on June 16, 1955, at the intersection of Clyborun and Valerio streets in the city of Los Angeles. Clybourn is a paved highway 61 feet wide, running north and south. Valerio is a dirt street 30 feet wide running east and west but does not extend easterly beyond Clybourn, thus forming what is commonly known as a "T" intersection. The day was clear and dry. At the northwest corner of the intersection there is a residence surrounded by shrubbery and some large trees. As a consequence, from a point 100 feet north of Valerio on Clybourn, visibility is limited to 66 feet west on Valerio and from a point 100 feet west on Valerio, visibility is limited to 60 feet north on Clybourn.

Immediately prior to the accident, defendant was driving south on Clybourn about 12 or 15 feet from its west side at about 35–37 miles per hour in a 1954 Lincoln automobile equipped with power brakes in good operating condition. The decedent was driving east on Valerio in a Willys station wagon. Defendant first observed decedent's automobile when he was about 100 feet north of the intersection. At that time the Willys was about 60 feet west of the intersection, 8 or 9 feet from the north curb of Valerio and traveling at about 10 to 15 miles per hour. Upon observing the deceased, the defendant applied his brakes and traveled a short distance before he felt the wheels lock and the car commence to skid, leaving 75 feet of overall locked skid marks upon the surface of the roadway before striking the deceased's vehicle at a point 10 feet south of the northerly part of Valerio and 10 feet east from the westerly line of Clybourn.

As previously stated, decedent was on the north or left side of Valerio when observed by the defendant, and immediately before the accident she was "cutting" the corner in making a left turn into Clybourn. She brought her vehicle to a stop in front of defendant's skidding car when her automobile was near the north intersection line with its bumper about 10–20 feet out into the intersection. Defendant undertook to turn his car to the right but was successful in doing so only to a very limited extent due to the fact that his wheels were locked. The right front of defendant's vehicle struck the door on the driver's side of the Willys, causing it to move for a distance estimated by the defendant of from two to five feet and to roll over on its right side.

[1] Appellants first contend that the judgment is unsupported by the evidence. We do not agree. The question of defendant's negligence aside, from the foregoing recital of evidence, it is apparent that the jury was warranted in concluding that the deceased was guilty of negligence in failing to observe the approach of defendant's automobile before entering the intersection and in undertaking to make a left-hand turn in violation of Vehicle Code, section 540(b), and that such negligence

upon her part was a proximate cause of the accident. In addition to the facts hereinabove stated, it appears that the deceased lived on Valerio street a few blocks west of the intersection and that she frequently drove over to and upon Clybourn and was familiar with traffic conditions thereon. The evidence is to the effect that the average speed at which southbound vehicles traveled on Clybourn was about 55 miles per hour a fact which the jury, under the circumstances, was warranted in concluding was known to her and in the light of which the reasonableness of her conduct was to be judged.

[2] Appellants next contend that the court erred in giving instructions upon contributory negligence. This contention is in effect disposed of by what has just been said above. However, in advancing this contention, appellants make the additional claim that the testimony of the defendant that the deceased was "cutting" the corner must be disregarded because it was given during the course of his examination under section 2055 of the Code of Civil Procedure. Their argument is that by reason of this fact the defendant's statement "was not affirmative evidence of the facts" and that the presumption of due care to which the deceased was entitled, as the court instructed the jury, was not thereby dispelled. The contention is without merit. While it is true, as appellants assert, that a plaintiff is not bound by the testimony elicited from a defendant under section 2055, it is nonetheless "substantive evidence in the case for all purposes to which it was relevant," (Dorn v. Pichinino, 1951, 105 Cal.App.2d 796, 800, 234 P.2d 307, 310), and whether this and other testimony was sufficient to overcome the presumption of due care was a fact question for the jury. Siegell v. York, 1948, 84 Cal.App.2d 383, 389, 191 P.2d 50. Moreover, evidence adduced by the appellants themselves as to the point of impact serves to corroborate defendant's testimony that the deceased was in fact "cutting" the corner as he testified.

[3] Appellants further contend that the court erred in not giving an instruction to the effect that the burden of proof upon the issue of contributory negligence was upon the defendants. While it is true that the court did not give an instruction which in so many words stated that the burden of establishing contributory negligence was upon the defendants the court gave a number of instructions upon this subject, the correctness of which is not challenged. Thus at the request of both parties, the court gave BAJI instruction No. 21, defining the terms "burden of proof" and "preponderance of the evidence," that the party asserting the affirmative of the issue must carry the burden of proving it; that if the conflicting evidence is evenly balanced so that the jury is unable to find that the evidence on either side of the issue preponderates, then the finding must be against the party carrying the burden of proof, namely: The one who asserts the affirmative of the issue. The jury, at the request of the appellants were also instructed "that if you should find that it is just as probable that Thelma Muir was free from negligence, or, even if negligent, that (her) negligence did not contribute as a proximate cause of her death, as it is that negligence on her part did contribute as a proximate cause, then the defense of contributory negligence has not been established." In addition, the jury at the request of the appellants was instructed as follows:

> "The law presumes that Thelma Muir (now deceased), in (her) conduct at the time of and immediately preceding the accident here in question, was exercising ordinary care and was obeying the law.
>
> "These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. (When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption (and any evidence that may support the

> presumption), to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof.)"

In the light of the foregoing, it may not be said that the jury were not informed that the burden of establishing contributory negligence rested upon the defendant. If the plaintiffs desired a further or more specific instruction upon the subject it was incumbent upon them to request the same, and absent such request they may not be heard to complain. Wyatt v. Pacific Elec. Ry. Co., 1909, 156 Cal. 170, 176, 103 P. 892.

[4] Appellants likewise complain that the trial court erred in not giving an instruction upon the doctrine of the last clear chance. However, if it were to be conceded that an instruction upon this subject might properly have been given no such instruction was requested by the appellants and they may not now be heard to complain. Newman v. Los Angeles Transit Lines, 1953, 120 Cal.App.2d 685, 698–699, 262 P.2d 95; Scandalis v. Jenny, 1933, 132 Cal.App. 307, 313, 22 P.2d 545.

[5] Finally the appellants assert that the court erred in various particulars in its rulings upon the admission and exclusion of evidence. The first of these relates to the refusal of the court to admit in evidence three photographs of the body of the deceased in the automobile immediately following the accident. Their argument is that these pictures were graphic views of the "exact details of the accident, its force and effect and as impeaching of the defendant's testimony as to the speed which he was traveling and as to the skid marks." It is difficult to understand how such a claim may be made for these photographs. Each of the facts which plaintiffs claim that they portray is more graphically and clearly disclosed by the many other photographs which were admitted in evidence, a number of them having been taken by the police officers immediately following the accident. These disclosed in detail the damage to both vehicles, their position in the roadway, the skidmarks of defendant's car, outlined with chalk marks, and the area immediately surrounding the intersection. On the contrary, the pictures which were excluded show nothing except the position of the decedent's body in the automobile after it had been righted. The only legitimate purpose of the photographs would be to prove the fact of death and that it had resulted from the accident, but these facts were admitted and stipulated to. Their introduction into evidence could have served no purpose unless possibly to prejudice the jury in favor of the appellants, and the trial court, in the exercise of a sound discretion, properly refused to admit the same. People v. Burns, 1952, 109 Cal.App.2d 524, 541, 542, 241 P.2d 308, 242 P.2d 9; Ryan v. United Parcel Service, 2 Cir., 205 F.2d 362, 364.

[6] Appellants also complain of the trial court's refusal in permitting appellants to introduce into evidence what they referred to as plaintiffs' exhibit 5 for identification. A reading of appellants' brief, however, discloses that they have reference to plaintiffs' exhibit 6, which was admitted in evidence when offered after foundational proof by the party who had prepared it. This exhibit is what appellants refer to as an onion skin drawing, which, as the evidence discloses, was prepared by a Mr. Bramble more than a year after the accident from a photograph which he had taken at that late date purporting to show a "black spot" on the surface of the roadway in the intersection where the accident occurred. Mr. Bramble was the surveyor who prepared the diagram of the intersection which was introduced in evidence upon the trial as plaintiffs' exhibit 1. The ruling of which appellants complain in this connection apparently has reference to the following incident: Prior to the time that Mr. Bramble testified and identified the diagram in question, and during the direct examination of plaintiffs' witness Mr. Petersen, who was one of the investigating police officers, counsel for appellants asked him the following question:

"I will show you what purports to be an * * * onion skin drawing of a section of a street that is labeled 'Clybourn and Valerio,' and it also has the directions, north, east, west and south, and it indicates for those directions, and it also has a black spot and some kind of a drawing in the center of it. I would like to ask you if you will take a look at that and tell us if you believe that that, placed on top of the drawing of Plaintiffs' Exhibit 1, would indicate some relationship to where the oil was left on the pavement there in that intersection on the 16th day of June, 1955." An objection to the question was sustained and counsel for the appellants pursued the matter no further. It does not appear that officer Petersen had even seen the drawing before and as he had neither prepared it nor exhibit 1, the question was clearly improper and the objection thereto properly sustained. Singularly enough, when Mr. Bramble was called as a witness by plaintiffs no similar question was propounded to him. Moreover, if, as appellants suggest, the purpose of the question addressed to officer Petersen was for the purpose of locating the portion of the roadway where oil had been spilled as a result of the collision, the question, if otherwise proper, was merely cumulative, as this witness, who arrived at the scene immediately following the accident, described in detail the location and extent of the fresh oil which he found upon the roadway at that time.

[7] Appellants next complain of the refusal of the trial court to permit them to show that at the coroner's inquest the defendant, after having been advised by the deputy coroner of his constitutional right to refuse to give any testimony if he felt that it might tend to incriminate him, and being asked if he wished to testify, answered in the negative. Whatever doubts may have existed as to the propriety of this ruling at the time it was made, have been effectively dispelled by the recent decision of our Supreme Court in People v. Bonelli, 1958, 50 Cal.2d 190, 324 P.2d 1, wherein it is held that such proof is inadmissible, and expressly disapproving the decisions in this State to the contrary upon which appellants rely. In this connection appellants advance a rather obscure argument to the effect that after having announced his intention of availing himself of his privilege of not testifying, the defendant waived the privilege by answering in the affirmative the single question put to him by the coroner: "Were you a party to this accident?" If, as appellants contend, this constituted a waiver of the privilege, how then can they argue that they were deprived of the right to adduce proof upon the trial of this action that the defendant had claimed his privilege at the coroner's inquest? The argument appears to us to be self-destructive.

[8] Appellants further complain of the ruling of the trial court in sustaining objections to questions propounded as to the reaction time it takes a driver to apply his brakes after realizing that he should do so. In answer to a previous question designed to qualify the witness as an expert, he testified that he "could state what the minimum reaction time is that I have encountered, but I couldn't say that that was the minimum for anyone." Thereafter the following question was propounded to the witness: "Well, let me ask you this. Do you have any way of computing, for example, that if there was three fourths of a second required from the time that a person actually decided that he was going to stop up until the time that he got his foot on the brake and the car began to slow down as a result of the braking, based upon 35 miles an hour, could you tell us how far the car would travel?" To this question, an objection that it assumed facts not in evidence, was sustained. Thereafter the following question was propounded to the witness: "Is there any figure such as three fourths of a second, or any similar figure that is commonly used as the basis for a person for reaction time from the time that they first see an object until such time as they can get their foot on the brake to stop the car?"

To this question, objection upon the ground of immateriality, was likewise sustained. Although the ground of the objection to the latter question may have been insufficient, the rulings were correct in view of the witness's previous testimony that he was unable to state what the minimum reaction time for anyone was. 4 Cal.Jur.2d p. 392, § 538. The situation here is similar to that presented in Jobe v. Harold Livestock Comm. Co., 1952, 113 Cal.App.2d 269, 273, 247 P. 2d 951, 954, where this court said: "He (the witness) did testify, however, that he could not express any opinion as to defendant's 'reaction time,' without making tests. This was sufficient to have excluded the opinions of the witness which assumed a theoretical time within which defendant would have applied his brakes." In any event, we cannot see wherein the appellants could have been prejudiced by these rulings in view of the evidence that defendant's vehicle laid down 75 feet of skidmarks to the point of impact and his testimony that he traveled approximately 25 feet before he felt his car begin to skid.

[9] Finally, appellants complain of the trial court's ruling in admitting testimony to the effect that the average speed at which southbound vehicles traveled on Clybourn was 55 miles per hour. As previously noted, the deceased lived on Valerio street, a few blocks west of the intersection and she frequently drove over to and upon Clybourn, which would warrant an inference that she was familiar with the traffic conditions on Clybourn and the speed at which vehicles customarily traveled thereon. This evidence was admitted by the court for the limited purposes, as the jury were expressly instructed, of informing the jury as to "the facts and circumstances existing at the time and place of the accident and which were known to the parties to it so as to permit the jury to pass upon the question: whether or not Thelma Muir [the deceased] conducted herself as an ordinary and reasonable person would have conducted herself in the light of all the circumstances." For the limited purposes stated, the evidence was admissible and the trial court's ruling was correct. Cucinella v. Weston Biscuit Co., 1954, 42 Cal.2d 71, 73–74, 265 P.2d 513.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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160 Cal.App.2d 552

In the Matter of the ESTATE of Adolph H. ANDERSON, Deceased.

Mabel M. BRUYN, Fred N. Root, Margaret Orbaugh and Frances Thayer, Petitioners and Appellants,

v.

H. G. MALM, as Vice Consul for the Kingdom of Sweden, representing Wilhelmina Nordstrom, of Jonkoping, Sweden, Respondent,

and

A. E. Gallagher, Public Administrator, etc., Respondent.

Civ. 5812.

District Court of Appeal, Fourth District, California.

May 16, 1958.

Proceedings on petition for order to determine interest in estate. The Superior Court of San Diego County, Gerald C. Thomas, J., entered judgment in which sole heir of husband was declared to be entitled to his estate and heirs of pre-deceased wife appealed. The District Court of Appeal, Griffin, J., held that evidence established it was intention of wife's heirs and husband in property exchange transaction after wife's death, to convert all community property belonging to husband and wife into separate property of husband and to convey to him any and all present and after acquired title of wife's heirs by quitclaim deed and assignment and therefore heir of husband was entitled to distribution of entire estate.

Affirmed.

1. Husband and Wife ⚷274(4)

In proceedings on petition for order to determine interest in estate, evidence established it was intention of predeceased wife's heirs and husband in property exchange to convert all community property belonging to husband and wife into separate property of husband and to convey to him any and all present and after acquired title of wife's heirs by quitclaim deed and assignment and therefore heir of husband was entitled to distribution of entire estate. West's Ann.Prob.Code, §§ 228, 229.

2. Appeal and Error ⚷1008(3)

When construction given an instrument by a trial court appears to be reasonable and consistent with intention of parties making it, District Court of Appeal will not substitute another interpretation, even though it seems equally tenable.

3. Husband and Wife ⚷274(4)

Where, after wife's death, husband and heirs of wife entered into negotiations for exchange of property, the husband receiving California community property and wife's heirs receiving wife's interest in ranch in Iowa, although quitclaim deed from heirs to husband did not use the words "sell and assign," the quitclaim deed quitclaimed property to husband without reserving interest in heirs, and heirs were not entitled to partial distribution of husband's estate under Probate Code providing that if neither decedent nor his predeceased spouse left children or descendants of children surviving, then one-half of community property of decedent and the previously deceased spouse shall go to certain heirs of predeceased spouse and the other half to heirs of decedent. West's Ann.Prob. Code, §§ 228, 229.

4. Assignments ⚷72

Deeds ⚷99

In determining proper construction as to intent of parties as to quitclaim deed and assignment, trial court was authorized to take into consideration all instruments involved in transaction.

◆

Robert B. Burch, Jr., of Davies & Burch, San Diego, for appellants.

Brooks Crabtree of Crabtree & Lindsley, San Diego, for respondent H. C. Malm, as Vice Consul of the Kingdom of Sweden, representing Wilhelmina Nordstrom.

James Don Keller, District Atty. and County Counsel, by Duane J. Carnes, Deputy Dist. Atty., San Diego, for respondent Gallagher.

GRIFFIN, Justice.

Lillian Anderson, wife of Adolph H. Anderson, died intestate in 1938 and left surviving her, her husband, and appellants, a brother, sister, and two daughters of a deceased brother. At the time of her death she owned property standing in her name in San Diego County. It had been formerly held in joint tenancy with her husband. In 1928 he deeded all of his interest to his wife. Her estate was probated. She also owned an interest in farm property in Iowa.

Appellants, in consideration of Mr. Anderson selling to them or giving up any interest he had in the Iowa property plus $1,000, agreed to sell to him or to make no claim to her estate in San Diego. To effect this agreement appellants assigned to Mr. Anderson all their interest in her estate and in her personal property. They also executed a quitclaim deed of the San Diego real property to him, which was duly recorded. The assignment was filed in the probate proceedings in Mrs. Anderson's estate and the court distributed the whole of the San Diego estate to Mr. Anderson and made a finding that such property was the community property of Mr. and Mrs. Anderson.

Mr. Anderson died on October 16, 1955, and his estate is being administered by respondent public administrator. It includes the proceeds of the real property in question, appraised at $10,050, out of total assets of $11,739.72. On February 27, 1957, appellants filed a petition for an order to determine interest in the estate. Respondent H. G. Malm, Vice Consul for the Kingdom of Sweden, filed an answer to such petition, representing Wilhelmina Nordstrom, a resident of Sweden and a sister of Mr. Anderson. The petition and answer thereto were heard on the regular probate calendar and the court made its order determining interest in the estate and determining heirship, wherein it was decreed that Wilhelmina Nordstrom was entitled to inherit all of the estate of Adolph E. Anderson. No evidence was presented at the hearing except that by stipulation the original and copies of letters from the file of attorney H. P. Larson Beck, who probated Mrs. Anderson's estate, were read to the court. These letters, together with the assignment and/or deeds showed an agreement between appellants and Mr. Anderson wherein Mr. Anderson sold, transferred, assigned or gave up his claim to the Iowa property for a consideration and appellants sold, transferred, assigned or gave up whatever interest they had in Mrs. Anderson's estate. Appellants now appeal from the court's order determining interest in the estate and determining heirship, and contend that the court should have divided the estate, so far as attributable to the community real property, giving one-half thereof to appellants and one-half to Wilhelmina Nordstrom.

Appellants contend that the assignment and quitclaim deed given by appellants to Mr. Anderson, after the death of Mrs. Anderson, had no effect on appellants' right to inherit in Mr. Anderson's estate, and the court erred in finding that it was the intention of the parties by the execution and delivery of said assignment and deed, to convert all community property belonging to Mr. Anderson and his wife, his predeceased spouse, into separate property of Mr. Anderson, and to convey to him any and all present and/or after-acquired title of appellants and each of them, and that the court erred in decreeing that appellants had no interest in Mr. Anderson's estate and declaring the sister, Mrs. Nordstrom, was the sole heir and entitled to distribution of his entire estate.

It must be conceded that, except for the evidence as to the intention of the parties, the assignment, and quitclaim deed executed by appellants, they would be heirs of Mr. Anderson and entitled to share in his estate under section 228 of the Probate Code. That section provides that if neither decedent nor his predeceased spouse left children or descendants of children surviving, then one-half of the community property of decedent and the previously deceased spouse shall go to certain heirs of the predeceased spouse and the other half to certain heirs of the decedent. Section 229 thereof provides that if decedent left no issue and the estate was separate property of the previously deceased spouse, all of such property goes to certain heirs of the predeceased spouse. It therefore becomes important to determine whether or not the assignment and quitclaim deed, when considered in connection with other evidence, had any effect on appellants' right to inherit from Mr. Anderson's estate. The original letter, dated March 20, 1938, signed by appellant Fred Root and directed to Mr. Anderson, after expressing condolence over the death of Mrs. Anderson, reads in part:

> "As for the house or any other property out there (San Diego) you can do as you think best with it as far as I am concerned * * * I don't know what the California laws are in regard to the settlement of property out there that was in her name. I am willing you should have it and go ahead and try to finish paying for it so you will have a home."

On July 6, 1938, an attorney in Iowa wrote Mr. Anderson saying:

> "Mr. Fred Root and Mrs. Bruyn were in the office discussing the matter of your wife's property both here and in California. They stated that you had informed them that they had inherited some interest in her property in California, and that you would like to have them sell out to you so

> that the California property would be yours absolutely. Of course, this is the proper thing to do, as you do not want them to own part of your home * * *.
>
> "Please think this matter over and let us know what your ideas are in regard to selling out your interest in the farm here and their selling out their interest in the property in California."

On July 13, 1938, Mr. Beck, Attorney for the Estate of Lillian Anderson, in California, wrote appellants' attorney:

> "* * * I understand from your letter that it is the desire of your clients, relatives of the deceased, that whatever interest they may have in the estate of the above-named deceased here in California should be taken as a set-off against the interest Mr. Anderson may have in the 147 acre farm in Iowa."

Then follows a statement that Mrs. Anderson's estate in California was appraised at $3,000, and Mrs. Anderson and her husband were indebted in the sum of $3,085.54, including a loan on the house, funeral and doctor bills, etc.; that Mr. Anderson thought it almost hopeless to pay off these claims; that since the house was the home of Mr. and Mrs. Anderson for so many years, for sentimental reasons, he felt he should carry on; that there was little or no equity for the heirs, and that a reply was requested. On July 18, 1938, appellants' attorney replied and said appellants were surprised when Mr. Anderson told them they might have some interest in the estate in California. They suggested there might be some way for him to buy them out and they buy out his interest in the Iowa farm; that they would cooperate with Mr. Anderson in every way; that Mrs. Anderson's estate in Iowa (one-fourth interest in the ranch) was being probated there and no final settlement could be made until the estate there was closed, which would be about May, 1939. On August 5, 1938, Beck replied that Mr. Anderson had authorized him to state that Mrs. Anderson's interest in the farm would be approximately $2,000; that he was not aware of the laws of Iowa as to what, if any, interest he would be entitled to, but Mr. Anderson was willing to dispose of his interest to them in the farm for $1,000 if the heirs would quitclaim any interests they might have in the San Diego property; that he believed the court in California would construe the home to be community property; that the Iowa heirs could not possibly obtain any inheritance out of the property in San Diego because of the "surviving husband taking all". On August 8th, Beck received a reply indicating willingness on the part of the Iowa heirs to the transaction, but insisting that the $1,000 be paid into escrow and placed with Mr. Anderson's deed of the Iowa property until time for filing claims in Mrs. Anderson's estate had expired. On September 30th, appellants' attorney replied, giving the names and addresses of all possible heirs, and stated he had prepared a quitclaim deed for Mr. Anderson to sign. It appears that the attorney for Mr. Anderson was requested to send a form of quitclaim deed for the heirs to sign, quitclaiming any interest in the San Diego property. A form of assignment and memorandum of agreement and quitclaim deed were enclosed for Mr. Anderson's signature. On October 11th, Mr. Beck acknowledged receipt of them and stated that Mr. Anderson had executed them. On May 22, 1939, appellants' attorney wrote back and informed him that the estate there had been closed and they were mailing the assignment and quitclaim deed of appellants' interest in Mrs. Anderson's estate in California. The assignment, subscribed by the appellants, reads in part:

> "* * * the undersigned * * * for value received, do hereby sell, assign, transfer and set over to Adolph H. Anderson, all their right, title and interest, * * * in and to the assets of the estate of said Lillian Anderson, Deceased, Probate file No. 25289 * * San Diego, * * * and hereby waive and quitclaim * * * any and

all their right, title and interest in and to the distribution of said estate.

> "* * * and * * * do * * * sell, assign, transfer, and set over to said Adolph H. Anderson all their right, title and interest * * * in and to all personal property * * * belonging to said Lillian Anderson, deceased, at the time of her death * * now located (in) * * * San Diego."

The quitclaim deed read:

> "* * * for and in consideration of One Dollar and other valuable consideration, being a settlement of the rights of the grantors and the grantee in the estate of Lillian M. Anderson, deceased, do hereby quitclaim to Adolph H. Anderson all that property situated in the city of San Diego * * (describing it)."

[1] Upon this evidence the court found that it was the intention of the parties to convert all community property belonging to Mr. Anderson and Lillian Anderson into separate property of Mr. Anderson, and to convey to him any and all present and/or after-acquired title of appellants and each of them. It found they had no interest in Mr. Anderson's estate and declared Mrs. Nordstrom to be his sole heir and entitled to distribution of his entire estate.

Appellants concede that In re Estate of Wilson, 40 Cal.App.2d 229, 104 P.2d 716, predicated upon a somewhat similar situation, arrived at a result contrary to that for which they here contend, but claim Sears v. Rule, 27 Cal.2d 131, 163 P.2d 443, supports their position and is the controlling authority.

It is true, in the Wilson case [40 Cal. App.2d 229, 104 P.2d 718], the quitclaim deed did remise, release and quitclaim to the grantor "and to his heirs and assigns forever * * * To have and to hold * * * unto the said party of the second part, his heirs and assigns forever" the property there involved. These additional terms were not used in the instant quitclaim deed. The court there held that the trial court was justified in holding such an assignment converted the property into separate property of the grantee. The Wilson case quoted the general rule in 58 Am.Law Rep. p. 361, that:

> "'* * * if there are recitals or covenants in the deed showing an intention not to limit the interest conveyed to that merely which the grantor then had, or expressly or impliedly affirming the existence of a particular estate which the parties intended should pass by the conveyance, the grantor may be estopped from asserting an after-acquired title or interest in contradiction of the terms or implications of the deed, even though the granting clause was in the form of a quitclaim. Thus, although an ordinary quitclaim deed will not estop the grantor from asserting an after-acquired interest, yet a distinct recital in such a deed, showing that the parties proceeded on the theory that a particular interest was thereby conveyed, may be as effectual to create an estoppel as a warranty. And it has been said that, while as a general rule a conveyance by a quitclaim deed will not operate to pass a subsequently acquired title of the grantor, this principle is applicable only to a quitclaim deed in the strict and proper sense of that species of conveyance; that, if the deed bears upon its face evidence that the grantor intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and the bargain proceeded upon such footing between the parties, then, although the deed may not contain covenants of title, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him with respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least to estop them from ever afterwards denying that he was seised

of the particular estate at the time of the conveyance.'"

The court there held that the form and substance of that instrument took it beyond the limitation of a quitclaim deed. It was entitled "Quitclaim Deed and *Assignment*". The terms of the assignment showed an intention to convey all interest, present and prospective, which the grantor had in any of the property about to be distributed in the estate. In considering the question the court said that under the law of succession, all community property passed to her husband without administration; that being so, the only apparent purpose the grantee could have had in obtaining a deed and assignment of the property from the grantor, which already belonged to the grantee, by operation of law, was to then and there acquire from her any after-rights which might accrue to her on his death under section 228 of the Probate Code.

[2, 3] In the Sears case there was a possible contest of a will and there was an agreement of settlement with the heirs of the estate forever settling and determining the dispute, and to prevent a con-contest a release and quitclaim of this right was executed. The Supreme Court distinguished the facts from the Wilson case and in upholding that transaction and the judgment of the court in that case, said that a quitclaim deed by a deceased husband's heirs to his widow in compromise of a rival claim (settling a will contest) does not make her a purchaser of the property formerly held by her husband. It did not overrule the Wilson case but held it was not inconsistent with its ruling in the Sears case, and that it depended upon the intention of the parties as gleaned from the evidence and instruments themselves. It reaffirmed the rule set forth in the Wilson case and authorities there cited, holding that when the construction given an instrument by a trial court appears to be reasonable and consistent with the intention of the parties making it, courts of appeal will not substitute another interpretation even though it seems equally tenable.

Construing the letters in conjunction with the assignment and in support of the judgment here entered, it affirmatively appears that the parties were desirous of selling, assigning and transferring to each other, any claimed interest they may have had in and to the property of Mrs. Anderson. It was not solely a release of any possible interest. One letter said that one of the heirs was willing that Mr. Anderson "should have it" ("her property out there") and their attorney said it was the proper thing "to have them sell out * * * so that the California property would be yours (Mr. Anderson's) absolutely", and in turn they would buy out his interest in the Iowa farm for $1,000. Apparently this was the agreement intended. The assignment executed in response to it was that they do "*hereby sell, assign, transfer and set over*" to Mr. Anderson their right, title and interest in the assets of the estate in its entirety, both real and personal. Although the quitclaim deed did not use the word "sell and assign" it quitclaimed the real property to them as being a settlement of the rights of the grantor and grantee in the estate.

In Touchard v. Crow, 20 Cal. 150, it was held that the operative words of release in a simple quitclaim deed are "remise, release and quit claim"; that where the words "bargain, sell and quit claim" are employed, they operate not merely to release, but to transfer any interest which the grantor possesses at the time of the execution of the deed.

[4] In determining the proper construction as to the intent of the parties, the trial court was authorized to take into consideration all instruments involving the transaction. It cannot be said, as a matter of law, that the construction given them was unreasonable and not in accord with the intent of the parties.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

160 Cal.App.2d 797

PEOPLE of the State of California, Plaintiff, Appellant and Respondent,

v.

ONE 1957 FORD 2-DOOR SEDAN, License No. CGL 775, Serial No. C7LT110571, Defendant.

Associates Discount Corporation, Legal Owner, Respondent and Appellant.

Civ. 22854.

District Court of Appeal, Second District, Division 1, California.

May 26, 1958.

Action to forfeit automobile used in transportation of narcotics. The Superior Court of Los Angeles County, Burnett Wolfson, J., rendered judgment of forfeiture subject to interests of legal owner, and both the people and the legal owner appealed. The District Court of Appeal, White, P. J., held that evidence supported finding that conditional seller had made reasonable investigation of buyer and hence was entitled to enforce interest in automobile.

Modified, and as modified, affirmed.

1. Forfeitures ⚷5

In proceeding for forfeiture of automobile used for transportation of narcotics, conditional seller of automobile had burden of proving investigation of buyer's moral responsibility, character and reputation, of the kind and to the extent required by statute, in order to enforce its interest in the automobile. West's Ann.Health & Safety Code, § 11622; West's Ann.Code Civ.Proc. §§ 1028, 1033.

2. Forfeitures ⚷5

To warrant enforcement of interest in automobile which is subject to forfeiture for use in transporting narcotics, on ground that such interest was created after reasonable investigation of automobile purchaser, such "investigation" should elicit, in addition to the usual information about financial status, the purchaser's reputation and standing in the community and his moral responsibility, and inquiry should be made not only as to present financial position, but also as to source of income, manner of living, employment, family and social connections. West's Ann.Health & Safety Code, § 11622; West's Ann.Code Civ. Proc. §§ 1028, 1033.

See publication Words and Phrases, for other judicial constructions and definitions of "Investigation".

3. Forfeitures ⚷5

The purpose of law providing for enforcement, in proceeding for forfeiture of automobile used for transportation of narcotics, of interest created after reasonable investigation of purchaser, was to require one who finances purchase of automobile to aid in prevention of crime, to an extent greater than that usually made before sale of commodity not ordinarily used in commission of crime, and what investigation is reasonable depends upon facts of each case. West's Ann.Health & Safety Code, § 11622; West's Ann.Code Civ.Proc. §§ 1028, 1033.

4. Appeal and Error ⚷991

Whether investigation of automobile purchaser, made before purchase of conditional sale contract, was reasonable so as to permit enforcement of conditional vendor's interest when automobile was forfeited for use in transporting narcotics, is a fact question, and determination thereof will not be disturbed on appeal if supported by any substantial evidence. West's Ann. Health & Safety Code, § 11622; West's Ann.Code Civ.Proc. §§ 1028, 1033.

5. Forfeitures ⚷5

Investigation of automobile purchaser, as basis for enforcement of vendor's interest when automobile is forfeited for use in transporting narcotics, includes inquiries by both seller of automobile and buyer of conditional sale contract. West's Ann. Health & Safety Code, § 11622; West's Ann.Code Civ.Proc. §§ 1028, 1033.

6. Forfeitures ⚷5

In proceeding for forfeiture of automobile used in transporting narcotics, evidence supported finding that conditional seller had made reasonable investigation of buyer and hence was entitled to enforce interest in automobile. West's Ann.Health & Safety Code, § 11622; West's Ann.Code Civ.Proc. §§ 1028, 1033.

7. Appeal and Error ⚿839(1)

Appeal purporting to be from portion of judgment "which fails to order" vehicle released to legal owner would be treated as appeal from the whole judgment, where the entire judgment failed to order such relief, mention amount of lien, or award costs.

8. Appeal and Error ⚿417(1)

Notice of appeal is to be liberally construed in favor of its sufficiency.

9. Forfeitures ⚿10

Where amount due conditional seller of automobile was in excess of value of vehicle at date of and after its seizure for transportation of narcotics, court should order vehicle released to lienholder instead of ordering forfeiture of the vehicle subject to legal owner's rights. West's Ann.Health & Safety Code, § 11622; West's Ann.Code Civ.Proc. §§ 1028, 1033.

10. Forfeitures ⚿5

Action to forfeit automobile is an action in rem commenced by the state as plaintiff against those who have property interests in the vehicle. West's Ann.Health & Safety Code, § 11622; West's Ann.Code Civ.Proc. §§ 1028, 1033.

11. Appeal and Error ⚿177

Where no memorandum of costs was filed in trial court, reviewing court would not give relief from failure to award costs. West's Ann.Health & Safety Code, § 11622; West's Ann.Code Civ.Proc. §§ 1028, 1033.

◆

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for appellant and respondent, the People.

Buchalter, Nemer, Coyle & Cooper, Leon M. Cooper, Los Angeles, for respondent and appellant, Associates Discount Corp.

WHITE, Presiding Justice.

The People of the State of California sought by the instant action to forfeit the right, title and interest of the registered and legal owners of a certain 1957 Ford 2-door Sedan because of its use for the transportation of narcotics in violation of Section 11610 of the Health and Safety Code.

The answer of Associates Discount Corporation, the legal owner, sets forth as an affirmative defense that it made a reasonable investigation as to the moral responsibility, character and reputation of the purchasers and that such investigation disclosed no facts upon which to base a suspicion that said automobile would be used to transport narcotics; that said automobile was sold upon a conditional sales contract under the terms of which upon purchaser's default the entire unpaid amount has been declared due and payable; that there remains due, owing and unpaid on said contract the sum of $3,112.55; and that at the date of the seizure by the People of the State of California and ever since that date the value of said automobile has not exceeded said sum of $3,112.55; that the proceeding instituted by the State should therefore be dismissed and the court should make its order releasing said vehicle to the "answering claimant as the bona fide and innocent lien holder and vendor".

The parties stipulated at the trial that the conditional sales contract was entered into by the Valley Automotive Center and was assigned to Associates Discount Corporation in the usual course of business without any knowledge by either that the car was going to be used for any unlawful purpose; and that the unpaid balance on the contract was at the time of the seizure of the automobile $3,112.55, which was then, and ever since has been, in excess of the value of the vehicle.

The court found that "said vehicle was on the 27th day of December, 1956, unlawfully used to transport and convey * * * a narcotic" in violation of Health and Safety Code, Section 11610; that at said time the vehicle was being used by William Henry Rodgers, one of the registered owners. The registered owners have not appealed from the judgment.

The court concluded that the legal owner "did establish that its interest in the above described vehicle was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser and without knowledge that the vehicle was being or was to be used for the purpose charged"; and adjudged that said vehicle "be, and the same is hereby, forfeited to the State of California, subject to the right, title and interest of Associates Discount Corporation, legal owner of the above described vehicle".

Both the People and the legal owner have appealed. We will first consider the appeal by the People of the State of California from the portion of the judgment "which declares that the forfeiture of the above vehicle shall be subject to the right, title and interest of the legal owner". The ground urged for reversal is that "the evidence does not support the finding of the trial court that the interest of the lien claimant was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser".

[1, 2] As urged by appellant, the lien claimant had the burden of proving an investigation of the automobile purchaser's moral responsibility, character and reputation, of the kind and to the extent required by statute. In addition to the usual information about financial status, such investigation should elicit the purchaser's reputation and standing in the community and his moral responsibility. Inquiry should be made not only as to present financial position, but also as to the source of income, manner of living, employment, family and social connections. People v. One 1939 Buick 8 Coupe, 43 Cal.App.2d 411, 416, 110 P.2d 1013; People v. One 1953 Pontiac, 135 Cal.App.2d 195, 199, 286 P.2d 885.

[3] The purpose of the law is to require one who finances the purchase of an automobile to aid in the prevention of crime. His interest in any vehicle used to transport narcotics will be forfeited to the State unless a reasonable investigation of the purchaser's moral responsibility, character and reputation is made before such interest is created. The investigation required for this purpose is something more than that usually made before the sale of a television, stove, or other commodity not ordinarily used in the commission of crime. What investigation is reasonable must be governed by the facts of each case.

[4, 5] Whether the investigation made before the purchase of the conditional sale contract now engaging our attention was a reasonable one is primarily a question of fact, and the determination thereof will not be disturbed on appeal if it is supported by any substantial evidence. Such investigation includes inquiries made by both the seller of the automobile and the buyer of the contract. People v. One 1952 Ford Sedan, 146 Cal.App.2d 183, 188, 303 P.2d 832; People v. One 1949 Ford Tudor Sedan, 115 Cal.App.2d 157, 164, 251 P.2d 776.

The evidence in the instant proceeding includes four documentary exhibits and the testimony of five witnesses. It is here summarized in the light most favorable to the lien claimant.

The two registered owners were husband and wife. The wife's employment for several years was checked. Her present and previous employers knew nothing of a derogatory nature about her. She had advanced in and resigned from her previous employment. They had run charge accounts at Sears Roebuck and a music supply house. Their card was out of the file at Sears and the account with the music company had been paid when due. The husband had been a student at the conservatory of music for about 14 months preceding the investigation and was then starting work on a job as an assembler. Both had lived in the same house for a year and nine months and paid their rent regularly. Their landlady who was also their neighbor agreed that they were "a fine young couple" and volunteered the information that they had caused her no trouble. That information was obtained by telephoning the persons mentioned in the questionnaires filled in by the purchasers. Each of the parties telephoned was asked to verify the purchaser's status as employee, tenant or debtor, and if they knew "anything derogatory" about the purchasers. Each disclaimed any knowledge of "anything derogatory".

[6] Appellant contends that the evidence is insufficient to support the finding that a reasonable investigation was made and asks "Where is the unearthing of facts that would enable a reasonably prudent person to determine whether or not the purchasers were of good moral character?" We are convinced that the Legislature did not intend to cast upon one who finances the purchase of an automobile the duty to make the kind of investigation required of the police when they have reason to suspect a person is a user or "pusher" of narcotics. The trial court determined that a reasonably prudent person would have relied upon the investigation made in the instant action, and we cannot say that, as a matter of law, it was not "a reasonable investigation of the moral responsibility, character and reputation" of the buyers. People v. One 1954 Chevrolet Bel Air, 140 Cal.App.2d 934, 939, 296 P.2d 55; People v. One 1941 Cadillac Club Coupe, 63 Cal.App.2d 418, 423, 147 P.2d 49; People v. One 1940 Chrysler Convertible Coupe, 48 Cal.App.2d 546, 551, 120 P.2d 117; People v. One 1955 Chevrolet Bel Air, 157 Cal.App.2d 851, 321 P.2d 870.

The legal owner has appealed from the portion of the judgment "which fails to order the aforesaid vehicle released to the lienholder and legal owner, Associates Discount Corporation, by reason of the fact that the amount due Associates Discount Corporation is in excess of the value of the vehicle as of the date of the seizure and which further fails to award costs to the said Associates Discount Corporation, the prevailing party".

[7, 8] Since the entire judgment "fails to order" the release of the vehicle, mention the amount of the lien, or award costs to any party, and since the notice of appeal is to be liberally construed in favor of its sufficiency, we shall assume that Associates Discount Corporation, the legal owner, has appealed from the whole judgment. Hamasaki v. Flotho, 39 Cal.2d 602, 609, 248 P.2d 910; Osborn v. Osborn, 42 Cal.2d 358, 367, 267 P.2d 333; American Enterprise, Inc., v. Van Winkle, 39 Cal.2d 210, 246 P.2d 935; Vyn v. Northwest Casualty Co., 47 Cal.2d 89, 90, 301 P.2d 869.

[9] According to the stipulation of the parties in the instant action, the amount due Associates was in excess of the value of the vehicle as of the date of, and at all times after, its seizure by the People of the State. Therefore, the registered owners had no interest in the vehicle at the time of its seizure and, instead of ordering a forfeiture of the vehicle subject to the rights of the legal owner, it was the duty of the court to order the vehicle released to the bona fide or innocent owner, lienholder, mortgagee, or vendor. Health and Safety Code, Sec. 11622.

[10, 11] Costs shall be awarded against the State (when it is a party) on the same basis as against any other party. Code Civ.Proc. § 1028. The action to forfeit an automobile is an action in rem commenced by the State as plaintiff against those who have property interests in the vehicle. People v. One 1941 Chevrolet Coupe, 37 Cal.2d 283, 302, 231 P.2d 832. "* * * (T)he party in whose favor the judgment is ordered, and who claims his costs, must serve upon the adverse party, and file * * * not later than ten (10) days after the entry of the judgment, a memorandum of the items of his costs and necessary disbursements in the action or proceeding * * *." Code Civ.Proc. 1033. In the instant action, no memorandum of costs was filed in the court below and the legal owner here seeks relief from that failure. It is not the function of an appellate tribunal to determine issues not

raised in the court below. Sepulveda v. Apablasa, 25 Cal.App.2d 381, 389, 77 P.2d 526.

For the foregoing reasons the judgment is modified by striking therefrom the words "forfeited to the State of California, subject to the right, title and interest of Associates Discount Corporation" and inserting in lieu thereof the words "ordered returned to the possession of Associates Discount Corporation".

As so modified, the judgment is affirmed, respondent and appellant legal owner to recover costs on appeal.

FOURT and LILLIE, JJ., concur.

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160 Cal.App.2d 804

Stephen F. GRANT, a minor, by Frederick D. Grant, his Guardian ad litem, and Frederick D. Grant, Plaintiffs and Respondents,

v.

Fritz MUELLER, Defendant and Appellant.

Civ. 22992.

District Court of Appeal, Second District, Division 2, California.

May 26, 1958.

Action for personal injuries sustained by 12 year old plaintiff when while riding on his bicycle upon school grounds of a church he was struck by pick-up truck of defendant who was a member of such church. After a verdict for defendant, the Superior Court, Los Angeles County, Jerold E. Weil, J., entered an order granting a motion for a new trial and defendant appealed. The District Court of Appeal, Fox, P. J., held that instruction in effect advising jury that if they found infant plaintiff to be a trespasser, that defendant would have owed such plaintiff duty to exercise ordinary care only in the event they also found defendant knew or should have known such plaintiff was in a dangerous position, was prejudicial error.

Order affirmed.

1. Appeal and Error 🔑1064(1)
Automobiles 🔑246(5)

In action for personal injuries sustained by 12 year old plaintiff when while riding on his bicycle upon school grounds of a church he was struck by pick-up truck of defendant, who was a member of such church, instruction in effect advising jury that, if they found minor plaintiff to be a trespasser, defendant would have owed such plaintiff duty to exercise ordinary care only in the event they also found defendant knew or should have known such plaintiff was in a dangerous position, was prejudicial error.

2. Automobiles 🔑162(2)

The operator of a motor vehicle who is or should be cognizant of the proximity of children must exercise ordinary care to discover their presence upon or near his vehicle and upon such discovery must use ordinary care to avoid inflicting injury upon them, and such rule applies regardless of the children's status as trespassers, licensees or invitees.

3. Automobiles 🔑162(2)

Where a motorist had knowledge of presence of children on a church playground, he owed a duty to exercise ordinary care to discover presence of a 12 year old child near his vehicle and to avoid injuring him, notwithstanding fact such child was trespassing on the property.

4. Automobiles 🔑162(1, 2)

A motorist who has knowledge of the presence of children may be responsible for injury to a child even if he had no reason to believe such child was in a position of danger, and even though he did not see the injured child in time to prevent the injury.

Spray, Gould & Bowers, Los Angeles, and Robert M. Maslow, Beverly Hills, for appellant.

Fisk & Tyson, Robert M. Fisk and Robert Charles Lutz, Pasadena, for respondents.

FOX, Presiding Justice.

This is an action for damages for personal injuries. A jury trial resulted in a verdict and judgment in favor of defendant. Plaintiff's[1] motion for a new trial was granted on grounds other than the insufficiency of the evidence to justify the verdict. Defendant has appealed from the order granting a new trial.

Late in the afternoon of September 22, 1954, plaintiff, who was then 12 years of age, rode his bicycle into and upon the school grounds of the First Lutheran Church, located a short distance from his home. He was accompanied by two other boys on bicycles. They proceeded on their bicycles to a drinking fountain on the north end of the grounds. One of the boys left almost immediately. Plaintiff testified that he and the other boy rode their bicycles in an elongated circle for a period of from 5 to 15 minutes in the area between the school and the church. He further testified that he had ridden his bicycle on these grounds between 20 and 40 times and had never been admonished, by teachers or others connected with the school, not to ride his bicycle on the premises. Although there was testimony as to the presence of a no trespassing sign at the entrance to the grounds, plaintiff was not aware of any such sign.

On the evening in question defendant had driven to the school grounds to pick up his daughter, who was there attending a girl scout meeting. Defendant had been a member of the church for ten years, and his daughter attended the school that it maintained in connection therewith. Upon driving onto the premises, defendant parked his car at the parking lot for 15 or 20 minutes before his daughter was ready. Upon his daughter's entering the car, defendant proceeded to leave the grounds. In so doing he came abreast of a pickup truck parked in the area. Plaintiff emerged on his bicycle from behind the truck and was struck by defendant's car, which dragged him approximately a car's length. It is for the injuries thus sustained that plaintiff brought this action.

Defendant knew that these church and school grounds were frequented by children and that they often rode their bicycles over the area. He had on many occasions warned children about riding their bicycles there, estimating that he had given such warnings between 20 and 30 times. On the afternoon in question defendant observed parked bicycles nearby. He also saw children using the playground equipment.

As stated by appellant's counsel, "There is but one question presented, i. e., Did the court abuse its discretion in granting the motion for a new trial"? We have concluded that this question must be answered in the negative. At the request of the defendant, the court instructed the jury as follows:

1. "The landowner or rightful occupant of land is under no duty to do acts to facilitate a trespass by another person or to render it safe. Neither is the owner or such occupant under any duty to the trespasser to exercise care in his, the owner's or occupant's, management of the premises or in his maintenance of conditions or his activities thereon except only that when a landowner or an occupant of land learns, or in the exercise of ordinary care should know, that a trespasser is in a dangerous position he, the owner or occupant, is bound to exercise ordinary care to avoid injuring the trespasser. A failure to do [so] is negligence."

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[1] Although there are two plaintiffs herein for the purposes of this opinion we shall use plaintiff in the singular as referring to Stephen, the minor.

2. "Certain instructions have been given you as to the duty owed a trespasser. You are instructed that so far as the issues of this case are concerned the defendant, Fritz Mueller, stands in the same position as First Lutheran Church as owner or occupier of land and if plaintiff Stephen Grant was a trespasser insofar as the Church is concerned, then he was a trespasser insofar as defendant, Fritz Mueller, is concerned. To put the matter another way, if Stephen Grant was a trespasser, the defendant, Fritz Mueller, owed plaintiff Stephen Grant the same but no greater duty than the First Lutheran Church would owe him.

"If Stephen Grant was not a trespasser, then the defendant owed him the duty to exercise the care of a reasonably prudent man under all the circumstances to avoid injuring him."

[1, 2] Instruction 1 in effect advised the jury that if they found the plaintiff to be a trespasser, then defendant would have owed the plaintiff the duty to exercise ordinary care only in the event they also found that defendant knew or should have known that plaintiff was "in a dangerous position." This instruction is clearly erroneous. The appropriate principle to be applied in the circumstances of this case is defined in Kading v. Willis, 135 Cal.App.2d 82, 286 P.2d 861. The court there stated (135 Cal.App.2d at page 87, 286 P.2d at page 865): "The rule now generally accepted in this state and elsewhere is that the operator of a motor vehicle who is or should be cognizant of the proximity of children must exercise ordinary care to discover their presence upon or near his vehicle and upon such discovery to use ordinary care to avoid inflicting injury upon them; and this rule applies regardless of the infant's status as trespasser, licensee or invitee. 'As the courts have frequently said, it is ordinarily necessary to exercise greater care for the protection and safety of young children than for adult persons possessing normal and mature faculties. Their conduct is unpredictable and one operating a motor vehicle should anticipate their thoughtlessness and impulsiveness. Shannon v. Central-Gaither Union School Dist., 133 Cal.App. 124, 23 P.2d 769. The presence of children is in itself a warning requiring the exercise of care for their safety. Seperman v. Lyon Fire Proof Storage Co., 97 Cal.App. 654, 275 P. 980. Moreover, if the evidence shows that a driver has knowledge of the presence of children he may be held to have been responsible although it appears that he did not see the injured child in time to prevent the injury.' Conroy v. Perez, 64 Cal.App.2d 217, 224, 148 P.2d 680, 684. To the same effect are Hilyar v. Union Ice Co., 45 Cal.2d 30, 286 P.2d 21; Frederiksen v. Costner, 99 Cal.App.2d 453, 456, 221 P.2d 1008; Freeland v. Jewel Tea Co., 118 Cal.App.2d 764, 768–769, 258 P.2d 1032; Marino v. Valenti, 118 Cal.App.2d 830, 842, 259 P.2d 84; Gorzeman v. Artz, 13 Cal.App.2d 660, 662, 57 P.2d 550; Parra v. Cleaver, 110 Cal.App. 168, 171, 294 P. 6 * * *."

[3, 4] Applying this principle to the facts at hand it is clear that defendant owed plaintiff the duty to exercise ordinary care to discover plaintiff's presence near his vehicle and to avoid injuring plaintiff. On the day of the accident defendant knew that children were in the area where he had parked his car; he observed them using the playground equipment and saw bicycles parked nearby. He knew that children often rode their bicycles in the area and had even warned them about it. Since defendant's mere knowledge of the proximity of children imposed upon him a duty to exercise ordinary care to discover their presence near his vehicle and to avoid injuring them regardless of whether or not they were trespassers (Kading v. Willis, supra; Conroy v. Perez, supra), it was error to instruct the jury that defendant owed such duty to plaintiff only if defendant knew or should have known that plaintiff was in a dangerous position. Defendant owed plaintiff the duty to exercise due care even if he had no reason to believe that plaintiff was in a position of danger. Assuming that the jury found the plaintiff was a trespasser, instruction 1 permitted them to conclude that defendant owed plaintiff no duty of care if he had no reason to suspect that his car might strike plaintiff as he (defendant) started to leave the grounds. But a driver who has knowledge of the presence of children may be held responsible "although it appears that he did not see the injured child in time to prevent the injury." Kading v. Willis, supra, 135 Cal.App.2d at page 87, 286 P.2d at page 865; Conroy v. Perez, supra, 64 Cal.App.2d at page 224, 148 P.2d 680.

Instruction 2 (which was given immediately following instruction 1), when read in conjunction with instruction 1, implies the idea that defendant owed plaintiff no duty of care if plaintiff was a trespasser. Under such circumstances the instruction was plainly erroneous and misleading.

There can be no doubt that the error in these instructions was prejudicial. A somewhat similar error was held to be ground for reversal in the Kading case.

The trial court also instructed the jury on unavoidable accident. The Supreme Court has recently pointed out the impropriety of giving such an instruction. Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500. The court held that it is confusing and misleading. Butigan v. Yellow Cab Co., supra, 49 Cal.2d at page 660, 320 P.2d at page 505; see, also, Martz v. Ruiz, 158 Cal.App.2d 590, 322 P.2d 981. The giving of such instruction in this case was further justification for the trial court's granting plaintiff's motion for a new trial. From the foregoing it is clear that the trial court did not abuse its discretion.

The order is affirmed.

ASHBURN and HERNDON, JJ., concur.

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160 Cal.App.2d 842

Matter of the ESTATE of William C. HARRIS, etc., Deceased.

Lucele BROWN, Petitioner, Contestant and Appellant,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, Executor and Respondent,

Mildred Lucille Brown Popp, Petitioner and Respondent.

Civ. 22719.

District Court of Appeal, Second District, Division 3, California.

May 27, 1958.

Proceedings to determine heirship. The Superior Court of Los Angeles County, Newcomb Condee, J., entered judgment for niece of testator's predeceased wife and sister of predeceased wife appealed. The District Court of Appeal, Patrosso, J. pro tem., held that evidence established that predeceased wife's niece, who was known as Lucille Brown, was intended as beneficiary rather than wife's sister whose true name was Bernice Lucele Brown under will devising part of estate to "wives nieces Lucele Brown".

Order affirmed.

1. Wills 🔑489(2)

Where testator provided that if his wife should predecease him property should go to, among others, "my wives nieces Lucele Brown of Ohio," and wife had a sister whose true name was Bernice Lucele Brown who was a resident of Ohio and also had a niece who was also known as Lucille Brown prior to her marriage but who was a resident of Los Angeles County, extrinsic evidence was properly admitted to remove latent ambiguity as who was intended to take under will.

2. Wills 🔑703

In proceedings to determine heirship under a will devising property to "wives nieces Lucele Brown of Ohio," among others, in event wife predeceased testator evidence established that predeceased wife's niece who was known as Lucille Brown prior to her marriage was intended as beneficiary rather than wife's sister whose true name was Bernice Lucele Brown.

3. Wills ⚷706

Where provision in will is ambiguous and evidence is admitted in order to arrive at testator's intention, the inferences and conclusions drawn by trial court from evidence and court's findings made thereon will not be disturbed unless such conclusion is contrary to inferences a reasonable mind might properly draw from evidence and such determination will not be disturbed by a reviewing court unless it is clearly erroneous.

◆

William J. Clark and Albert C. McCall, Alhambra, for petitioner, contestant and appellant.

Weintein & Shelley, Robert R. Shelley, Alhambra, for petitioner and respondent.

James B. Ogg, Alhambra, for executor and respondent.

PATROSSO, Justice pro tem.

This is an appeal from a decree determining heirship. The appellant is Lucele Brown, a sister of the predeceased wife of the testator and the respondent is Mildred Lucille Brown Popp, a niece of the said predeceased wife.

By paragraph Third of his will, the decedent gave, devised and bequeathed the whole of his estate to the wife Nora E. Harris. Paragraph Fourth of the will, with which we are here concerned, reads as follows:

> "Fourth: In the event my said wife should predecease me, or die prior to the distribution of my estate, I give, devise and bequeath my property and estate as follows:
>
> "To my nieces, Lillian George of New York, Ruth Greenwall of Ohio and Lucille Evans of Ohio, and to my wives nieces Lucele Brown of Ohio, and nephews John Henry Brown of Ohio, Wendell Brown of Los Angeles and Morris Swan of Temple City, California, share and share alike."

While the language of paragraph Fourth is clear upon its face, a latent ambiguity is inherent therein by reason of the uncertainty as to the identity of the person therein referred to as "my wives nieces Lucele Brown of Ohio." The appellant whose true name is Bernice Lucele Brown, but who was also known as Lucele Brown, is a resident of Ohio, but is a sister and not a niece of the testator's predeceased wife, while the respondent Mildred Lucille Brown Popp, who was also known as Lucille Brown prior to her marriage, is the niece of the predeceased wife, but is a resident of Los Angeles County and not of the State of Ohio.

[1,2] In this situation extrinsic evidence was properly admitted by the trial court to remove the ambiguity. In re Estate of Nunes, 1954, 123 Cal.App.2d 150, 155 et seq., 266 P.2d 574. Such evidence was conflicting, but that favorable to the respondent and supporting the trial court's finding that she is the person referred to as Lucele Brown is to this effect: Respondent is a niece of the testator's predeceased wife; she was commonly referred to by her entire family as Lucille and also so referred to by the testator and his predeceased wife, while the appellant was referred to by the deceased wife as Bernie or Bernice; respondent lived in Ohio prior to coming to California and was visited by the testator and his wife in Ohio. When respondent moved from Ohio to California in 1943 she and her daughter lived with the testator and his wife for six months, and when she purchased a home in San Gabriel, testator and his wife assisted

her in deciding which home to buy and loaned her $767, without interest, with which to make the down payment on the home. After respondent moved into her home, respondent saw her aunt on the average of once a week and both respondent and her daughter were the recipients of Christmas gifts from her aunt, and respondent's daughter also received birthday presents from her. It also appears that the respondent was affectionately regarded by her aunt.

In view of this evidence the trial court was warranted in concluding, as it did, that by the testator's reference "to my wives nieces Lucele Brown" he intended to refer to the respondent rather than to the appellant. Moreover, the trial court was undoubtedly influenced in reaching its decision by reason of the fact that it was unlikely that Mrs. Harris, who was present at the time the will was executed and who furnished the names of her relatives to the attorney who prepared it, would have referred to the appellant as her niece knowing that she was his sister with whom, as the evidence discloses, she frequently corresponded and therein addressed as "Bernie."

[3] While, as appellant contends, there was other evidence which would have supported a finding that the appellant was the intended beneficiary, where, as here, "a provision in a will is ambiguous and evidence is admitted in order to arrive at the testator's intention, the inferences and conclusions drawn by the trial court from the evidence and the court's findings made therefrom will not be disturbed unless such conclusion 'is contrary to the inferences a reasonable mind might properly draw from the evidence' and such a determination will not be disturbed by a reviewing court unless it is clearly erroneous." In re Estate of Sullivan, 1948, 86 Cal.App.2d 890, 895, 195 P.2d 894, 896.

The order appealed from is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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160 Cal.App.2d 742

Fred EMERTON, Esther E. Emerton, Gilbert T. Emerton and Edna L. Emerton, Plaintiffs and Appellants,

v.

Den M. ACRES, Defendant and Respondent.

Civ. 17748.

District Court of Appeal, First District, Division 2, California.

May 23, 1958.

Action was brought for injuries sustained by plaintiff when automobile, in which plaintiff was riding, collided with defendant's automobile when driver of automobile, in which plaintiff was riding, attempted to pass defendant's automobile from the rear. The Superior Court, Monterey County, Stanley Lawson, J., entered judgment in favor of the defendant, and the plaintiff appealed. The District Court of Appeal, Dooling, J., held that giving of instruction on unavoidable accident was error under evidence, which failed to establish a special situation, and that such error was prejudicial to plaintiff under the circumstances.

Judgment reversed.

1. Automobiles ⚷246(57)

In action for injuries sustained when automobile, in which plaintiff was riding, collided with defendant's automobile when driver of automobile, in which plaintiff was riding, attempted to pass defendant's automobile from the rear, giving of instruction on unavoidable accident was error under evidence which failed to establish a special situation.

2. Appeal and Error ⚷1064(1)

In action for injuries sustained when automobile in which plaintiff was riding, collided with defendant's automobile when driver of automobile, in which plaintiff was riding, attempted to pass defendant's automobile from the rear, error in giving of instruction on unavoidable accident was prejudicial to plaintiff, where evidence, which showed no damage to front of automobile, in which plaintiff was riding, strongly corroborated evidence of plaintiff's witnesses that defendant's automobile turned into left lane after automobile, in which plaintiff was riding, was already partly alongside of defendant's automobile, and tended to contradict testimony of defendant's wife and another witness that defendant's automobile was struck from the rear.

3. Automobiles ⚿245(53)

In action for injuries sustained when automobile, in which plaintiff was riding, collided with defendant's automobile when driver of automobile, in which plaintiff was riding, attempted to pass defendant's automobile from the rear, question whether alleged failure of defendant to give signal before turning was the proximate cause of the collision was for the jury.

◆

Vizzard, Baker & Sullivan, Bakersfield, Rosendale, Thomas & Muller, Salinas, for appellants.

Grunsky & Pybrum, Donald L. Grunsky, Watsonville, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment for defendant following the verdict of a jury. Appellant was riding with other members of his family in an automobile driven by his brother. This automobile came into collision with one driven by defendant on Highway 101 in Monterey County a few miles south of San Ardo. The two cars were proceeding northward at the time and the car in which appellant was riding had been following the one driven by respondent. According to appellant and his witnesses after the two cars reached the brow of a hill with a long stretch of straight highway ahead appellant's brother sounded his horn and turned into the left lane to pass respondent's automobile. When about one-fourth of his car was opposite the respondent's car respondent suddenly, without giving a signal, turned into the left lane and the collision occurred.

According to the testimony of respondent and his wife, who was riding with him, he had turned into the left lane to pass another automobile ahead of him, without noticing that the car in which appellant was riding was behind him, and he was fully in the left lane when struck by this automobile. It had been raining and respondent testified that his windows were slightly misted. There was evidence that he had told a highway officer at the scene of the accident that his windows were "fogged up." When asked if he gave a signal before turning into the left lane he answered: "I don't recall that I did, no. * * * I don't recall giving any signal."

The driver of the third car, O'Connor, gave testimony at variance with both versions. He testified that he was driving behind (not in front of) respondent's car, which at all times was in the right lane, when appellant's car passed him, turned into the right lane in front of him and struck respondent's car in the rear.

[1] The trial court gave to the jury the instruction on unavoidable accident since disapproved in Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500. While the giving of this instruction was supported by the existing decisions when this trial took place, under the decision in Butigan we must hold that it was error to give it because there was no element of unavoidable accident established by any evidence which would justify its giving under the Butigan decision.

The sole question is whether the error was prejudicial. Our reading of the record satisfies us that it was. The evidence showed no damage to the front of the car in which appellant was riding, which strongly corroborates the evidence of his witnesses that respondent's car turned into the left lane after the car in which appellant was riding was already partly alongside of it, and tends to contradict the testimony of respondent's wife and O'Connor that respondent's automobile was struck from the rear.

In Butigan the Supreme Court noted as one element of prejudice "the tendency which such an instruction would have to induce the jury to believe that the stalling of the taxi engine, if a fact, was an unavoidable occurrence * * *". 49 Cal. 2d at page 661, 320 P.2d at page 506. In the case before us the testimony that the windows of respondent's automobile were misted or fogged up, thus interfering with his seeing the car behind him, might similarly be regarded by the jury as an "unavoidable occurrence."

[2] The question of prejudice must be decided on the facts of each case and Rayner v. Ramirez, Cal.App., 324 P.2d 83, cited to us by respondent, is not helpful since the facts were markedly different. We conclude on the record before us that the giving of the instruction on unavoidable accident must be held prejudicial to appellant.

[3] Appellant argues that the failure of respondent to give a signal before turning establishes his negligence as a matter of law. Disregarding entirely O'Connor's testimony the question of proximate cause would still remain for the jury, since the jury could find from the evidence of respondent and his wife that he had already turned fully into the left lane when appellant's car struck him from the rear.

We find no prejudicial error in the other specifications urged by appellant.

Judgment reversed.

KAUFMAN, P. J., and DRAPER, J., concur.

50 Cal.2d 330

Prentiss MOORE, Plaintiff, Cross-Defendant, Respondent and Cross-Appellant,

v.

Leopold FELLNER and Clara M. Fellner, Defendants, Cross-Complainants, Appellants and Cross-Respondents.

L. A. 24895.

Supreme Court of California,
In Bank.

May 20, 1958.

Rehearing Denied June 17, 1958.

Attorneys action to recover reasonable value of services. From judgment of the Superior Court, Los Angeles County, Arnold Praeger, J., in favor of attorney, both clients and attorney appealed. The Supreme Court, Schauer, J., held that although attorney breached contingent fee contract by wrongfully demanding payment of additional fee for handling appeal, upon successful termination of case he was entitled to reasonable value of services not to exceed fee fixed by contract, less expenses to which clients were put by change of counsel, but under circumstances, it was error for trial court to refuse to consider time spent by associated attorney in determining reasonable value of services rendered by attorney.

Reversed and remanded for further proceedings.

Traynor and Spence, JJ., dissented.

Opinion, 318 P.2d 526, vacated

1. Attorney and Client 🔑149

Where contingent fee contract provided that agreement covered conclusion of cases in superior court and at client's option in any of the higher courts, and after prosecution of cases in trial court attorney took necessary steps respecting appeal, under the circumstances, client was not required to give formal notice of exercise of option to have attorney handle appeal.

2. Attorney and Client 🔑149

Where contingent fee contract provided for handling of cases including, at client's option, appeal to higher courts, and attorney upon termination of case in trial court demanded an additional fee to handle appeal, the demand was a breach of contract and client was not bound to make further demands for performance by attorney but was justified in accepting his conduct as a termination of attorney-client relationship and in employing other counsel to handle appeal.

3. Attorney and Client 🔑134(2)

Where attorney breached contingent fee contract by demanding extra compensation for handling of appeal and client then retained another attorney to handle the appeal, original attorney was entitled upon successful termination of case to reasonable compensation for services rendered up to the time of termination of attorney-client relationship less any expense or other damage to which client was subjected by default of attorney.

4. Attorney and Client 🔑134(1)

If an attorney is discharged for sufficient cause he is entitled to no more than reasonable value of his services rendered prior to discharge, but where discharge appears to have been without cause, where contract amount is less than reasonable value of services, recovery is limited to fee fixed by contract.

5. Attorney and Client 🔑134(2)

Recovery of attorney discharged for cause under contingent fee employment is limited to the same contingency as if he had completed service, even though measure of his recovery is reasonable value of services rather than the full contract amount and he should not have judgment until contingency has occurred.

6. Abatement and Revival 🔑78

Unfavored defense that action was prematurely brought is simply a matter of abatement which must be pleaded in proper time or it is waived.

7. Abatement and Revival 🔑81

Where attorney brought action for reasonable value of services rendered originally under contingent fee employment before appeal of case successfully handled by attorney in trial court had been determined, and client first raised point of premature filing by objection to introduction of evidence and by motion for nonsuit when case was on trial and at a time when basis of objection had been rendered nonexistent by client's recovery on appeal, court was justified in ruling against plea.

8. Attorney and Client ⚿134(2)

In action by attorney originally employed on a contingent fee basis against client who discharged him for cause, for reasonable value of services rendered up to the time of discharge, where it appeared that attorney had hired another attorney to assist him in preparation of case and it appeared that attorney's employment by client had contemplated participation of other attorney whose service was to be included in the contingent fee to be paid, time spent by other attorney in case was required to be considered in order to determine reasonable value of services rendered by plaintiff attorney.

◆

George Bouchard, Los Angeles, for plaintiff and appellant.

Sidney Dorfman, Beverly Hills, for defendants and appellants.

SCHAUER, Justice.

From a judgment for $12,825 in plaintiff's favor in his action to recover the reasonable value of services rendered by him as an attorney, both plaintiff and defendants appeal. Plaintiff contends that the award is inadequate, and defendants, claiming breach of contract by plaintiff,[1] urge that judgment should have been in their favor. We have concluded that plaintiff has established a prevailing right, and that the judgment should be reversed and the value of the services redetermined.

The contract between the parties is evidenced by writings in the form of letters. These, and other writings between the parties, appear in the margin. The first is dated May 29, 1951, and constitutes the contract by which defendants (hereinafter sometimes referred to as Fellner) employed plaintiff to represent them as attorney in certain litigation.[2] By this contract Moore was employed on a contingent fee basis to prosecute an action by Fellner against one Steinbaum for damages arising from breach of contract, and *for the same contingent fee* to also defend Fellner in an action brought against him by one Berzon for a broker's commission arising out of the same transaction. Moore's compensation for the dual services was to be 20 per cent of any amount recovered from Steinbaum in a settlement before trial and 25 per cent in case of trial. He was paid $500 on account of costs and an additional $500 "as an advance payment which will be a retainer." The two actions were consolidated for trial and resulted in (1) a judgment of $104,500 in favor of Fellner and against Steinbaum, and (2) a judgment of $20,000 against Fellner and in favor of Berzon, which was settled for $17,500.

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[1] Defendants by their cross-complaint sought a declaration that they owed plaintiff nothing.

[2] "May 29, 1951

"Mr. Prentiss Moore
"Attorney at Law
"453 South Spring Street
"Los Angeles 13, California.

"Dear Mr. Moore:

"This will confirm our oral understanding that you are to represent myself and my wife in the prosecution of a claim against Morris Steinbaum arising from a breach of contract dated the fourteenth day of April 1951 and also that you are to defend an action against us filed by Irvin D. Berzon in the Superior Court, being Action No. 585893.

"As compensation for your services in these matters we agree to pay you 20% of any amount recovered from Morris Steinbaum before trial and 25% if the action proceeds to trial, including three days before the start of the trial. We agree to advance all necessary costs, including court costs, depositions or any other costs incurred incident to the preparation of the case such as appraisers' fees and expert witness' fees, but not fees to any other attorneys you may employ in these matters. We are depositing at this time with you $500.00 on account of such costs and agree to make available any additional amounts necessary for these purposes upon notice from you. However, all these advances will be deducted from the amount to be recovered and the compensation of 20% or 25% resp. will be based on the net amount.

"In addition to this we are depositing another $500.00 as an advance payment which will be a retainer. However, this amount will be deducted from your compensation of 20% or 25% resp.

"It is understood that this agreement covers our understanding to the conclusion of these two cases in the Superior Court and, at our option, in any of the higher courts.

"Yours very truly,
"Leopold Fellner
"Clara M. Fellner

"Approved:
"Prentiss Moore"

Steinbaum filed notice of appeal. Moore testified that thereafter his office "went right on handling the case on appeal" as various matters arose needing attention, including arranging for a clerk's and a reporter's transcript, "authorization for all exhibits to be sent up to the District Court of Appeal and any and all other preparations which were incidental to and short of the writing of the brief and the details going to that point," as well as entering into a stipulation under which $110,000 in U. S. Treasury Certificates were deposited by Steinbaum in lieu of an undertaking on appeal.

On March 2, 1954, *before appellant Steinbaum's brief had been received,* and when the services called for by the contract, insofar as they had then accrued, *had been faithfully performed,* Moore wrote to Mr. and Mrs. Fellner stating that if they wished him to handle the appeal his fee would be $2,000 plus the necessary costs.[3] On March 3, 1954, Mr. Fellner replied,[4] referring to the provision of the employment contract[2] reading as follows: "It is understood that this agreement covers our understanding to the conclusion of these two cases in the Superior Court and, at our option, in any of the higher courts." Moore replied on March 10,[5] and on March 13 Fellner wrote

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[3] "March 2, 1954

"Mr. and Mrs. Leopold Fellner
"9970 West Pico Blvd.
"Los Angeles, California

"Dear Mr. and Mrs. Fellner:

"The deposit of $110,000.00 of Treasury Certificates has been made by the defendant Steinbaum and we have received notification that the Clerk's Transcript has been prepared and the appeal is proceeding.

"The reason for writing you at this time is to advise you that in our opinion the respondents' briefs and the costs on appeal will approximate $500.00, of course, depending upon the length of our reply to the appellant's brief. We should like to have you advise as soon as possible as to whether you desire this office to handle the appeal and if so, our fee will be $2,000.00, plus the necessary costs above outlined. Should you desire any other firm to handle the appeal, kindly notify us as soon as possible and I am enclosing the only current obligation which is now due, the cost of the balance of the Reporter's Transcript in the amount of $16.00.

"Respectfully,
"Moore, Webster, Lindelof & Hughes
"Prentiss Moore
J
"Prentiss Moore"

[4] "March 3, 1954

"Mr. Prentiss Moore
"417 South Hill Street
"Los Angeles 13, Calif.

"Dear Mr. Moore:

"I have received your letter of March 2nd and I have paid the bill of $16.00 to the Reporter.

"I assume that you overlooked that part of our agreement which specifically stipulates that the agreed fees cover and include all the appeals. I would appreciate it if you would let me know your considered opinion about this matter.

"Whatever the court costs will be we will make payments upon receipt of the bills to the court Reporter as in the past.

"Cordially yours,
"Leopold Fellner"

[5] "March 10, 1954

"Mr. Leopold Fellner
"9970 West Pico Blvd.
"Los Angeles, California

"Dear Mr. Fellner:

"I am at a loss to understand the position taken in your letter of March 3rd inasmuch as during the negotiations which we had leading to the making of our agreement with respect to the fees of this office, it was clearly under-

Moore[6] again calling attention to the above-quoted contract provision and declaring, among other things, that "We must consider that you have deliberately breach-

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stood to be through proceedings in the Superior Court.

"As you may recall, you pointed out at the time you corrected the letter which we had prepared for your signature on May 25, 1951, (altered by your letter of May 29, 1951) that what you wanted clearly understood was, regardless of the outcome of the proceedings in the Superior Court, you wanted to have the opportunity of choosing other counsel if you saw fit after the termination of the litigation in the Superior Court.

"As you well know, we at no time ever made any agreement that presupposed the carrying of your litigation beyond the Superior Court under the contingent fee arrangement of twenty-five per cent of the recovery from Morris Steinbaum any more than it would be assumed that we would carry an appeal in the event the litigation was lost in the trial court, through the state appellate courts and possibly the Supreme Court of the United States, without any compensation. Your only request was that you be allowed the opportunity of changing counsel after the determination of the proceedings in the trial court.

"In accordance with that understanding we wrote you on the 2nd, due to the imminence of the appeal, to advise you that it was still satisfactory with this office for you to choose any counsel for the purpose of defending your rights on appeal; that should you care to have this office represent you in the appeal, that our fee would be $2,000.00 in addition to any costs on appeal.

"As you may recall, you asked for and were given the balance of costs that had been deposited in connection with the trial litigation after the judgment had been entered. We received notice that the next amount due is $25.80, payable to the County Clerk for preparation of the Clerk's Transcript on Appeal, which must be paid by March 14th.

"Respectfully,
"Moore, Webster, Lindelof & Hughes
"Prentiss Moore"

[6] "March 13, 1954

"Messrs. Moore, Webster, Lindelof & Hughes
"417 South Hill Street
"Los Angeles 13, California

"Dear Mr. Moore:

"I have received your letter of March 10th. The reading of it was quite a shocking experience to us. As I outlined in my letter of March 3rd we were confident that you overlooked the terms of our agreement and that your considered opinion, based on the terms of the contract, would not differ from ours.

"Your statements and implications are false and designed to distort the issues. We never considered and negotiated about anything else but a contingency fee which would cover the litigation to the final satisfaction of our claim, and, if necessary, at our option, any litigation to the highest court. The purpose of a contingency arrangement had no other purpose for us but to assure ourselves against payments of attorneys' fees which would be difficult for us to handle. We emphasized this in our agreement by saying: 'of any amount recovered from Morris Steinbaum.' As if this would not be enough, we emphasized it again: 'it is understood that this agreement covers our understanding to the conclusion of these two cases in the Superior Court and, at our option, in any of the highest courts.'

"I do not understand what bearing our right to change counsel would have on this matter, still I wish to state the facts as they are. When I asked you during our negotiations what the purpose of a retainer fee was, when there is a contingency fee arrangement, you explained that this was just something like earnest money in case I would change counsel and there was never any suggestion on my part that I would consider this possibility.

"You used the fact that I picked up the balance of our deposit with you to distort the issues. You know well what happened. When we had to pay, without prior notice from you, over $1,500 to the Court Reporter and Appraiser, I told you that it was very difficult for us to raise this money on such a short notice. Then I suggested that, as we were paying the bills direct to the Court Reporter, and other expenses, it would not serve any purpose to have a deposit lying around in your office.

"We cannot see any possibility of a misunderstanding on your part. We cannot look at it in any other way but that you tried to take advantage of our position. This, of course, has disrupted and destroyed any relationship of confidence between us. We must consider that you have deliberately breached our agreement of May 29th, 1951. For that reason 1) we consider your relationship as our attorney terminated by your con-ed our agreement of May 29th, 1951. For that reason 1) we consider your relationship as our attorney terminated * * * and will seek other counsel to represent us in this litigation." Moore replied on March 19.[7] Moore declined to sign a substitution of attorneys and Fellner obtained an order in the District Court of Appeal substituting other counsel on the appeal. Thereafter on June 30, 1954, Moore again wrote to Fellner.[8] The judgment against Steinbaum was affirmed on appeal (Fellner v. Steinbaum (1955), 132 Cal.App.2d 509, 282 P.2d 584), and Fellner was paid some $117,000 (which included interest) thereunder. The substituted counsel charged Fellner $1,000 for handling the appeal.

From the writings above listed and other evidence the trial court found, so far as here material, as follows: plaintiff Moore demanded from Fellner $2,000 as additional compensation for handling the appeal and refused, after demand by Fellner, to handle the appeal unless he was paid the $2,000; he was discharged by Fellner, and "it is not true that the defendants discharged plaintiff without cause or justification"; on June 30, 1954, "plaintiff in writing rescinded" his contract with defendants; "at the time of his discharge plaintiff had substantially performed his part of the agreement with defendants, and the services rendered by him were of value to the defendants"; the "reasonable value of the professional services rendered * * * by plaintiff * * * to the time he was discharged is the sum of $13,325.00" of which he had been paid on account the sum of $500. As conclusions of law the court declared that plaintiff, under the terms of his contract with Fellner, was "required to represent" the latter on the appeal from the judgment against Steinbaum without further charge; that plaintiff's demand for an additional fee was wrongful and a breach of his contract; but that plaintiff is

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duct and we will seek other counsel to represent us in this litigation. 2) The agreement of May 29th, 1951, between us has been terminated by you and we must accept the termination of the contract and act accordingly.

"Our new counsel will contact you as soon as possible. He will conduct any necessary negotiations with you in our behalf.

"Yours very truly,
"Leopold Fellner"

[7] "March 19, 1954

"Mr. Leopold Fellner
"9970 West Pico Blvd.
"Los Angeles, California

"Dear Mr. Fellner:

"I have your letter of March 13th. Of course, most of the statements you make in your letter as to facts are unfounded. There is no attempt by me to breach our agreement of May 29th as you state. In writing you I was merely endeavoring to clarify my position so far as the appeal of your case was concerned.

"From your correspondence, I can only conclude that you are exercising your option to employ other counsel for the appeal, and that the fee arrangement is still in effect. According, I will expect payment of twenty-five per cent of all funds received from Morris Steinbaum.

"Respectfully,
"Prentiss Moore"

[8] "June 30, 1954

"Mr. and Mrs. Leopold Fellner
"9970 West Pico Blvd.
"Los Angeles, California

"Dear Mr. and Mrs. Fellner:

"By your action in securing an order of court June 22, 1954, substituting Sidney Dorfman as your attorney in place of myself in the case of Fellner vs. Steinbaum, you have made it impossible for me to complete the performance of my part of any agreement that we had regarding your representation in that case. Your discharge of me was without cause and was wrongful. I hereby elect to treat the contract of my employment as your attorney in that matter as rescinded and will shortly commence an action for the determination of the reasonable value of my services to date. In this action you will receive credit for the $500.00 retainer that you gave me at the time the representation first arose.

"I am sending a copy of this letter to Mr. Sidney Dorfman for his information.

"Yours truly,
"Prentiss Moore

"CC: Mr. Sidney Dorfman
"10332 La Grange Avenue
"Los Angeles 25
"California"

entitled to recover from Fellner the reasonable value of his services, less the $500 paid on account. Judgment was thereupon entered in plaintiff's favor for $12,825, and these appeals by both parties followed.

As ground for reversal, defendants contend that plaintiff was required to represent them on the Steinbaum appeal without further compensation, that he wrongfully demanded payment of an additional fee of $2,000 and refused to render further services on the appeal unless paid that sum, and that he thereby breached the employment contract and is therefore entitled to no compensation.

[1] Plaintiff does not dispute that he was obligated to handle the appeal if Fellner so requested, and seems not now to contend that he was entitled to demand an additional fee for so doing. Plaintiff does, however, urge that he was to "do so [only] when the client *exercised* his option and notified him," and that the option was never exercised. This contention, on the record before us, is without substantial merit. Previous to his letter of March 2, 1954, to Fellner, plaintiff had already, with Fellner's consent, handled all steps proper to be performed up to that time relative to the appeal, had notified Fellner of the charges for appeal transcripts, and had been advised by Fellner that these and additional costs would be paid. He had not written the respondent's brief, but appellant's opening brief had not yet been received. It further appears from plaintiff's testimony that he had originally drafted the employment contract between the parties but that the words "and, at our option, in any of the higher courts," as well as the provision that Fellner was not to pay as costs the "fees to any other attorneys you [plaintiff] may employ in these matters," were inserted by Fellner in the contract; and, further, that "one of the reasons for * * * [Fellner's insertions was] to make sure that if the case were lost, he would have no obligation of any kind to me or anyone employed by me for any services rendered in this matter * * * and * * * would have the right to * * * have somebody else prosecute the appeal or take whatever action they cared to after the case might be lost in the Superior Court." It is thus inferrible that Moore did not understand the option provision to apply if, as actually occurred, the case was won in the trial court. Moreover, although Fellner testified that following the trial he did not talk to Moore "specifically" about "these appeal problems," he did testify to "two or three" personal conversations and a "few" telephone conversations concerning their progress with Moore's office associate, Mr. Lindelof, with whom Moore had previously directed that Fellner "always should talk." Moore himself testified freely that "whatever was done by my office I take the full responsibility for it and it is not that of either Mr. Lindelof or anyone else in the office other than my own and done under my authority and by my delegation." Thus the trial court could infer that Moore was fully aware, prior to his letter of March 2, that Fellner expected and intended that Moore would handle the appeal, and that no formal notice of exercise by Fellner or his option was required.

[2] Moore, although not contending that he was entitled to an additional fee of $2,000, urges that after all he did not *demand* an additional fee for the appeal or make "the fee itself a condition precedent to the attorney going ahead with the appeal." The language he used in the letter of March 2, was: "We should like to have you advise as soon as possible as to whether you desire this office to handle the appeal and if so, our fee will be $2,000.00, plus the necessary costs above outlined." In his letter of March 10 to Fellner, Moore referred again to his statement that "should you care to have this office represent you in the appeal, * * * our fee would be $2,000.00 in addition to any costs on appeal." It is apparent that the trial court was warranted in interpreting this language as a demand by Moore for payment of an additional fee and a refusal to handle the appeal unless it was paid, and in concluding that plaintiff's demand was

"wrongful and a breach of his contract." It follows that Fellner was not bound to make further demands for performance by Moore but was justified in accepting his conduct as a termination of "your relationship as our attorney"[6] and in employing other counsel to handle the appeal.

However, it does not follow that Moore's right to compensation for services already performed was thereby forfeited. Although it has been held that an attorney who wrongfully abandons or withdraws from a case which he has contracted to handle, or has been discharged for cause by the client, may not recover compensation (see 7 C.J.S. Attorney and Client § 169, subd. a(3), b, p. 1031; 5 Am.Jur. 363, § 171), this approach appears to have grown in part from situations in which the contract of employment was considered to be entire and indivisible. (See Cahill v. Baird (1902), 7 Cal.Unrep. 61, 70 P. 1061; 7 C.J.S. Attorney and Client § 110, p. 943; cf. Oliver v. Campbell (1954), 43 Cal.2d 298, 304 [3], 273 P.2d 15.) On the other hand recovery for services rendered up to the date of a discharge for cause has likewise been upheld where the agreed compensation was payable to the attorney in equal monthly payments; i. e., where the services seemingly were regarded by the court as divisible. (See Moser v. Western Harness Racing Ass'n (1948), 89 Cal.App.2d 1, 3, 13–14, 200 P.2d 7; cf. Salopek v. Schoemann (1942), 20 Cal.2d 150, 124 P.2d 21, affirming, on *appeal of assignee of attorney* discharged for cause, judgment of $300 as reasonable value of his services, claimed by him to be an inadequate award.)

[3] In the present case it appears that the parties at the time of entering into the employment contract contemplated that the attorney's services should be divisible into those rendered (1) in the superior court, and (2) on any appeal from a superior court judgment. The expression "and, at our option, in any of the higher courts," was inserted into the contract by the client, Fellner, who thus clearly indicated that he wished to reserve the right to change counsel on appeal. If services are to be divisible for the benefit of the client, at his option, then it follows that they may also be treated as divisible for the benefit of the attorney, if the interests of justice so require. Especially is this true in this case where plaintiff had completed his services in connection with defending Fellner in the Berzon action and had *not failed to perform any service which had become due for performance* up to the time of the disagreement. Fellner did not await any actual failure to perform. He had a right to, and he did, elect to treat the contract as ended by reason of Moore's unjustified demands. Thus, at least in effect, he discharged Moore for cause. No reason whatsoever appears why the court cannot fully protect Fellner against any loss on account of plaintiff's default in relation to his obligations on appeal and at the same time preclude the former's seeming unjust enrichment, by awarding reasonable compensation to plaintiff for his services in the Berzon action and in the Steinbaum action up to the time of breach. Consequently, under the above holdings the attorney is entitled to reasonable compensation for services already rendered up to the time of termination of his attorney-client relationship with Fellner, less any expense or other damage to which the client was subjected by the default of Moore.

[4] As declared in Salopek v. Schoemann (1942), supra, 20 Cal.2d 150, 153 [1], 155 [3], 124 P.2d 21, "if an attorney is discharged for sufficient cause he is entitled to no more than the reasonable value of his services rendered prior to his discharge," has "no cause to complain and is fully protected by payment of the reasonable value," and may not recover the full contract amount (at least if such amount exceeds the reasonable value of the services). On the other hand in a case in which the discharge appears to have been without cause, it has been held that where

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[6] See note 6 on page 860.

the contract amount is less than the reasonable value of the services, recovery is nevertheless limited to the fee fixed by the contract. (See Oliver v. Campbell (1954), supra, 43 Cal.2d 298, 306 [9], 273 P.2d 15.) In the present case plaintiff sought and was awarded judgment based on reasonable value.[9] Under the rules above stated his recovery must not, of course, exceed the fee fixed by the employment contract, less expenses to which the client (defendant) was put by the change of counsel.

[5–7] Defendants urge, however, that even if plaintiff is entitled to judgment, his action was premature because filed before final disposition of the Steinbaum case on appeal and recovery by Fellner from Steinbaum. This action was filed December 1, 1954; the Steinbaum judgment was affirmed on appeal on April 25, 1955 (Fellner v. Steinbaum (1955), supra, 132 Cal.App.2d 509, 282 P.2d 584), and hearing by the Supreme Court was denied on June 23, 1955. It appears that before this action went to trial on May 22, 1956, Fellner had collected from Steinbaum. In Jones v. Martin (1953), 41 Cal.2d 23, 27, 256 P.2d 905, the rule is stated that "An attorney employed under a contingent fee agreement who is wrongfully discharged by his client, is generally entitled to the same amount of compensation and *under the same contingency* as if he had completed the services contemplated. [Citations.]" (Italics added.) If the recovery of an attorney wrongfully discharged under a contingent fee employment is limited to the same contingency as if he had completed the services, then one whose discharge has been for cause should be similarly limited; i. e., even though the measure of his recovery is the reasonable value of his services rather than (and not in excess of) the full contract amount, he should not have judgment until the contingency has occurred—here, recovery by Fellner from Steinbaum. However, the unfavored defense that the action was prematurely brought is simply matter of abatement which must be pleaded in proper time or it is waived. Further, if the defense has ceased to exist at the time defendant seeks to raise it, there is no occasion to consider whether it has been waived, as it may be disregarded. (Radar v. Rogers (1957), 49 Cal.2d 243, 317 P.2d 17.) In the present case defendant first raised the point of premature filing of the action by an objection to the introduction of evidence and by motion for nonsuit when the case was on trial and at a time when the basis of the objection had been rendered non-existent by Fellner's actual recovery from Steinbaum. Under such circumstances the court was justified in ruling against the plea.

Plaintiff on his part contends (1) that the valuation placed by the trial court on his services is inadequate and not supported by the evidence, and (2) that the court erred in refusing to consider or place any value upon the services of plaintiff's office associate, Lindelof.

[8] Plaintiff testified that in his opinion the reasonable value of services rendered by him and Lindelof to Fellner was not less than $40,000. Other attorneys testifying as experts gave valuations of $25,000 and of $10,000. Plaintiff further testified as to the time he himself had spent on the Fellner matters, as well as that Lindelof, who was employed by plaintiff, had devoted some 450 hours to assisting him in preparation of the cases. Fellner likewise testified that most of his communications and contacts with plaintiff's office were made with Lindelof rather than with plaintiff personally, thus making it clear that Fellner's employment of plaintiff contemplated the participation of other attorneys in the services rendered by plaintiff, although the cost of their services was by the employment contract included in the fee to be paid to plaintiff, rather than being charged as additional or separately itemized costs to Fellner. It is thus apparent that Lindelof's services were included in those provided by Moore and should be considered in determining the reasonable value of the services rendered by

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[9] It may be noted that plaintiff by his pleadings has sought recovery only in *quantum meruit*, and has not sued for the contract fee.

plaintiff to Fellner, and that the trial court erred in its express refusal to consider the time spent on the Fellner cases by Lindelof. Under such circumstances the matter should be remanded for a new determination in the trial court. (Arenson v. National Auto. & Cas. Ins. Co. (1957), 48 Cal. 2d 528, 540 [8], 310 P.2d 961.)

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views hereinabove expressed, each party to bear his or their own respective costs on appeal.

GIBSON, C. J., and SHENK, CARTER and McCOMB, JJ., concur.

TRAYNOR, Justice.

I dissent. For the reasons stated by Mr. Presiding Justice Shinn in the opinion prepared by him for the District Court of Appeal in Moore v. Fellner, Cal.App., 318 P.2d 526, I would reverse the judgment with instructions to the trial court to vacate the present judgment, make new conclusions of law, and enter judgment on the findings and conclusions in favor of defendants Fellner.

SPENCE, J., concurs.

Rehearing denied; TRAYNOR and SPENCE, JJ., dissenting.

160 Cal.App.2d 620

Roy C. KAISER and Geraldine C. Kaiser, his wife, Plaintiffs, Cross-Defendants, Defendants in Intervention and Appellants,

v.

Margaret MANSFIELD, Defendant, Cross-Complainant and Respondent,

Clara Holecheck, Plaintiff in Intervention and Respondent.

Civ. 5658.

District Court of Appeal, Fourth District, California.

May 19, 1958.

Rehearing Denied June 16, 1958.

Hearing Denied July 16, 1958.

Action to quiet title to certain lands. The Superior Court, Kern County, Robert B. Lambert, J., entered judgment quieting title in defendant and an intervenor, and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that in view of fact money paid by judgment debtor's assignees, who redeemed land from first execution sale, not only increased value of what judgment creditors claiming under a second execution sale had, but resulted in giving them clear title to portion of land in question, repayment of that amount to assignees of judgment debtor who were decreed to not have title to any of the property in question should have been provided for.

Judgment modified and affirmed.

1. Fraudulent Conveyances ⇨298(1)

In quiet title action, evidence sustained finding to the effect that transfers of a contract for purchase of certain land from judgment debtor to third parties were made or caused by judgment debtor with an intent on his part to defraud his creditors.

2. Execution ⇨302

A redemption by a judgment-debtor of property sold in an execution sale terminates the particular sale in which that redemption is made and restores the estate of the judgment debtor, and the redemption by the judgment-debtor's successor in interest has the same effect. West's Ann.Code Civ.Proc. §§ 701–703.

3. Execution ⇨302

Statutes providing that redemption of property sold at execution sale may be made by a creditor having a lien or by the judgment-debtor or his successor in interest and that if the debtor redeem effect of the sale is terminated and debtor is restored to his estate, were designed to protect redemption rights of various parties, but not to relieve the judgment-debtor from payment of his just debts, and when a redemption is made by a creditor, the junior lien which is wiped out does not represent a debt which is owed by the redeeming creditors. West's Ann.Code Civ.Proc. §§ 701–703.

4. Execution ⚷302

A judgment-debtor by redeeming from a first execution sale cannot thereby cancel and wipe out his obligation on other execution liens on such property covering debts which he also owes, and such rule also applies where redemption from the first sale is made by judgment debtor's successor in interest since such successor stands in judgment debtor's shoes and is entitled only to the same rights. West's Ann.Code Civ. Proc. §§ 701–703.

5. Execution ⚷302

Action of a judgment debtor's successor in interest, in redeeming certain property from a first execution sale, had the effect of restoring an interest in such property in the judgment debtor, but did not adversely affect or extinguish subsequent execution sale of such property by another judgment creditor, and in view of fact there was no redemption from second execution sale sheriff's deed in that connection conveyed any interest which judgment debtor had at the time of the first execution sale. West's Ann.Code Civ.Proc. §§ 701–703.

6. Quieting Title ⚷50

Where money paid by judgment debtor's assignees, who redeemed certain land from a first execution sale, not only increased value of what judgment creditors claiming under a second execution sale had, but resulted in giving them clear title to portion of land in question, repayment of that amount to judgment debtor's assignees who were decreed to not have any title to any of the property in question should have been provided for in action to quiet title to such lands.

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Roland T. Williams, Roy C. Kaiser, Los Angeles, for appellants.

Thomas A. Wood, Larwill & Wolfe, Los Angeles, Borton, Petrini, Conron & Brown, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a decree quieting title to 640 acres of land in the defendant and the intervener.

On July 12, 1948, Joseph S. Lees secured an option to buy this land from J. W. Eddington for a purchase price of $57,600. He gave his check for $1,000 for the option, and on July 16 he secured $1,000 from Margaret Mansfield for the purpose of covering that check. On August 24, he got an additional $1,000 from Mrs. Mansfield and $2,500 from Clara Holecheck. Under a contract dated August 20, 1948, Eddington agreed to sell this land to Lees for $57,600, the total down payment being $3,800. On October 25, 1949, Lees assigned this contract to a Mrs. Fisher, with whom he had been closely associated for several years. On August 8, 1950, Mrs. Fisher transferred the contract to J. A. Long, whose wife was a sister of Lees.

On March 7, 1951, Mrs. Holecheck filed an action in the municipal court on a note for $2,500 which she had received from Lees on April 16, 1949. On the same day, March 7, Mrs. Mansfield filed an action for $2,000 on an account stated. Judgment in favor of Mrs. Holecheck for $2,750 and costs was entered on October 10, 1951, and another judgment for $2,360.14 and costs was entered in favor of Mrs. Mansfield on November 27, 1951. On December 15, 1952, the sheriff of Kern County levied an execution issued in Mansfield v. Lees on the interest of Lees in and to this land. On December 19, 1952, a similar execution was levied in connection with Holecheck v. Lees. On January 5, 1953, Mrs. Holecheck assigned her judgment against Lees to Mrs. Mansfield for the purpose of collection. On January 19, 1953, the sheriff sold all the interest of Lees in this land to Mrs. Mansfield for $2,550.77, being the full amount due under the judgment in Mansfield v. Lees. Ten minutes later on the same day, and pursuant to the execution in Holecheck v. Lees, the sheriff sold all the interest of Lees in this land to Mrs. Mansfield, as assignee, for $3,065, being the full amount due under that judgment. On February 11, 1953, both of these judgments were satisfied of record.

On August 13, 1953, J. A. Long and his wife assigned the contract for this land to these appellants for a purported consideration of $4,000, and Kaiser gave Long $1,000 and a note for $3,000. The $1,000 never went into any bank account of Long, and Kaiser later cancelled the $3,000 note. On December 22, 1953, Lees and his wife gave these plaintiffs a quitclaim deed and an assignment of their right to redeem this 640 acres "from execution Sale or Sales heretofore made in respect to said real property." On December 23, 1953, Kaiser notified the sheriff of his desire to redeem this 640 acres from the sale under the execution issued in the case of Mansfield v. Lees. In his affidavit he stated that he and his wife "as successors in interest of Joseph S. Lees" desired to redeem this property "from said sale". The sheriff notified Mrs. Mansfield's attorney of this application to redeem and the attorney notified the sheriff that the land had also been sold on the same day in the case of Holecheck v. Lees, and that the amount necessary to redeem from that sale was $3,065.99. On January 21, 1954, the sheriff issued to these plaintiffs a certificate of redemption, in which it was recited that the Kaisers had paid him $2,821.52, being the full amount necessary to redeem from the sale under the execution issued in the case of Mansfield v. Lees. No redemption was made or attempted in connection with the sale under execution in the case of Holecheck v. Lees. Thereafter, on March 18, 1954, the sheriff issued a deed to Mrs. Mansfield under and pursuant to the execution sale under the judgment in Holecheck v. Lees.

A deed conveying this 640 acres from the Southern Pacific Land Company to "the heirs or devisees of J. W. Eddington, Deceased" was recorded on May 12, 1954. On the same day an administrator's deed was recorded conveying 140 acres, being a part of the 640 acres in question, to these plaintiffs. This deed recited that it was made pursuant to an order of court in the Estate of J. W. Eddington, Deceased, authorizing the execution of this deed on the payment of $4,000; that this amount had been paid; that the court's order was made to carry out the agreement made by J. W. Eddington on August 20, 1948 in favor of Joseph S. Lees; and that the purchaser's interest under said agreement was subsequently assigned to Elmira Fisher, who had since assigned the same to Roy C. Kaiser and Geraldine C. Kaiser.

On May 20, 1954, the plaintiffs filed this action to quiet title to the 140 acres described in the administrator's deed. The complaint was in the ordinary short form, naming Mrs. Mansfield and three Does as defendants. Mrs. Mansfield answered and filed a cross-complaint and Mrs. Holecheck filed an answer and a complaint in intervention, each claiming an interest in the entire 640 acres. The court found in favor of the two women, held that they were the owners of the contract covering the whole 640 acres, and entered judgment to that effect. On appeal that judgment was reversed. Kaiser v. Mansfield, 141 Cal.App.2d 428, 297 P.2d 98. This court held that while it clearly appeared that the initial payments on the option and contract were made by Lees with funds advanced by Mrs. Mansfield and Mrs. Holecheck, they had elected to pursue a remedy which was inconsistent with the trust theory upon which the findings and judgment were partly based. It was further stated that the parties should be allowed to amend their pleadings and that, except for the elimination of the trust theory, there was no intention to limit the scope of an inquiry into the facts or equities of the case upon retrial. It was also pointed out that the effect of the execution sale in the case of Holecheck v. Lees would depend upon what title Lees had in the realty on the date of that sale, and that it would appear that if Lees had any interest at the time of the first sale that interest, having been restored by the redemption from that sale, could be reached and effectively disposed of at the second sale, with the result that Mrs. Mansfield would obtain good title through her purchase in the sale under Holecheck v. Lees, as confirmed by the sheriff's deed.

Subsequently, an amended cross-complaint and an amended complaint in intervention were filed by which the two women sought to quiet their title to their respective interests in the entire 640 acres of land. After a trial the court found, among other things, that Lees transferred this contract to Mrs. Fisher without consideration and with intent to defraud his creditors and while he was insolvent; that at that time Mrs. Mansfield and Mrs. Holecheck were creditors of Lees; that thereafter Lees caused Mrs. Fisher to transfer said contract to Mr. and Mrs. Long, his sister and brother-in-law, without consideration and with intent to defraud his creditors; and that the transfers by Lees to Fisher and by Fisher to the Longs were void as against the creditors of Lees. With respect to the execution sales it was found that Lees was the owner of the property at that time; that the sheriff issued to Mrs. Mansfield a certificate of sale pursuant to the execution in the action of Mansfield v. Lees, and another certificate of sale pursuant to execution in Holecheck v. Lees; that subsequent to the issuance of said certificates of sale Mrs. Mansfield conveyed a one-half interest in said property to Mrs. Holecheck; that on December 23, 1953, these plaintiffs, as successors in interest of Lees, redeemed said property from the execution sale in Mansfield v. Lees for the sum of $2,831.52, and the sheriff issued to them a certificate of redemption from said sale; that no redemption was made by anyone from the execution sale in Holecheck v. Lees; that after the time for redemption expired and on March 18, 1954, the sheriff issued his deed to Mrs. Mansfield, the purchaser at the execution sale in Holecheck v. Lees; and that said deed was recorded on March 23, 1954. Further findings were made to the effect that Mrs. Mansfield and Mrs. Holecheck are the owners each of an undivided one-half interest in the entire 640 acres, and that these plaintiffs do not have any right, title or interest in or to said real property, or any part thereof. Among the conclusions of law it was found that Mrs. Mansfield and Mrs. Holecheck are entitled to have their title to said property quieted as against these plaintiffs and all persons claiming under them upon their depositing in court, for the benefit of these plaintiffs, the sum of $2,831.52 paid by the plaintiffs to redeem the property from the first sale. Judgment was entered accordingly, and the $2,831.52 was deposited with the clerk. The plaintiffs have appealed from that judgment.

[1] The record is voluminous and it would serve no useful purpose to consider in detail the many technical points raised by the appellants. It clearly appears from the record that the respondents advanced the money used by Lees in making the initial payments on this option and contract; that they thought and were led by Lees to believe that they were not merely making a loan but were buying an interest in real property; that their later actions in attempting to get their money back, by seeking the aid of the district attorney's office and by filing suits, were caused by Lees' statements to them that he had transferred the contract to an innocent third party and that he was unable to give them any evidence of their interest in the land or to repay them, and by statements made to them by both Lees and Kaiser to the effect that if they did not accept a settlement then proposed by Lees he would go into bankruptcy and they would get nothing. It also clearly appears that Lees was closely associated with the parties involved in the various transfers of this contract, and the evidence justifies the inference that Kaiser had full knowledge of the various transactions. He took a considerable part in the efforts of Lees to settle with the two women, and represented Lees in connection with the investigation being made by the district attorney. Kaiser was an attorney and Lees a real estate broker, their offices were in the same suite, and Lees was handling a subdivision for Kaiser. Mrs. Mansfield was a stenographer in the same suite and performed some services for both of them.

Mrs. Fisher had been a close associate of Lees for many years, and Long was his brother-in-law. The evidence would amply support a recovery on the trust theory had that theory not become unavailable for the reason pointed out in the prior decision. The controlling issues on this appeal are as to whether the findings to the effect that the transfers of this contract from Lees to Mrs. Fisher and from Mrs. Fisher to the Longs were made or caused by Lees with an intent on his part to defraud his creditors are sustained by the evidence; and as to whether the redemption by Kaiser from the execution sale in the case of Mansfield v. Lees had the legal effect of wiping out the subsequent execution sale in the case of Holecheck v. Lees.

It was proved that Lees had only $5.67 in his bank account when he gave a check for $1,000 for an option to buy this property, and the total initial payments on this $57,600 deal were considerably less than the amounts he received from the respondents. During the times these transfers were being made the respondents were pressing him and the district attorney's office was investigating the matter, he was telling the respondents that he could not give them the property as he had transferred it to an innocent third party, and he and Kaiser had both threatened that he would go into bankruptcy. The testimony of Mrs. Fisher was that the only transaction she had with Lees concerning this property was that she had accepted the property "as a surety of money that I loaned Mr. Lees." She later said that she had cancelled a loan she had made to Lees amounting to $2,275.45, and loaned him $200 more when she took an assignment of this property; that she had previously loaned Lees $207.45 in 1948 and that the rest was a loan to a man named Popkin which Lees had orally guaranteed. She explained that at the suggestion of Lees she loaned $2,000 to Popkin in 1944, taking a chattel mortgage on a boat; that of this $2,000, $300 to $500 was by check and the rest was cash which she had in the house; that Popkin paid $800 on the loan in 1945, and she had not heard anything about him since; that she never saw the boat; and that she turned the chattel mortgage papers over to Lees, but she could not remember whether she signed anything or not. She said Kaiser had previously filed an action for her against Popkin; that Kaiser got service on Popkin in 1952 and was trying to collect from him after she had transferred the mortgage to Lees; that she did not tell Kaiser that she had transferred the note and mortgage to Lees; and that she did not tell him that she had purchased this property from Lees and had transferred the Popkin mortgage as part of the consideration. She also said she had sold this contract to Long for $1,000, but did not put the money in a bank; that she took a loss of $1,207.45 on the property; that Lees was present when Long bought the property from her, and made out the papers; and that Lees charged her no commission "on account of I was taking a loss anyway". She also said that when Lees sold her the property he told her he had about $4,000 invested in it; that she had no title search made and did not check to see if the taxes were paid; and that she could not recall whether she had ever notified Eddington that she had bought the contract or that she had sold it.

Long's testimony is that he did not see this property until after he had bought it from Mrs. Fisher, and that he paid her $1,000 in a cashier's check which he purchased with money he had kept hidden in his home. It appeared that he was working for wages, that he had never had a bank account, and his wife said she had never known that he had any amount of money in the house. Long also said that Lees handled both transactions, when he bought the property from Mrs. Fisher and when he sold it to Kaiser, and that Kaiser paid him $1,000 and gave him a note for $3,000 which he later refused to pay and the note was cancelled. Lees testified, among other things, that when he transferred the property to Mrs. Fisher she gave him the Popkin note and papers, that he did not have her endorse the note over to him because "I knew it was no good, anyway"; that his obligation to Mrs. Fisher on the Popkin deal was merely a moral obligation; that he did not really owe the money but "when he didn't pay it, I figured I owed it"; that he did not give preference to anybody but "I couldn't pay it all"; and that, although he could not pay his debts, he was not insolvent since he had not gone into bankruptcy. Kaiser testified that he drew the original contract when Eddington sold the land to Lees; that when he bought the contract from Long he paid him $1,000 and gave him a note for $3,000; that the note was later cancelled and he got it back; and that he had an agreement to either pay Long $2,500 or deed him five acres of the land when title to the land was cleared.

The evidence indicates that neither Mrs. Fisher nor Long were in a position to handle a deal of this size, and justifies an inference that Lees knew that they never intended to do so. Aside from the general circumstances shown by the evidence, the testimony of these witnesses was evasive, contained contradictions, and was sufficient in itself to show why it was not accepted at its face value by the court. The evidence, with the inferences that could reasonably be drawn therefrom, was amply sufficient to sustain the findings to the effect that this property was transferred by Lees with intent to defraud his creditors, and that he manipulated and controlled its further transfers for the same purpose. The evidence also justifies the inference that Kaiser was not an innocent purchaser, that he knew the material facts throughout these transactions and rendered assistance in some of them, and that all of these parties cooperated at various times in concealing the interest of Lees in this property.

[2] With respect to the redemption made by Kaiser, the appellants contend that by this redemption from the first execution sale they acquired all rights which Lees had in the property, leaving no interest in Lees which could be reached or which was affected by the sale in Holecheck v. Lees. It is argued that the execution in Mansfield v. Lees, having been levied first, was the senior execution lien and the lien in Holecheck v. Lees was the junior lien; that the first sale of the property pursuant to the senior lien wiped out the junior lien; that as successors in interest of Lees through the quitclaim deed they redeemed the property from the sale under the senior lien; and that any claim that might have otherwise existed under the execution sale in Holecheck v. Lees, involving the junior lien, was thus extinguished. They cite Allen v. McGee, 54 Cal.App.2d 476, 129 P.2d 143; Mitchell v. Alpha Hardware, etc., Co., 7 Cal.App.2d 52, 45 P.2d 442, and Bagley v. Ward, 37 Cal. 121, as supporting the proposition that a creditor who purchases a debtor's interest in property at an execution sale acquires all of the debtor's interest and wipes out all junior liens, except that the junior liens may survive for the purpose of determining who is a "redemptioner", and that after such a sale on a prior execution the junior lienholders can look only to the proceeds after the first judgment has been satisfied. These cases all involved sales to a *creditor* who claimed under a senior or prior lien. There is a wide difference between a redemption made by such a creditor, with its effect on the rights of other redemptioners, and a redemption by the judgment-debtor or his successor in interest. A redemption by the judgment-debtor terminates the particular sale in which that redemption is made and restores the estate of the judgment-debtor. Section 701 of the Code of Civil Procedure provides that redemption may be made by a creditor having a lien or by the judgment-debtor or his successor in interest. Section 703 specifically provides "if the debtor redeem, the effect of the sale is terminated, and he is restored to his estate." A redemption by the judgment-debtor's "successor in interest" has the same effect. Bateman v. Kellogg, 59 Cal.App. 464, 211 P. 46, 54. This view is supported by much of the reasoning used in Clark v. Cuin, 46 Cal.2d 386, 295 P.2d 401; Bristol v. Hershey, 7 Cal. App. 738, 95 P. 1040; Huling v. Seccombe, 88 Cal.App. 238, 263 P. 362; Stetson v. Sheehan, 52 Cal.App. 353, 200 P. 387 and Salsbery v. Ritter, 48 Cal.2d 1, 306 P.2d 897.

[3–5] Whether the statement in the prior decision in this case, to the effect that if Lees had an interest in this property at the time of the first sale his title would be restored by the redemption from that sale which would serve to develop a good title in Mrs. Mansfield through the sale in Holecheck v. Lees, is to be considered as the law of the case need not be decided. In any event, our view as to the law applicable to the situation which now appears is in accord with the suggestion there made. We see nothing in sections 701 to 703 of the Code of Civil Procedure which supports the appellants' contention in this regard, and we find no case justifying or compelling such a conclusion. These statutes were designed to protect the redemption rights of various parties, not to relieve the judgment-debtor from the payment of his just debts. When a redemption is made by a creditor the junior lien which is wiped out does not represent a debt which is owed by the redeeming creditors. There would be no justice, however, in permitting a judgment-debtor to redeem from the first execution sale and thereby cancel and wipe out his obligation on other execution liens covering debts which he also owes. We cannot construe these statutes as having that effect and as leading to such a result. The same rule would apply where the redemption from the first sale is made by the "successor in interest" [59 Cal.App. 464, 211 P. 54] of the judgment-debtor who stands in his shoes, and is entitled only to the same rights. We hold, therefore, that Kaiser's redemption from the sale in Mansfield v. Lees had the effect of restoring an interest in this property in Lees under the circumstances which here appear, and that it did not adversely affect or extinguish the subsequent execution sale in Holecheck v. Lees. There was no redemption from that sale and the sheriff's deed in that connection conveyed any interest which Lees had at the time of the sale in Mansfield v. Lees. The evidence supports the essential and controlling findings made by the court.

[6] The other points raised by the appellants, with two exceptions, require no consideration. It is claimed that the court should have required the respondents to repay to the appellants the $4,000 which had been paid to the Eddington estate for a deed to a portion of the property after the redemption from the first execution sale. At the hearing on a motion for a new trial the court expressed great doubt with respect to what was required in that connection. Through the second execution sale the respondents acquired only such rights as Lees then had. The $4,000 thereafter paid not only increased the value of what the respondents had received but it resulted in giving a clear title to 140 acres of this land. The effect of this payment was similar to that where a redemptioner pays off an encumbrance on the property, and in this action in equity a repayment of that amount should have been allowed and provided for.

The appellants also contend that the court erred in permitting the filing of an amended cross-complaint and amended complaint in intervention since they involved the quieting of title to the entire 640 acres whereas the complaint in the action involved only 140 acres of that land. We see no error in this connection. H. & J. Mabury Co. v. Bryant, 9 Cal.2d 586, 71 P.2d 1111; Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 116 P.2d 465. In any event, the appellants are in no way prejudiced.

The judgment is modified by changing the first clause of Paragraph III thereof so that the same shall read: "The cross-complainant Margaret Mansfield shall deposit the sum of $2831.52, and Margaret Mansfield and Clara Holecheck shall deposit the additional sum of $4000.00, with the Clerk of the above entitled court for the use and benefit of and payment to the plaintiffs Roy C. Kaiser and Geraldine V. Kaiser;" As so modified, the judgment is affirmed, each party to pay his own costs on appeal.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

160 Cal.App.2d 680

Marjorie B. TASSI, Plaintiff, Appellant and Respondent,

v.

Edwin TASSI, also known as Edwin G. Tassi, and Alma Tassi, Defendants, Appellants and Respondents,

Giacomo Tassi, Bank of America National Trust & Savings Association, as executor of the Estate of Harold Paul Tassi, deceased, Bank of America National Trust & Savings Association, Central Bank, Crocker First National Bank of San Francisco, American Trust Company, Oakland Bank of Commerce, The Hibernia Bank, Defendants and Respondents.

Civ. 17358.

District Court of Appeal, First District, Division 2, California.

May 21, 1958.

Rehearing Denied June 20, 1958.

Action by widow upon death of her husband to recover one half of various properties on the ground that they were gifts of community property made by the husband without her consent. From a judgment of the Superior Court, County of Alameda, A. T. Shine, J., the widow appeals and defendants appeal from a portion of the judgment. The District Court of Appeal, Dooling, J., held that the widow was not put to an election either to take under trustee accounts created for her and waive her claim to community property interest in other trustee accounts created for the brother and that the evidence supported the determination that 73% of the property was the husband's separate property at the time of the transfers.

Judgment affirmed.

1. Estoppel ⚷92(1)
Wills ⚷781

Where property to which one has a valid claim is disposed of by will in violation of those rights while at the same time other property to which the claimant would not be entitled is devised to the claimant, an election is forced, and claimant cannot at the same time take benefits under will and repudiate the losses, and such doctrine of election while more frequently applied to wills is also applicable to any instrument creating property rights.

2. Estoppel ⚷92(1)

The doctrine of election with respect to instrument creating property rights is limited to those cases where the necessity of election appears from the face of the instrument under which the claimant takes.

3. Husband and Wife ⚷265

In action by widow to recover from defendants various properties on ground that they were gifts of community properties made by husband without widow's consent, where husband created trustee bank accounts, three for wife and four for brother of husband, widow was not put to an election, either to take under trustee accounts created for her, or in the alternative to abandon her claim to the whole of the trustee accounts created for her and claim only her community interest in all seven accounts.

4. Evidence ⚷461(1)

In action by widow to recover from defendants one half of various properties on ground that they were gifts of community property made by husband without her consent, evidence of oral declarations of husband, that bank accounts were all parts of a consistent scheme to dispose of funds therein upon death without necessity of administration and thereby put widow to an election was inadmissible, since intention of husband to require an election was required to appear from will itself. West's Ann.Prob.Code, § 101.

5. Husband and Wife ⚷262(1)

The presumption in favor of the community character of property of spouses is of less weight where the marriage has existed but a short time.

6. Husband and Wife ⚷264

Circumstantial as well as direct evidence may be used to rebut the presumption that property acquired during marriage is community property.

7. Husband and Wife ⚷264

In action by widow to recover from defendants one half of various properties on the ground that they were gifts of community property made by the husband without the widow's consent, substantial evidence sustained finding that investment in profitable meat business did not come from separate property.

8. Husband and Wife 🔑262(1)

Presumption that property acquired during marriage is community is controlling only when it is impossible to trace the source of the specific property.

9. Stipulations 🔑14(10)

In action by widow to recover one half of various properties from defendants on the ground that they were gifts of community made without her consent, stipulation that certain funds came indirectly from the earnings of business was construable as meaning that where they did not come directly from the business, they could be traced through whatever form they took, to earnings of the business.

10. Evidence 🔑313

In action by widow to recover properties on ground that they were gifts of community made by husband without her consent, filing income tax returns showing all of the husband's earnings as community property did not make them such, where accountant preparing the returns testified that he showed all income as community without consulting the husband.

11. Husband and Wife 🔑264

In action by widow to recover properties on the ground that they were gifts of community property made by the husband without her consent, evidence supported finding that as to amount invested in government bonds, they were 73% separate property.

12. Evidence 🔑505

The trial court has a wide discretion in the admission of expert testimony.

13. Evidence 🔑112

Salary customarily paid to general managers of wholesale meat businesses is relevant evidence of reasonable value of such services in a particular business of that character.

14. Evidence 🔑553(2)

In widow's action to recover gifts of community property on ground that they were made without her consent, hypothetical questions with respect to reasonable salary for general manager of a business such as operated by decedent were not improper on the ground that they did not include factors that the business of decedent was a small wholly owned business.

15. Husband and Wife 🔑264

In widow's action to recover properties on ground that they were gifts of community property made by husband without her consent, in determining sufficiency of evidence to support allocation of earnings from the business of the decedent in the ratio of 73% separate property and 27% community, finding that the reasonable value of decedent's services to the business did not exceed $15,000 per year was authorized.

16. Husband and Wife 🔑257, 259

In applying the principle of apportionment in determining community and separate property, the court is not bound either to adopt a predetermined percentage as a fair return on business capital which is separate property, nor need it limit the community interest only to the salary fixed as a reward for a spouse's services, but court may select whatever formula will achieve substantial justice between the parties.

17. Husband and Wife 🔑249

In widow's action to recover one half of various properties on the ground that they were gifts of community made by the husband without her consent, deducting living expenses form portion of the business earnings attributable to community property in determining the percentage of separate and community property, was not improper.

18. Trial 🔑395(5)

Where findings were directed to the ultimate facts as alleged in the pleadings, such was sufficient and there was no error in failure to make more specific findings of the probative facts on which the ultimate facts depended.

19. Husband and Wife ⚷249

In widow's action to recover one half of various properties on the ground that they were gifts of community made by husband without her consent, where income tax returns showed all income as community, there was no error in allocating the tax burden accordingly in determining the percentage of separate community property.

20. Husband and Wife ⚷257

In widow's action to recover one half of properties on the ground that they were gifts of community made by the husband without her consent, where earnings were not allowed to accumulate in the business of the parties and the business investment was a separate property of the husband there was no requirement that some part of the increase in the value of the business should have been allocated to community property.

◆

Wallace B. Colthurst, Orlando J. Bowman, Oakland, for appellant and respondent Marjorie Tassi.

Stark & Champlin, Franklin C. Stark, John F. Wells, Oakland, for respondents and appellants.

DOOLING, Justice.

Plaintiff Marjorie Tassi brought this action upon the death of her husband to recover from defendants one-half of various properties on the ground that these properties were gifts of community property made by her husband without her consent. She appeals from the judgment which held that 73% of the property was her husband's separate property at the time of the transfers. Defendants Edwin and Alma Tassi appeal from that portion of the judgment which held that plaintiff was not required "to elect to take either the said three trustee accounts specified for her or her one-half interest in the total of the community property * * *"

Plaintiff Marjorie and decedent Harold Tassi were married on January 31, 1942 and lived together until Harold died on February 19, 1953. At the time of the marriage decedent owned a wholesale meat business which he had purchased in 1938 for $400 or $500. The book value of the business at the time of Harold's marriage was $14,519.95.

After the marriage plaintiff continued to work for about ten months, and thereafter worked part time in her husband's business. The company account books contained an entry in 1943 indicating an additional investment at that time of $27,615.01 but there was no direct evidence as to the source of those funds. Income tax returns reported by decedent indicated that the business earned $419,993.17 during the eleven years of marriage. The evidence showed that plaintiff's husband withdrew from the business $447,805.75 from the date of marriage until his death.

During the marriage in 1947 and 1948 decedent opened seven trustee accounts, three for his wife, totaling $73,962.49, and four for his brother totaling $122,514.26. Three days before the decedent's death, Edwin wrote himself a $20,000 check on decedent's bank account. In 1951 decedent gave to Edwin five $1,000 U. S. Bearer Bonds, and in 1946 purchased for him 300 shares of corporate stock. All of these transactions were without appellant's knowledge or consent.

There was evidence that decedent made various investments in securities and of transferring of sums between bank accounts.

The trial court found "(t)hat the source of the funds which set up the accounts and purchased the securities and bonds * * * was the earnings and profits of a wholesale meat business known as Associated Meat Company." It found that the decedent set up the trustee bank accounts with the intention of passing the money to the beneficiaries with a minimum of expense and delay in the event of his death. The court found further that the meat company was at all times decedent's separate property and that the earnings and profits from the business "are allocable 27% to the community property of decedent and plaintiff and 73% to the separate property of decedent." It was also found that the transfers to defendant "were the community property of decedent and plaintiff to the extent of 27% thereof * * *"

Defendants' Appeal.

The defendants urge on appeal a single question, that as to the seven trustee bank accounts, three created for the plaintiff wife and four for the defendant brother, plaintiff was put to an election either to take under the three trustee accounts created for her and waive her claim to a community property interest in the four trustee accounts created for the brother, or in the alternative to abandon her claim to the whole of the three trustee accounts created for her and claim only her community interest in all seven accounts.

The essentials for the application of the doctrine of election are thus stated in 2 Pomeroy's Equity Jurisprudence, 5th Edition, section 462, page 332: "The essential facts presenting an occasion for the doctrine of election are: A gives to B property belonging to C, and by the same instrument gives to C other property belonging to himself. The equitable doctrine upon these facts, briefly, is: C has two alternatives: 1. He may elect to take under the instrument, and to carry out all its provisions; he will then take A's property, which was given to him, and B will take C's property. 2. He may elect against the instrument. In that case * * * he must surrender * * * so much of such benefits as may be necessary to compensate B for the disappointment he has suffered by C's election to take against the instrument."

[1] As applied to wills the doctrine was thus stated in Williams v. Williams, 170 Cal. 625, 627–628, 151 P. 10, 11: "Where property to which one may have a valid claim * * * is disposed of by will in violation of those rights, while at the same time other property to which the claimant would not be entitled, is devised to that claimant, an election is forced. The claimant cannot at the same time, take the benefits under the will and repudiate the losses. [He] must either accept the terms of the will *in toto*, or reject them *in toto*."

While the doctrine of election has been most frequently applied to wills, it is also applicable to any instrument creating property rights. Mazman v. Brown, 12 Cal.App.2d 272, 55 P.2d 539; 2 Pomeroy's Equity Jurisprudence, 5th Ed., § 470, p. 347.

The first fact to be noted in determining whether the doctrine of election is applicable to the trustee accounts in question is that each account was not only separately created, but each account was created at a different date. The accounts for the benefit of the wife were respectively created on April 18, 1945; September 24, 1947; and September 21, 1950. Those for the benefit of the brother were opened on September 25, 1947; August 27, 1948; February 6, 1948; and September 12, 1951. The signature cards by which the several accounts are created make no reference of any sort one to the other. Each, so far as appears on the face of the document creating it, is an entirely independent transaction from any of the others. It is stated by Pomeroy in the quotation above set out that the doctrine of election applies where "A gives to B property belonging to C, and *by the same instrument* gives to C other property belonging to himself." (Emphasis ours.)

In none of the cases cited by defendants-appellants was an election compelled where the inconsistent rights were created by separate documents none of which on its face makes any reference to the others. In re Estate of Ettlinger, 73 Cal.App.2d 967, 167 P.2d 738, the claim was made that the will, which made no mention of two insurance policies in favor of testator's daughters, and the two policies must be construed together so as to compel the widow to elect between taking under the will and waiving her community interest in the policies, or waiving her rights under the will and taking only her community interest. We said at pages 970–971 of 73 Cal.App.2d, at page 739 of 167 P.2d:

> "Respondents further argue that the will and the policies must be construed together to put appellant to an election. No authority is cited to support this argument and we have found none. The case is not similar to Mazman v. Brown, 12 Cal.App.2d 272, 55 P.2d 539, where the widow was made a beneficiary of the policy itself and was held by virtue of that fact to be put to her election to take under the policy or to claim her community interest and renounce her rights as beneficiary. Appellant is not here claiming any property disposed of, or even referred to, in the will, and her claim is not inconsistent with any of the will's provisions. If she is put to an election here then every widow to whom a husband left any separate property by will, where he also left a life insurance policy paid for in whole or in part with community funds with someone other than the wife named as beneficiary, would be put to a similar election."

[2, 3] If defendants-appellants are correct in their contention that the several accounts must be construed together to put the wife to an election no good reason appears why the same rule would not apply to separate deeds, separate life insurance policies or other separate transactions of a similar character, by some of which the wife benefited and by others of which she was deprived of community property rights. To so hold would open up a host of future controversies the uncertainties of which might perplex the courts for years and leave the respective rights of claimants under separate instruments, none of which on their faces made any reference to the others, in a state of doubt and confusion. The rule as previously applied, limiting the doctrine of election to those cases where the necessity of election appears from the face of the instrument under which the claimant takes, is simple of application. In the absence of controlling authority we are satisfied that it should not be extended beyond that point.

[4] Defendants-appellants, over objection, were permitted to introduce evidence of oral declarations of the decedent that the several bank accounts were all a part of a consistent scheme to dispose of the funds therein upon death without necessity of administration. It was thus sought by evidence of these oral declarations to prove *dehors* the instruments creating the accounts that it was the intention of the decedent to put his widow to an election. It was expressly held in Re Estate of Clausenius, 96 Cal.App.2d 600, 613, 216 P.2d 485, 495, where oral testimony was sought to be admitted to prove the testatrix' intention to put her husband to an election that "it is the law that the intention of the testator to require his beneficiary to elect whether to take under will or under statute must appear from the will itself." This is the uniform rule in other jurisdictions. McDonald v. Shaw, 92 Ark. 15, 121 S.W. 935, and cases collected in the note to this case in 28 L.R.A.,N.S., 657 et seq.; 2 Pomeroy's Equity Jurisprudence, 5th Ed., § 473a, p. 353.

Defendants-appellants rely on Probate Code section 101, that "(s)everal testamentary instruments executed by the same testator are to be taken and construed together as one instrument." The section is limited to "testamentary instruments," i. e. wills, and has no application to documents other than wills. We conclude that the trial court properly held that plaintiff widow was not put to an election.

Plaintiff's Appeal.

[5–7] Plaintiff-appellant widow first attacks the finding that the meat business was the separate property of decedent husband. The parties were married on January 31, 1942. The books of the business show an additional capital investment on January 1, 1943, of $27,615.01. An accountant testified as to this entry, that he did not know whether this money was actually put into the business but if it was that it could not have been earnings from the business. No other source of earnings by decedent between the date of the marriage and January 1 of the year following was shown. Plaintiff-appellant worked for 10 months after her marriage at $175 per month, which aggregates only $1,750. The circumstances would support an inference that if $27,615.01 was actually put into the business on January 1, 1943, it must have come from property acquired by decedent before marriage. Plaintiff-appellant relies upon the presumption in favor of the community character of the property, but this presumption is of less weight where the marriage has existed but a short time. In re Estate of Duncan, 9 Cal.2d 207, 217, 70 P.2d 174. Here the parties had been married less than a year when the book entry showing this investment was made and for that year the total net income of the business was only $13,767.48. Considering the earning power of the parties during that brief period and the accountant's testimony that, if actually made, this investment could not have come from earnings of the business the inference of the court that it came from separate property cannot be held not to find substantial support in the evidence. "Circumstantial as well as direct evidence, may be used to rebut the presumption that property acquired during marriage is community property." In re Estate of Doran, 138 Cal.App.2d 541, 550, 292 P.2d 655, 661.

[8, 9] The parties stipulated that the monies which went into the trust accounts and with which the stock was purchased "came initially directly or indirectly from moneys which were earned in the Associated Meat Company." Relying on the rule that where community and separate property is commingled to the extent that the two can no longer be segregated the commingled property is regarded as community property (Pope v. Pope, 102 Cal. App.2d 353, 227 P.2d 867) plaintiff-appellant argues that the stipulation that these monies came "indirectly" from earnings of the meat company will not support the finding that to the extent that these monies were originally the separate property of decedent they retained that character. "The presumption that property acquired during marriage is community is controlling only when it is impossible to trace the source of the specific property. * * * If the exact amount of money allocable to separate property and the exact amount of money allocable to community property deposited in a bank account can be ascertained, the money allocable to separate property is not so commingled that all of the funds become community property. It can be traced." Thomasset v. Thomasset, 122 Cal. App.2d 116, 124, 264 P.2d 626, 631. When the stipulation was offered and accepted counsel for defendants had an accountant on the stand and was starting to trace the source of the trust accounts. When the stipulation was accepted he offered no further proof on the subject. The stipulation that these funds came "indirectly" from earnings of the business must be held to mean that where they did not come directly from the business they could be traced through whatever form they took to earnings of the business. Counsel are attempting to put too narrow a construction on the stipulation when they argue that under the stipulation funds traced "indirectly" to earnings of the business must be held to have lost their character of separate earnings. Tracing the funds "indirectly" to earnings of the business fairly construed means tracing their character as earnings of the business through whatever transmutations they may have undergone. In view of the stipulation counsels' reliance on cases such as In re Estate of Adams, 132 Cal.App.2d 190, 282 P.2d 190, where the effort to trace was ineffectual are not in point.

[10] The claim that by filing income tax returns showing all of his earnings as community property decedent must be held to have transmuted them into community property is answered by Balkema v. Deiches, 90 Cal.App.2d 427, 202 P.2d 1068, and Hopkins v. Detrick, 97 Cal.App.2d 50, 217 P.2d 78. The accountant who prepared the income tax returns testified that he showed all income as community without consulting decedent and "an appellate court cannot say that the trial court abused its discretion in believing the explanation of the form of these returns given by * * [the] tax adviser * * *." Balkema v. Deiches, supra, 90 Cal.App.2d at page 431, 202 P.2d at page 1070.

[11] As to the $5,000 in government bonds there was no stipulation as to the source of the money with which they were purchased and plaintiff-appellant insists that as to them there is nothing to support the finding that they were 73% separate property. Since the evidence showed no source of earnings during the marriage other than income from the business and to a small extent from securities purchased with earnings from the business we conclude that the finding is sufficiently supported.

Plaintiff-appellant's main attack is on the sufficiency of the evidence to support the allocation of earnings from the business in the ratio of 73% separate property and 27% community property. It is the duty of the court to allocate earnings from a business which is the separate property of a husband and in which the husband is actively employed, finding as separate property the portion of the earnings properly attributable to the business, and as community property the portion of the earnings properly attributable to the husband's efforts. The evidence showed that during the marriage decedent withdrew $447,805.75 from the business and paid living expenses of $44,093.16. No attempt was made by decedent to allocate these withdrawals between salary and business earnings. Decedent devoted full time to the management of the business.

Two approaches have ordinarily been made to the allocation of earnings in such cases: 1. to allow interest on the capital investment of the business, allocate such interest as separate property, and treat the balance as community earnings attributable to the efforts of the husband (Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880); 2. to determine the reasonable value of the husband's services in the business, allocate that amount as community property, and treat the balance as separate property attributable to the normal earnings of the business. Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708. The court adopted the latter formula.

[12–14] There was evidence of witnesses familiar with the wholesale meat business that the reasonable salary for the general manager of such a business was from $10,000 to $15,000 per year. Plaintiff-appellant argues that the hypothetical questions on which this testimony was based were not based upon the evidence, particularly in that they did not include the factors that this was a small, wholly owned business. The court has a wide discretion in the admission of expert testimony (In re Guardianship of Jacobson, 30 Cal.2d 312, 313, 324, 182 P.2d 537; 19 Cal.Jur.2d, Evidence, § 288, p. 14) and the salary customarily paid to general managers of wholesale meat businesses is relevant and competent evidence of the reasonable value of such services in a particular business of that character. The difficulty of obtaining evidence limited to small, wholly owned businesses is obvious. The salary allowed by such owners to themselves lies entirely in their own discretion and the surest standard would not be what such owners were accustomed to allow to themselves but rather what independent employers were in the habit of paying others for similar services in the free give and take of the open market. We find no error in the admission of this evidence.

[15] The evidence is sufficient to support the trial court's conclusion that the reasonable value of decedent's services did not exceed $15,000 per year. Plaintiff-appellant argues that only where the husband has in fact allocated a portion of earnings to salary is the formula adopted by the court allowable. It is true that in Gilmore v. Gilmore, 45 Cal.2d 142, 150, 287 P.2d 769, and Harrold v. Harrold, 43 Cal.2d 77, 78, 80, 271 P.2d 489, there had been a fixed amount drawn by the husband-owner as salary. But in Huber v. Huber, supra, 27 Cal.2d 784, 167 P.2d 708, in which case the husband had drawn $150 from

the business every two weeks, without allocating any part to salary, and there was testimony "that the business would warrant a salary of $150 per month to defendant" the court said (27 Cal.2d at page 792, 167 P.2d at page 713): "Under these circumstances the court was justified in reaching the conclusion that the earnings allocable to community property consisted of $1,800 per year * * *."

[16] "In applying this principle of apportionment the court is not bound either to adopt a predetermined percentage as a fair return on business capital which is separate property nor need it limit the community interest only to the salary fixed as the reward for a spouse's service but may select whatever formula will achieve substantial justice between the parties. * * *

"It is primarily a question of fact 'for the court to determine what portion of the profits thereafter arises from the use of this (separate) capital and what part arises from the activity and personal ability of the husband.'" Logan v. Forster, 114 Cal.App.2d 587, 600, 250 P.2d 730, 738.

There was testimony that the period of World War II and the Korean War which followed it were years of high profits in the meat business, and an analysis of the customers' accounts showed that almost ⅓ of the total sales volume during the entire marriage was to purchasers who were already customers of the business when the parties were married. From this evidence the court was justified in finding that the business earnings were chiefly attributable to the business as such rather than to decedent's services. Plaintiff-appellant points to the scarcity of meat and rationing as off-setting factors to the high war time profits but the balancing of these factors is the appropriate function of the trial court and not of this court on appeal.

[17] Plaintiff-appellant complains that the trial court should not have deducted living expenses from the portion of business earnings attributable to community property, but "(i)t is presumed that the expenses of the family are paid from community earnings" (Huber v. Huber, supra, 27 Cal.2d 784, 792, 167 P.2d 708, 713; Thomassett v. Thomassett, supra, 122 Cal.App.2d 116, 126, 264 P.2d 626) and the court would threfore be justified in making such deduction.

[18] The findings were directed to the the ultimate facts as alleged in the pleadings. This was sufficient and there was no error in the failure of the trial court to make more specific findings of the probative facts on which the ultimate facts depended. 24 Cal.Jur., Trial, § 203, pp. 968–969.

[19] Since income tax returns showed all income as community it is claimed that the portion of earnings allocated to separate property should have been charged with a greater than pro rata share of such taxes, but since all income received the benefit of the lower tax bracket we can see no impropriety in allocating the tax burden accordingly.

[20] Since earnings were not allowed to accumulate in the business, and the business investment was the separate property of decedent we find no substance in the complaint that some part of the increase in the value of the business should have been allocated to community property.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

50 Cal.2d 428

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank William WHITE, Defendant and Appellant.

Cr. 6209.

Supreme Court of California,
In Bank.
May 28, 1958.

Defendant was convicted for possession of narcotics. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment, and defendant appealed. The Supreme Court, Gibson, C. J., held that where defendant's apartment mate purchased heroin as agent for defendant and pursuant to defendant's express instructions, defendant, as owner of the capsule, was entitled to exercise dominion and control over it, and consequently defendant had constructive possession and could be convicted for illegal possession of heroin, notwithstanding that he may have had personal knowledge of presence of heroin in the apartment.

Judgment of conviction and order denying new trial affirmed.

Opinion, 318 P.2d 141, vacated.

1. Criminal Law 🔑419(11)

In prosecution for possession of narcotics, conversations had by policeman with defendant's apartment mate and with narcotics user who went to defendant's apartment were inadmissible hearsay.

2. Criminal Law 🔑824(8)
Witnesses 🔑389

In prosecution for possession of narcotics, where police officer, without objection, testified to his conversations with defendant's apartment mate and narcotics user who went to defendant's apartment, and conversations were inadmissible hearsay, and trial court on its own motion instructed jury to disregard such testimony, and apartment mate and user, as witnesses for defendant, denied on cross-examination that they had made certain statements testified to by officer, rebuttal evidence of another officer as to the substance of the conversations was admissible to impeach apartment mate and user, and in absence of defendant's request that rebuttal evidence be so limited there was no duty on the trial to so instruct. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law 🔑1144(12)

In absence of objection to prosecutor's statements implying that hearsay evidence was received not only for purposes of impeachment but also as proof of the charge against defendant, Supreme Court would assume that, if defendant had objected, the trial court would have informed the jury that the hearsay evidence was to be considered solely for purposes of impeachment.

4. Poisons 🔑4

Constructive possession of a narcotic is a violation of the statute relating to illegal possession of narcotics. West's Ann.Health & Safety Code, § 11500.

5. Poisons 🔑9

Evidence of physical possession by defendant's agent, or by any other person when the defendant has an immediate right to exercise dominion and control over the narcotic, is sufficient to sustain a conviction for illegal possession of narcotics. West's Ann.Health & Safety Code, § 11500.

6. Poisons 🔑4

Where defendant's apartment mate purchased heroin as agent for defendant and pursuant to defendant's express instructions, defendant, as owner of the capsule, was entitled to exercise dominion and control over it, and consequently defendant had constructive possession and could be convicted for illegal possession of heroin, notwithstanding that he may not have had personal knowledge of presence of heroin in the apartment. West's Ann.Health & Safety Code, § 11500.

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Freedman & Herscher, Horace N. Freedman and Daniel M. Herscher, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller and Joe J. Yasaki, Deputy Attys. Gen., for respondent.

GIBSON, Chief Justice.

Frank William White, Todd Conover and Harry Hanick were charged with the possession of narcotics in violation of section 11500 of the Health and Safety Code. Conover and Hanick pleaded guilty. Thereafter White was tried by a jury and found guilty. He has appealed, claiming that the trial court erred in failing on its own motion to instruct the jury that certain hearsay testimony was admitted for a limited purpose, that the prosecuting attorney was guilty of misconduct in commenting on the hearsay testimony, and that the judgment of conviction is not supported by the evidence.

Hanick, a known user of narcotics, was followed by police officers to an apartment which was shared by appellant and Conover. The officers questioned Hanick as he left the apartment house, and he was arrested after admitting he had narcotics in his possession. Conover, who was also arrested as he left the building, directed the officers to a potted plant in his bedroom where they found equipment ordinarily used in administering narcotics and to a watch box on his dresser where the officers found a capsule of heroin. Appellant was arrested several hours later when he returned from work. The officers informed him that Hanick and Conover had been arrested earlier and had told them there was a narcotic outfit and a capsule of heroin in the apartment.

According to one of the police officers, appellant said that he had some heroin in the apartment and that it was probably in the box on top of the dresser. Later appellant told the officers that he had not seen the capsule of heroin which was in the room but that he had left money with Conover for the purchase of heroin from Hanick. He also said that he had a narcotic outfit and that he thought it would probably be in the potted plant by the bed. An examination of his arm revealed evidence of numerous hypodermic injections, and he told the officers that he had been an addict for many years.

[1, 2] The same officer was also allowed to relate conversations had by the policemen with Hanick and Conover which were clearly inadmissible hearsay. However, no objection was made, and at the close of the prosecution's case, the court, on its own motion, instructed the jury to disregard the testimony of the officer concerning these conversations. Conover and Hanick, appearing as witnesses for appellant, denied on cross-examination that they had said some of the things the officer attributed to them. In rebuttal another officer repeated in substance the conversations had with Hanick and Conover. The rebuttal evidence was admissible to impeach them, but there was no request that it be limited to this purpose, and the jury was not so instructed. In the absence of such a request there was no duty upon the trial court to instruct the jury that the rebuttal testimony was admissible solely for the purpose of impeaching Hanick and Conover. People v. Holbrook, 45 Cal.2d 228, 233, 288 P.2d 1; People v. Weitz, 42 Cal.2d 338, 347, 267 P.2d 295; People v. Simeone, 26 Cal.2d 795, 808, 161 P.2d 369; People v. Findley, 132 Cal. 301, 306, 64 P. 472; People v. Hovermale, 76 Cal.App. 91, 97–98, 243 P. 878; cf. People v. White, 43 Cal.2d 740, 744–745, 278 P.2d 9; People v. Stevens, 5 Cal.2d 92, 100, 53 P.2d 133. The cases of People v. Grimes, 148 Cal.App.2d 747, 307 P.2d 932, and People v. Bentley, 131 Cal.App.2d 687, 281 P.2d 1, are disapproved insofar as they are inconsistent with the authorities cited above.

[3] The prosecutor in his argument to the jury made several references to the testimony of the officers concerning their conversations with Hanick and Conover. While not entirely clear, some of the statements of the prosecutor might be construed as implying that the hearsay evidence was received not only for the purposes of impeachment but also as proof of the charge

against appellant. No objection was made to the prosecutor's statements, and we must assume that, if appellant had objected, the court would have informed the jury that the hearsay evidence was to be considered solely for the purposes of impeachment. Cf. People v. Corrigan, 48 Cal.2d 551, 556, 310 P.2d 953; People v. Amaya, 40 Cal.2d 70 79, 251 P.2d 324.

[4–6] Appellant's principal contention is that the evidence is insufficient to support the judgment because, he asserts, there is no evidence that he had possession of the narcotic or knowledge of its presence. Numerous cases have recognized that constructive possession of a narcotic constitutes a violation of section 11500 of the Health and Safety Code (see, e.g., People v. Hancock, 156 Cal.App.2d 305, 319 P.2d 731; People v. Walker, 121 Cal.App.2d 173, 174, 262 P.2d 640; People v. Gonzales, 116 Cal.App.2d 843, 844, 254 P.2d 603; People v. Graves, 84 Cal.App2d 531, 534–535, 191 P.2d 32, and evidence of physical possession by the defendant's agent, or by any other person when the defendant has an immediate right to exercise dominion and control over the narcotic, has been held sufficient to sustain a conviction under that section (People v. MacArthur, 126 Cal. App.2d 232, 236–237, 271 P.2d 914; People v. Gonzales, supra, 116 Cal.App.2d 843, 844, 254 P.2d 603; People v. Graves, supra, 84 Cal.App.2d 531, 534–535, 191 P.2d 32; People v. Sinclair, 129 Cal.App. 320, 322, 19 P.2d 23). Conover purchased the heroin as agent for appellant and pursuant to his express instructions, and appellant, as the owner of the capsule, was entitled to exercise dominion and control over it. He had constructive possession as soon as the narcotic was acquired for him, and it is immaterial whether he had personal knowledge of the presence of the narcotic in the apartment. The case of People v. Gory, 28 Cal.2d 450, 170 P.2d 433, did not involve constructive possession through an agent and therefore is not in point.

The judgment and the order denying a new trial are affirmed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

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50 Cal.2d 373

Edward J. VOLF and Victoire R. Volf, Plaintiffs and Respondents,

v.

The OCEAN ACCIDENT AND GUARANTEE CORPORATION, Ltd., a corporation, Defendant and Appellant.

Sac. 6890.

Supreme Court of California,
In Bank.
May 27, 1958.

Action on comprehensive liability policy. The Superior Court, Calaveras County, J. A. Smith, J., rendered judgment for plaintiffs, and defendant appealed. The Supreme Court, Traynor, J., held that even if it were assumed that liability incurred by insured building contractor to replace defective stucco work might otherwise have been included within coverage afforded by comprehensive liability policy for property damage liability caused by accident, such liability was excluded where cracks in stucco first appeared before insured surrendered possession, by subsequent clauses making such coverage inapplicable to (1) property in care, custody or control of insured, or (2) property manufactured, sold, handled or distributed by insured, or work completed by insured.

Reversed with directions.

Carter, J., dissented.

Opinion, 316 P.2d 651, vacated.

Insurance ⚷434

Even if it were assumed that liability incurred by insured building contractor to replace defective stucco work might otherwise have been included within coverage afforded by comprehensive liability policy for property damage liability caused by accident, such liability was excluded, where cracks in stucco first appeared before insured surrendered possession, by subsequent clauses making such coverage inapplicable to (1) property in care, custody or control of insured, or (2) property manufactured, sold, handled or distributed by insured, or work completed by insured.

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Alexander, Bacon & Mundhenk, William F. Stone, Paul A. Unsworth, San Francisco, Honey, Mayall & Hurley, Stockton, for appellant.

Gordon J. Aulik, Stockton, for respondents.

TRAYNOR, Justice.

Plaintiff Edward J. Volf, a general contractor, constructed a stucco house in San Andreas for A. P. Hoover. A stucco exterior finish for a house consists of three coats: a "scratch" coat, which is a mixture of sand, cement and water applied ⅜″ to ½″ thick; a "brown" coat, which is a similar mixture of the same thickness; and a "color" or "finish" coat, which is like a paint wash applied with a trowel about ⅛″ thick. The "scratch" coat went on without incident. The "brown" coat would not stick to the "scratch" coat so Volf returned the mixture to the Neilsen Company for replacement. He mixed the new ingredients in the proper proportions and applied the "brown" coat. The mixture did not meet Volf's expectations but he assumed that it would be all right. After applying the "brown" coat, he applied the finish or "color" coat. Shortly before the building was completed and possession taken by Hoover, cracks appeared in the exterior stucco of the building and Hoover complained. Hoover and Volf then agreed that if the cracks did not get worse Hoover would accept the building and Volf would fill in and paint over the cracks if necessary. When the rain came, the cracks became worse and Hoover called in the State Contracting Board. Tests showed that the stucco was of the right mixture but below compressive strength and that the cracking occurred in the "scratch" and "brown" coats. The board decided in favor of Hoover and Volf put a new stucco exterior over the old at an additional cost to him of $1,309.15.

Defendant had issued to plaintiffs a comprehensive liability insurance policy that contained, among other provisions, the following clause: "Coverage D—Property Damage Liability—Except Automobile. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident." The policy also contained certain exclusions. The pertinent part of "Exclusion (g)" provided that the policy did not apply under coverage "D" to injury to or destruction of "(3) * * * property in the care, custody or control of the insured, or (4) any goods or products manufactured, sold, handled or distributed * * * by the named insured, or work completed by * * * the named insured, out of which the accident arises. * * *"

Plaintiffs brought this action to recover the cost of the new stucco exterior. The trial court entered judgment for plaintiffs, and defendant insurance company appeals. The only issue involved is the coverage afforded by the policy.

We agree with defendant that the injury was excluded under "Exclusion (g)" of the policy, even if it is assumed that it was otherwise included under coverage D. Since the defective cement was used and the cracks appeared in the stucco while Volf was constructing the house and before Hoover took possession, the loss was occasioned by "injury to * * * property in the care, custody or control of the insured" and is therefore excluded under Exclusion (g) (3). The injury is also excluded under Exclusion (g) (4), for it was to a product "manufactured, sold, handled or distributed * * * by the named insured" as well as to "work completed by * * * the named insured."

Hauenstein v. Saint Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122, 125, and Heyward v. American Casualty Co. of Reading, Pa., D.C., 129 F.Supp. 4, 8, invoked by plaintiff, actually support defendant. In the Hauenstein case the plaintiffs were distributors of a certain type of plaster. They were insured by defendant for property damage under a clause similar to coverage D in the instant policy, which was subject to an exclusion identical to the products exclusion in Exclusion (g) (4). The plaintiffs sold the plaster to a contractor who used it on a construction job. After application the plaster shrank and cracked, and the contractor had to remove it and replaster the walls and ceilings. The contractor sought recovery from the plaintiffs for breach of warranty. Plaintiffs then sought a declaratory judgment against the defendant casualty company. They contended that the injury to the plaster itself was not excluded on the grounds that after its application it ceased to be goods or products, and by virtue of the law of accession became a part of the realty. The court rejected this contention, stating: "The law of accession is important in controversies where the distinction between personalty and realty is vital, but it has no justifiable use as a vehicle for importing ambiguity into the language of an insurance contract where none otherwise exists. * * * Clearly the exclusionary clause herein is applicable to plaster as a product handled by plaintiffs without any limitation as to its changed condition by its regular and ordinary use." The court then found that aside from any injury to the plaster itself the building was damaged by its application because the plaster had to be removed so that the walls and ceilings could be replastered. In the instant case, however, the stucco did not have to be removed and there is no evidence and no finding that the house was injured by reason of the application of the defective stucco.

In holding that an exclusion similar to Exclusion (g) in the instant policy had no application to personal injury the court in Heyward v. American Casualty Co. of Reading, Pa., supra, stated: "This Exclusion means that the policy will not protect the insured if he has to repair or replace some product or work which proved defective and caused an accident. The Exclusion has no reference to liability for damage to *other property* or *personal injury* arising out of such accident." (129 F.Supp. at page 8.) In the instant case the plaintiffs seek protection for the very thing that is specifically excluded by Exclusion (g), i. e., the cost to the plaintiffs of replacing the stucco that proved to be defective. So far as Exclusions (g) (3) and (g) (4) are concerned it is immaterial whether or not Hoover became the owner of the stucco.

Plaintiffs contend that the extrinsic evidence supports the interpretation that Exclusion (g) does not preclude recovery of the loss here involved. Mrs. Volf testified that they stated that they wanted "full coverage as far as materials and workmanship" were concerned and made other similar statements. There was no discussion of particular risks. Mrs. Volf also testified that they wanted "the most coverage for as much, what we could afford," and that cost was an item with respect to the purchase of insurance. She further testified that they stated that they wanted full coverage "like Lodato," a competitor, and that defendant's agent showed her Lodato's policy and "we were equally covered." When questioned about the particular loss involved here, i. e., a situation where plaintiffs had done a job and had to replace it, Mrs. Volf testified that there was no reference to such a situation "because we never had the need of it. We didn't think anything like that would come up." There was no discussion of the particular exclusions, but plaintiffs accepted the policy and renewed it the following year without objection. Exclusion (g), especially Exclusion (g) (4) relating to work completed by the named insured, is not reasonably susceptible of the interpretation contended for by plaintiffs, and the extrinsic evidence does not support their position. To read the policy to cover the loss here involved would require that Exclusion (g) be omitted from the policy, but the evidence does not show, nor do plaintiffs claim, that they are entitled to a reformation of the policy omitting Exclusion (g).

The judgment is reversed with directions to the trial court to enter judgment in favor of defendant.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

It is my considered opinion that there is sufficient evidence to support the findings and judgment of the trial court. That court found that the cement used to make the "scratch" and "brown" layers of the stucco application was defective and caused it to disintegrate. It also determined that the oral and documentary evidence offered to interpret the insurance contract implied that the contract covered the loss.

In reversing the judgment of the trial court the majority holds that the damage was within exclusion (g) of the policy for two reasons:

(1) The cracks in the stucco first appeared before Mr. Hoover took possession of the house which was then "property in the care, custody, or control of the insured."

(2) The damage was to a product "manufactured, sold, handled or distributed * * * by the named insured" and "work completed by or for the named insured."

The holding of the majority is highly technical and is not supported by either the facts or law.

Although the stucco was slightly cracked before Mr. Hoover took over the house, he and Volf agreed that the damage was not so serious as to require another stucco application. Only a bit of paint was needed to repair the damage. Only after Mr. Hoover moved into the house did rainfall make the disintegration bad enough to require a new application of stucco. Therefore the damage which made Volf liable for the new application occurred while Mr. Hoover resided in the house. Had the rainfall not caused this additional disintegration, Volf would not have been liable for the cost of a stucco application. According to the majority's interpretation, exclusion (g) encompasses any flaws in a completed building which later becomes so aggravated as to require repair. It would also include damage to other parts of the same building which are affected by the original flaw. This is hardly consistent with the observation of the writer of the majority opinion that "* * * it must not be forgotten that the primary function of insurance is to insure." Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 405, 154 P.2d 399, 403.

The majority also relies on exclusion (g) (4) which excludes injury to or destruction of "* * * any goods or products manufactured, sold, handled or distributed or premises alienated by the named insured, or work completed by or for the named insured, *out of which the accident arises.* * * *" (Emphasis added.)

Preliminarily it must be said that the emphasized phrase modifies the entire subsection and not only "or work completed by or for the named insured. * * *" If it were meant to relate only to the latter phrase the comma would properly be omitted.

The trial court found that the accident arose from the cement used in the first stucco application. This exclusion may be construed to avoid liability for the cement itself, although its identity disappeared when it was mixed with other materials to make stucco. The majority has ignored the phrase "out of which the accident arises" which is the key to understanding the holding of the trial court. My disagreement with the majority lies here. I have four reasons for this interpretation:

(1) The clear intent of Volf and defendant's agent was to provide "*full* coverage as far as materials and workmanship" were concerned for a building contractor. Other statements similar in implication to the quoted phrase were made by Volf and his wife in their negotiations with the agent. The latent defects involved in this case are typical construction problems. Volf asked for a form of complete protection and relied on defendant to provide it. It is hardly possible to enumerate the multitude of particular incidents which may arise out of a business so complex as that of a building contractor. What was not discussed by Volf and the agent does *not* imply that those things were not meant to be covered. Volf asked for *full* coverage "like Lodato." This implies that he thought Lodato was "fully covered." The agent showed Volf Lodato's policy and said Volf was "equally covered." Volf's reasonable interpretation of this was that *both* he and Lodato were fully covered. This oral evidence is important in determining the meaning of the language used in the contract.

(2) Under coverage "D" Volf was protected against "Products Hazard." The contract defines this as: "* * * the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, other than equipment rented to or located for use of others but not sold, if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured or on premises for which the classification stated in the company's manual excludes any part of the foregoing. * * *"

Note that this paragraph includes coverage for "* * * the existence of any condition in * * * goods or products *manufactured, sold, handled* or *distributed* by the named insured. * * *" The majority cites this language of exclusion D: "'manufactured, sold, handled or distributed * * * by the named insured'" as taking a thing out of the policy. If this is correct, products hazard coverage as defined in the policy is *removed completely* by the very same words in the exception! By giving meaning to the phrase "out of which the accident occurred" this anomaly would be avoided. It should not be assumed the company, in bad faith, meant the definition of "products hazard" to be meaningless.

(3) The meaning of the phrase "out of which the accident arises" is made clearer by the fact that the person buying and using a defective product may recover its value from the seller. In this case Volf can recover the value of the defective cement from the Nielsen Company. This implies that the phrase in question applies only to the cement in this case, not to the other ingredients of the stucco.

(4) "An insurance policy is to be construed most favorably to the insured, in such manner as to provide full coverage of the indicated risk rather than to narrow the protection. Olson v. Standard Marine Ins. Co., 109 Cal.App.2d 130, 135, 240 P.2d 379; Miller v. United Ins. Co., 113 Cal. App.2d 493, 497, 248 P.2d 113; Pendell v. Westland Life Ins. Co., 95 Cal.App.2d 766, 769, 214 P.2d 392; Fageol Truck & Coach Co. v. Pacific Indem. Co., 18 Cal.2d 748, 751, 117 P.2d 669. The courts will not sanction a construction of the insurer's language that will defeat the very purpose or object of the insurance. Miller v. United Ins. Co., supra, 113 Cal.App.2d at page 497, 248 P.2d 113; Narver v. California State Life Ins. Co., 211 Cal. 176, 180, 294 P. 393, 71 A.L.R. 1374. * * * Normally a businessman who takes 'comprehensive' insurance with express coverage of 'products property damage' would expect his ordinary transactions to be covered. If the insurer would create an exception to the general import of the principal coverage clauses, the burden rests upon it to phrase that exception in clear and unmistakable language. Pendell v. Westland Life Ins. Co., supra, 95 Cal.App.2d at page 770, 214 P.2d 392. If this is not done any ambiguity or uncertainty is resolved in favor of the policyholder. Indeed an ex-

ception must be couched in terms which are clear to the ordinary mind, Pendell v. Westland Life Ins. Co., supra, 95 Cal. App.2d at page 770, 214 P.2d 392, or any doubts as to the meaning will be resolved against the insurer." Ritchie v. Anchor Casualty Co., 135 Cal.App.2d 245, 257–258, 286 P.2d 1000, 1007. In view of the foregoing rule defendant should not be permitted to exclude the very type of coverage desired by plaintiffs by an exclusionary clause worded ambiguously and not called to their attention.

I think Hauenstein v. Saint Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122, supports plaintiff. The court held the plaster sold by the plaintiff was the element causing the damage in that case. The court held that plaintiff could not recover for damage to the plaster itself, but it could recover for damage to the building. It is an inconsequential distinction that the plaster had to be removed in the Hauenstein case but the damaged stucco in this case was merely covered over. The crux is that because of the damage the building's market value decreased. Id., 65 N.W.2d at page 125, "No one can reasonably contend that the application of a useless plaster, which has to be removed before the walls can be properly replastered, does not lower the market value of a building. * * *" Id. The court held a proper measure of damages to be the cost of removing the defective plaster and restoring the building to its former condition. I interpret this to mean restoration with proper plastering.

It can be argued that the Hauenstein case is distinguishable because the building damaged was not built by the insured. A company publication of the National Underwriters Company,[1] the "F. C. & S. Bulletins," dated August, 1955, entitled "Products Liability Insurance," interprets the exclusion here scrutinized. This publication is written for sellers of insurance. After discussing the Hauenstein case it says:

"A common source of argument—not answered by any decisions at present—is liability arising out of a piece of equipment with *several distinct parts,* all sold or installed by the *same insured at the same time.* Should a defect in one part or a faulty installation of that part damage the balance of the equipment, it is not clear whether the exclusion would deny coverage for damage to the entire piece of equipment or only to the portion causing the damage."

Thus it is obvious that underwriters themselves are not certain what the paragraph in issue means. The policy to interpret ambiguous clauses in insurance contracts in favor of the insured is clearly invoked.

I conclude that there was sufficient evidence before the trial court to justify its finding that the policy in issue covered this loss.

It will be recalled that the trial court awarded plaintiffs the sum of $1,309.15 together with court costs. Defendant contends that even if it is liable under the policy, it is liable only to the extent of $1,000 under the "each accident" clause. The policy, under the heading "Conditions" sets forth, in paragraph 6, "Limits of Liability, Coverage D. The limit of property damage liability stated in the declarations as 'aggregate operations' is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by the ownership, maintenance or use of premises or operations rated upon a remuneration premium basis or by contractors' equipment rated on a receipts premium basis. * * *

"The limit of property damage liability stated in the declarations as 'aggregate contractual' is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, with respect to each contract.

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[1] A profit-oriented insurance enterprise.

"These limits apply separately to each project with respect to operations being performed away from premises owned or rented by the named insured."

Paragraph 5 provides "Limits of Liability—Products, Coverages B and D. The limits of bodily injury liability and property damage liability stated in the declarations as 'aggregate products' are respectively the total limits of the company's liability for all damages arising out of the products hazard. All such damages arising out of one prepared or acquired lot of goods or products shall be considered as arising out of one accident." "Products Hazard" (3(f)) as defined by the policy is quoted *supra.*

The trial court found that by the terms of the contract of insurance defendant agreed to pay on behalf of plaintiffs all sums which they should become legally obligated to pay because of loss caused to property including the loss of use thereof "by reason of the handling or use of, the existence of any condition in, or a warranty of goods or products manufactured, sold, handled or distributed by the insured plaintiffs. * * *". Under the unquestionably ambiguous provisions heretofore quoted, it cannot be said that the finding is unsupported by the record. An insurance policy is to be construed most favorably to the insured, in such a manner as to provide full coverage of the indicated risk rather than to narrow the protection (Continental Casualty Co. v. Phoenix Constr. Co., 46 Cal.2d 423, 437–438, 296 P.2d 801, 57 A.L.R.2d 914; Ritchie v. Anchor Casualty Co., 135 Cal.App.2d 245, 257, 286 P.2d 1000; Glickman v. New York Life Ins. Co., 16 Cal.2d 626, 634, 107 P.2d 252, 131 A.L.R. 1292). If the insurer would create an exception to the general import of the principal coverage clauses, the burden rests upon it to phrase that exception in clear and unmistakable language. Pendell v. Westland Life Ins. Co., 95 Cal.App.2d 766, 770, 214 P.2d 392.

In view of the foregoing it would seem that if, as stated by Mr. Justice Traynor in Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 405, 154 P.2d 399, 403, "that the primary function of insurance is to insure," the judgment here should be affirmed.

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50 Cal.2d 360

Edward GONZALES, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION OF The State of CALIFORNIA, Alfred Klaas et al., Respondents.

L. A. 24851.

Supreme Court of California,
In Bank.

May 27, 1958.

Rehearing Denied June 25, 1958.

Proceeding to annul a decision of Industrial Commission denying the claimant compensation from the Subsequent Injuries Fund. The Supreme Court, McComb, J., held that where claimant had been a deaf-mute at age of five years and was unable to read lips, and since his recovery from the injury he had worked as steadily as any other member of plaintiff's union to which he belonged, Industrial Commission properly concluded that since the lowered rating accorded the claimant, added to percentage of total disability resulting from the industrial accident did not equal the 70% required by the statute, the claimant was not entitled to additional benefits from the Subsequent Injuries Fund.

Award affirmed.

Carter, J., Gibson, C. J., and Traynor, J., dissented.

Opinion 316 P.2d 736, vacated.

1. Constitutional Law 🔑301

In compensation proceeding, denial of right of cross-examination to claimant of rating expert with respect to amount of disability is a denial of due process.

2. Constitutional Law ⚷301

In compensation proceeding where claimant after rejection in rating of disability by the Commission was granted an application for reconsideration and afforded a hearing to cross-examine the rating expert, claimant was not denied due process on the ground that the commission failed to afford him a right to cross-examine the rating expert. West's Ann.Labor Code, §§ 4751, 5704, 5804.

3. Workmen's Compensation ⚷1030

In compensation proceeding, where Subsequent Injuries Fund filed petition for reconsideration of the award within 20 days after the referee's amended findings and within five years from date of the injury, and final order of the Commission made more than five years after the date of the injury, related solely to proceedings for reconsideration, award was not improper on the ground that the Commission was without jurisdiction in that more than five years had elapsed after the injury occurred. West's Ann.Labor Code, §§ 5900 et seq., 5903.

4. Workmen's Compensation ⚷1939

Findings of the Industrial Accident Commission are not subject to review on the ground that there is no substantial evidence to sustain them, except in so far as it may appear that they have been made without any evidence whatever in their support.

5. Workmen's Compensation ⚷902

It is error to rate a congenital condition of deaf-mutism to which claimant has so far adjusted himself as reasonably to be employable after the injury as well as before by the same standard that it would have been rated if the claimant had lost his hearing and speech in the same accident in which he received the industrial injury.

6. Workmen's Compensation ⚷1030

Where claimant had been a deaf-mute at age of five years and was unable to read lips, and since his recovery from the injury he had worked as steadily as any other member of his union to which he belonged, Industrial Commission properly concluded that since the lowered rating accorded the claimant, added to the percentage of total disability resulting from the industrial accident did not equal the 70% required by the statute, the claimant was not entitled to additional benefits from the Subsequent Injuries Fund. West's Ann.Labor Code, § 4751.

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Levy, Russell & DeRoy, Los Angeles, and Jack P. Koszdin, Beverly Hills, for petitioner.

Everett A. Corten, San Francisco, Edward A. Sarkisian, Robert J. Calvert, Los Angeles, Daniel C. Murphy, San Francisco, Edmund G. Brown, Attorney General, Irving H. Perluss, Assistant Attorney General, F. G. Girard and Henry K. Workman, Deputies Atty. Gen., for respondents.

McCOMB, Justice.

Petitioner seeks annulment of a decision made by respondent Industrial Accident Commission denying him compensation from the Subsequent Injuries Fund of the State of California.

Facts: Petitioner is 42 years of age. He has been a deaf-mute since he was five years old, and he is unable to read lips.

He worked as a painter for a number of years prior to October 18, 1951, when he sustained an industrial injury to his back.

On December 3, 1952, the commission awarded him benefits for a 21½% permanent partial disability for the injury. Contemporaneously, pursuant to section 4751 of the Labor Code, a separate finding and award was made determining that the industrial injury was superimposed on the pre-existing deaf-mutism, resulting in a combined disability rating of 80%, and an award was made against the Subsequent Injuries Fund of $7,020 plus a lifetime pension.

On March 13, 1956, the Subsequent Injuries Fund's petition to reopen the cause was granted.

On August 6, 1956, after a hearing, a referee made an order and award amending the previous finding of December 3, 1952, by increasing the rating for petitioner's combined disability from 80% to 88%.

On August 24, 1956, the Subsequent Injuries Fund filed its petition for reconsideration, which was granted, and the commission rerated petitioner's disability for deaf-mutism on the basis of 50% of the standard rating for loss of speech and loss of hearing industrially caused. This resulted in a combined rating of 55¾%, following which an order of the commission was filed October 10, 1956, directing that petitioner take nothing from the Subsequent Injuries Fund.

Thereafter, pursuant to petitioner's application, a further hearing was held to permit petitioner to cross-examine the rating expert, who testified, in substance, that he was instructed to issue a rating of 50% of the standard schedule rating for loss of speech and for loss of hearing; that he did not take into consideration petitioner's inability to read lips; and that there was no rating for deaf-mutism as such in the rating schedule, but only ratings for loss of hearing and loss of speech separately.

On January 23, 1957, the commission affirmed its decision of October 10, 1956, that petitioner take nothing from the Subsequent Injuries Fund.

Petitioner contends:

First. *That the commission's decision of October 10, 1956, was made without affording him the right to cross-examine the rating expert and that he was thus denied his constitutional right of due process.*

This contention is devoid of merit under the facts in the present case. On October 3, 1956, after granting the petition of the Subsequent Injuries Fund for reconsideration, the commission requested from the rating bureau a recommended permanent disability rating on the basis of 50% of the standard rating for loss of speech and loss of hearing.

On October 8, 1956, the commission gave notice that the report had been received from the rating bureau and that the case would be submitted for decision seven days thereafter unless good cause was shown to the contrary. However, two days later, on October 10, 1956, the commission made its decision, after reconsideration, rerating petitioner's combined disability at less than 70%.

Section 5704 of the Labor Code provides: "* * * copies of all reports and other matters added to the record, otherwise than during the course of an open hearing, shall be served upon the parties to the proceeding, and an opportunity shall be given to produce evidence in explanation or rebuttal thereof before decision is rendered." Commission Rule No. 10929 provides: "After the Permanent Disability Rating Bureau has prepared the recommended rating and the rating specialist has signed it, it shall be returned to the person requesting the recommended rating, who shall thereupon cause it to be served on all interested parties, together with a notice that the case will be submitted for decision seven days after the date of service, unless good cause to the contrary is shown in writing prior thereto."

[1] In making its decision on October 10, 1956, the commission did not accord petitioner the required seven days within which to object to the recommended rating or to request a hearing for the purpose of cross-examining the rating expert. It is settled that the denial of such a right of cross-examination is a denial of due process. Pacific Employers Ins. Co. v. Industrial Acc. Com., 47 Cal.App.2d 713, 715, 118 P.2d 848; Walker Mining Co. v. Industrial Acc. Com., 35 Cal.App.2d 257, 262, 95 P.2d 188 [hearing denied by the Supreme Court]. However, in the present case the commission granted petitioner's application for reconsideration, and he was afforded a hearing to cross-examine the

rating expert, following which the commission reaffirmed its order of October 10, 1956. Thus, petitioner, having been afforded an opportunity of cross-examination at the subsequent hearing, was not denied due process in the instant case. Walsh v. Industrial Acc. Com., 1 Cal.2d 747, 748 [1], 36 P.2d 1072.

[2] Second. *That the commission was without jurisdiction to make the order of January 23, 1957, since more than five years had elapsed after the injury occurred.*

This contention is likewise devoid of merit. Section 5804 of the Labor Code provides that no award of compensation shall be rescinded, altered, or amended after five years from the date of the injury. In the instant case, the injury occurred on October 18, 1951. The Subsequent Injuries Fund filed its petition to reopen on March 13, 1956, and on August 6, 1956, an order was made by the referee amending the finding and award, all within five years from the date of the injury.

Section 5900 of the Labor Code provides, in substance, that any person aggrieved by a final order, decision, or award made and filed by a commissioner or referee may petition the commission for reconsideration in respect to any matters determined or covered thereby.

Section 5903 of the Labor Code provides that a petition for reconsideration may be filed at any time within twenty days after the service of any final order, decision, or award upon any of the grounds therein specified.

Sections 5900 and 5903 are parts of Chapter 7, entitled "Reconsideration and Judicial Review," of Part 4 of Division 4.

In the present case, respondent Subsequent Injuries Fund filed its petition for reconsideration within twenty days after the referee's amended findings and within five years from the date of injury. This petition for reconsideration was filed pursuant to the provisions of section 5900, and the final order of the commission made on January 23, 1957, which was more than five years from the date of the injury, related solely to the proceedings for reconsideration under Chapter 7.

Sutton v. Industrial Accident Commission, 46 Cal.2d 791, 298 P.2d 857, relied on by petitioner, is not here in point. That case expressly points out, 46 Cal.2d at page 795, 298 P.2d at page 858, that sections 5803 and 5804 of the Labor Code applied to the proceedings there under consideration and that the five-year limitation within which the commission may amend or rescind an award is fixed by section 5804 of the Labor Code. There is no provision in Chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory limitation none will be implied.

Third. *That the decision of the commission in rating his deaf-mutism at 50% of the standard rating is not sustained by the evidence and is unreasonable and arbitrary.*

This contention is untenable.

[3] (1) Findings of the Industrial Accident Commission are not subject to review on the ground that there is no substantial evidence to sustain them, except insofar as it may appear that they have been made without *any* evidence whatever in their support. Douglas Aircraft, Inc., v. Industrial Acc. Com., 47 Cal.2d 903, 905 [2], 306 P.2d 425.

[4] (2) It is error to rate a congenital condition of deaf-mutism to which petitioner has so far adjusted himself as to be reasonably employable after the injury as well as before by the same standard that it would have been rated if petitioner had lost his hearing and speech in the same accident in which he received the industrial injury. State of California, Subsequent Injuries Fund v. Industrial Acc. Com., 129 Cal.App.2d 302, 304 [1], 276 P.2d 820 [hearing denied by the Supreme Court]. Petitioner's disability would have been much greater if he had had the normal faculties of speech and hearing up to the time of the accident and had lost them

then, with the whole period of adjustment to their loss before him, than it could possibly have been with the whole period of adjustment to their lack behind him.

[5] In the instant case, the record discloses that petitioner had been a deaf-mute from the age of five years and was unable to read lips; that he had learned the painting trade when he was fourteen; that he had been a prize fighter and an aircraft worker during the war; and that in 1944 he joined the painters' union and had worked steadily from that time until the accident. It further discloses that since his recovery he has worked as steadily as any other member of the painters' union.

[6] Therefore, the commission properly reasoned that petitioner had lived with his condition all of his life and that there was no showing that the industrially-caused injury would force him to change his occupation, in which case his congenital deaf-mutism might be a greater handicap.[1] The commission thus concluded that since the lowered rating, added to the percentage of total disability resulting from the industrial accident, did not equal the 70% required by section 4751 of the Labor Code,[2] petitioner was not entitled to additional benefits from the Subsequent Injuries Fund.

Since the evidence sustains the finding of the commission, under rule (1), supra, such finding is binding upon this court.

In State of California, Subsequent Injuries Fund v. Industrial Accident Commission, supra, a case almost identical in its facts with the present case, an order of the Industrial Accident Commission awarding recovery against the Subsequent Injuries Fund was annulled when the commission, without taking evidence on the question, had applied its rating for industrially-caused deaf-mutism to a case involving congenital deaf-mutism. The court in such case indicated the correct procedure as that set forth under rule (2), supra. In the present case, the commission, in following this rule, concluded that deaf-mutism did not seriously affect petitioner's ability to be a painter and that he had adjusted well to his condition. There is thus sufficient evidence in the record to support its finding.

The award is affirmed.

SHENK, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The majority concludes that there is some evidence to support the commission's

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1. For an excellent discussion of the concept of permanent disability under the California plan and the reasoning in support of the variable factors taken into account thereunder, see "Variable Factors in Permanent Disability Rating, With Particular Reference to the Inclusion of Age and Occupation," by R. E. Haggard, Supervisor, Permanent Disability Rating Bureau, Vol. 2, Appendix to Journal of the Senate, California Regular Session, 1951, page 101 of Partial Report of Senate Interim Committee to the Senate on Workmen's Compensation Benefits.

2. Section 4751 of the Labor Code reads as follows: "If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article; provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to the age of the employee, is equal to 40 percent or more of total."

percentage rating of petitioner's disability. I am constrained to disagree. Moreover, the effect of the majority holding is to defeat the principle that dictates that there be uniformity in awards for the same injury, which principle forms the basis of the theory upon which the rating schedules are based.

The problem in this case is to compute a disability rating for loss of speech and hearing sustained at age five on the basis of a rating schedule designed for determining the permanent disability rating of a painter who sustains loss of speech and hearing at age forty.

No intelligent use of such a schedule is possible until a common denominator is established between the rating schedule and the disability to be rated. It is not enough that the disability to be rated and the occupation involved are identical with those appearing in the schedule. The schedule is predicated upon the assumption that the age, injury and claim for compensation are contemporaneous. In this case the claim for compensation, and hence the age, occurs at a time separate from the time of injury. This difference prevents the use of the schedule until the significance of the difference is analyzed to determine whether it compels a deviation from the percentage ascribed to such injury in the rating schedule. This involves an examination of the rating schedule, the factors considered in preparing the schedule and what it is designed to compensate.

The law provides that where an employee with a pre-existing known permanent disability receives a subsequent industrial injury which is independent in its effects and does not aggravate the pre-existing permanent disability, but which results in additional permanent disability, the subsequent injuries fund is liable for the combined effect of the injuries if they equal a permanent disability rating of 70 percent or more of total disability (Lab.Code, § 4751). Having created the need for determining the percentage of permanent disability to total disability, the law also, by section 4660 of the Labor Code, prescribes how it is to be computed.

Section 4660(b) of the Labor Code authorizes the preparation of "a schedule for the determination of the percentage of permanent disabilities in accordance with this section." The schedule prepared contains lists of particular injuries to which all injuries may be related, and a list of the more frequently found occupations. These two lists are correlated by means of tables. In addition there are a series of rating tables to correlate the relative severity of an injury with the age of the employee at the time of injury. Percentage values are assigned to each injury and through the use of the tables these percentages are adapted to any given injury.

In arriving at the value of the percentages for each listed injury the architects of the schedule take into consideration the nature of the disability as modified by age and occupation with consideration given to ability to compete in an open labor market. See, Lab.Code, § 4660(a); Vol. 2, Appendix to Journal of the Senate, California Regular Session, 1951, page 58 of Partial Report of Senate Interim Committee to the Senate on Workmen's Compensation Benefits (hereinafter 1951 Partial Report). Of course, the percentage of permanent disability resulting from an injury does not depend entirely on the nature of the disability. Moreover, there are other factors than those of age and occupation entering into consideration, such as the make-up of the man, his desire to recover and his inherent adaptability. However, all of these things affect the individual only and are not capable of objective measurement or determination (1951 Partial Report supra, 103). As a result only those factors described in section 4660(a) of the Labor Code are considered in ascertaining the percentage of disability to attribute to a particular injury. The percentage ratings so specified are considered adequate on the average to compensate for the residual physical disability resulting from the injury and to afford a reasonable period of accommodation to the effect of such injury. (1951 Partial Report, supra, 68.)

This system of disability rating is called the "standard measure for determining percentage of disability to total disability." (1951 Partial Report, supra, 59.) The reason justifying such standardization is that it makes it possible to obtain uniform evaluation for identical disabilities, avoid unnecessary litigation, and reduce the cost thereof and expedite the promptness of evaluation (1951 Partial Report, supra, 69).

It is through the disability rating schedule that the theory behind the compensation of employees for industrial injuries is implemented. This theory is termed the theory of rehabilitation. It assumes that a permanently injured employee either can or cannot regain his earning capacity and if he cannot he must be pensioned for life. If he can, he must be aided financially during the period of rehabilitation. Where rehabilitation to gainful employment is possible the amount of compensation is obviously contingent upon whether the injury will prevent the employee from assuming his former occupation, and thus, require the development of a new occupational skill, or if he can resume his former job, whether there is any loss of past proficiency and expected potential (see, 1951 Partial Report, supra, 102). To illustrate, a bookkeeper who has lost his leg can return to his former work completely rehabilitated in a short time, while the structural iron worker who loses his leg is forever barred from following his former occupation. In the latter case, then, the percentage of disability to total disability would be greater than in the former case, since the rehabilitation period would be more extensive. Therefore, in each case the accuracy and proper application of the percentages appearing in the disability schedule must be measured according to the general considerations which prompt the rehabilitation percentage value; that is, must the employee develop a new skill, and if not, what is the extent of the loss of past proficiency and expected potential.

If the principle of uniformity of compensation for the same injury is adhered to, it is only differences in the extent of rehabilitation which can justify a deviation from the percentage assigned an injury in the schedule.

With the revelation of the factors which permit the assignment of a different percentage from that appearing in the schedule, it is now possible to compare the percentage value of the schedule based on age forty with the injury herein, and thus arrive at a percentage of disability for an employee now forty, but who lost his speech and hearing at age five. The basis of comparison is the extent of rehabilitation required. The disability is rated first in accordance with the regularly adopted schedule and then adjusted downward or upward, or possibly with no change at all depending upon the differences in rehabilitation (see, Springer v. Subsequent Injuries Fund, 21 C.C.C. 335, 342).

The method of accomplishing this comparison is by hearing evidence, and with all the facts consult the disability schedule, computing a rating which will be in accord with the rehabilitation principle of the schedule. This is true regardless of whether the percentage is to be adapted to a case such as the one now before us (see, State of California, Subsequent Injuries Fund v. Industrial Acc. Com., 129 Cal.App.2d 302, 276 P.2d 820) or if the rating is for unscheduled injuries (see, 1951 Partial Report, supra, 58–59).

If it is correct that the sole basis of comparison between the disability schedule and the particular injury involved herein is the extent of rehabilitation required, then it must follow that the only relevant evidence on such issue is evidence that tends to show similarity or dissimilarity between the rehabilitation required in each instance.

The only evidence presented on this issue came from two of petitioner's witnesses, both of whom qualified as experts in the rehabilitation of deaf-mutes for gainful employment. The witnesses agreed that loss of speech and hearing at age forty would pose no particular difficulty in an employee's ability to paint. Such a disabled employee could paint as well after the injury as he did before. The main problem would be placement of the worker, and its solution depends on how well the employee could communicate to others and understand in some manner another's directions. It was noted that even assuming placement was possible the injured employee's problem would remain communication. In other words to rehabilitate a deaf-mute painter implies that he has some means of communication, and the better he can communicate the more complete the rehabilitation.

Without contradiction the experts concurred in the opinion that lip reading was the most desirable type of communication. It constituted the greatest degree of rehabilitation.

Having estabished that rehabilitation of a deaf-mute means learning to communicate, witness Becker testified unequivocally and without dispute that a person who becomes a deaf-mute at age five is not in as good a position for gainful employment and advancement in an occupation as the person who becomes a deaf-mute at age forty, except in individual cases. The reason being that a person who becomes a deaf-mute at an early age never makes the same adjustment as one who becomes a deaf-mute at age forty. A person who could hear before would have a better chance to go on, whereas the person who is a deaf-mute at age five is still fighting the language barrier. He cannot express himself in writing or otherwise as well as one who acquires the loss later. The one who acquires the disability at age forty can build speech and lip reading more quickly because he has a memory of speech and sound. It is fair to state that a man who became a deaf-mute at age forty would get along better, or at least as well as one who incurred the disability at age five.

Witness Jonas' testimony was substantially in accord with Becker. However, he did state that a person who became a deaf-mute at age forty might have greater disability for a short time while he is making an adjustment to his mental problem, but he would not have greater disability in his vocational problem because he has a greater ability to read and write. Since the rehabilitation here involved pertains to a return to gainful employment the mental aspect is not relevant.

The conclusions to be drawn from this testimony are self-evident. It would appear that Gonzales' disability rating can be no less than that of a man incurring the injury at forty.

The evidence upon which the majority relies to uphold the panel's finding is irrelevant and immaterial to the issue of a comparison between the rehabilitation problems of a man who incurs loss of speech and hearing at age forty and a man age forty who incurred a similar injury at age five. This evidence reads as follows: "* * * petitioner had been a deaf-mute from the age of five years and was unable to read lips; that he had learned the painting trade when he was fourteen; that he had been a prize fighter and an aircraft worker during the war; and that in 1944 he joined the painters' union and had worked steadily from that time until the accident. It further discloses that since his recovery he has worked as steadily as any other member of the painters' union." Although it is not entirely clear, the majority apparently utilizes this evidence to demonstrate that Gonzales is rehabilitated to a greater degree in comparison to a man who at forty becomes a deaf-mute. If I have correctly perceived the use of this evidence then it is patently clear that the use of it by the majority is incorrect. In fact the evidence is not a comparison at all, but merely the biographical facts of Gonzales' life. By themselves they are no more significant than anyone else's past employment history.

The essential element to be established is whether Gonzales has been vocationally rehabilitated to a greater degree than an employee who lost his speech and hearing at age forty. The evidence used by the majority is only probative on this point if we accept the premise that because a deaf-mute has had forty years to adjust to his disability he has accomplished greater rehabilitation than one who at age forty incurs such a disability. According to the uncontradicted expert testimony in this case the premise is false. Quite unfortunately it was first propounded in State of California, Subsequent Injuries Fund v. Industrial Acc. Com., supra. At the time it was made there was no basis in the record for such a conclusion. Upon remand of the case to the commission it appeared that the premise was to be buried after expert evidence had refuted the truth of it (Springer v. Subsequent Injuries Fund, supra, 338). The expert evidence in that case was substantially the same as the expert testimony herein. Thus, the attempt by the majority to resurrect this premise leads to an untoward and ill-advised result, and it should be scrapped for the same reason it was in Springer v. Subsequent Injuries Fund, supra.

If the evidence upon which the majority relies is to have any relevance at all, it must be to show that Gonzales is an exceptional individual with better powers of adjustment than the average person incurring such disability at age forty. Such proof would then justify a deviation from the disability schedule which is based upon the average individual and be in keeping with the expert testimony which likewise was phrased in terms of the average. However, here again the evidence is not susceptible to such an inference. In order to show that Gonzales is exceptional there must be either a comparison with an average person, or a demonstration that his past actions are so remarkable that he may be called exceptional. Since the record is devoid of any evidence of a comparison, this ground cannot form the basis for a finding that Gonzales was exceptional. We do know that Gonzales, in addition to being a painter, was a prize fighter and aircraft worker. But this evidence, without more, does not tell us that he was exceptional. He could have been inept in all fields. In view of the false premise that was unwisely announced in State of California, Subsequent Injuries Fund v. Industrial Acc. Com., supra, we should remain circumspect in making any such assumptions from the history of past employment without any elaboration in the record to support it.

Fortunately we need not rely on lack of evidence to prove irrelevance, for there is affirmative, uncontradicted evidence that shows Gonzales is no more than average. This evidence is the fact that Gonzales cannot lip read. It is true that past acts do show some measure of adjustment, at present he can at least hold a position, but the experts all agree that the failure to lip read will always prevent rehabilitation to the degree one may attain if the injury is incurred at age forty.

The error of the majority is that it equates the length of time since the injury with vocational adjustment. One does not necessarily follow from the other. It is not time that promises proficiency, but the dimension of the disability.

Moreover, if the majority opinion is allowed to stand it will undermine the theory supporting a uniform disability schedule. In the Springer case, which the majority concedes is factually indistinguishable from the instant case, an award against the subsequent injuries fund was upheld (21 C.C.C. 335, 337). If this is correct, then what rational basis can there be for not allowing an award here? If the principle of uniformity in awards for the same injury is to have any efficacy the result in the Springer case should be followed.

For the foregoing reasons I would annul the decision of the commission and remand the proceeding.

GIBSON, C. J., and TRAYNOR, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

161 Cal.App.2d 13

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jack Taylor O'FARRELL, Defendant and Appellant.

Cr. 1352.

District Court of Appeal, Fourth District, California.

May 28, 1958.

Rehearing Denied June 17, 1958.

Hearing Denied July 23, 1958.

Defendant was convicted of armed robbery, burglary while armed with a deadly weapon, kidnaping for purposes of robbery, and from a judgment of the Superior Court of San Diego County, and from an order denying a new trial, L. N. Turrentine, J., the defendant appeals. The District Court of Appeal, Griffin, J., held that evidence of identification of the defendant as perpetrator of crime was sufficient for the jury; that remark of the prosecutor was not prejudicial; and that the evidence authorized the conviction of defendant for both kidnaping for purpose of robbery and for robbery.

Judgment and order affirmed.

1. Criminal Law 🔑741(2)

In prosecution for armed robbery and burglary while armed with a deadly weapon and of kidnaping for robbery, evidence of identification of the defendant as perpetrator of the crimes was sufficient for the jury. West's Ann.Pen.Code, §§ 209, 211, 211a, 459, 460.

2. Criminal Law 🔑1169(5)

Where during cross-examination of people's witness, an alleged accomplice, witness, when testifying as to prior felony conviction, stated that he had known the defendant and had seen him before in San Quentin, and trial court subsequently granted motion to strike, and the jury was instructed to disregard the testimony, and there was no bad faith by the prosecution, the court or the witness, prejudicial error was not committed.

3. Criminal Law 🔑730(1)

Where counsel for defendant told jury that defendant did not fail to take the stand on his own initiative, and that if there was any blame to be assessed the counsel should be blamed, and the prosecutor stated that there was a saying among defense attorneys, probably in jest, that for a reasonable fee the attorney could give a reasonable doubt, and the court instructed the jury to disregard the statement, no prejudicial error resulted.

4. Kidnapping 🔑1

Commission of a kidnaping for purpose of robbery is separate from the crime of robbery which is the object of the kidnaping. West's Ann.Pen.Code, § 209.

5. Criminal Law 🔑29

A defendant may be properly convicted of kidnaping for the purpose of robbery and for the robbery which is the object of the kidnaping, though the robbery is the same as that which the defendant is charged with having intended to commit in perpetrating the kidnaping, provided that the robbery is not so inseparable from the kidnaping that it and the kidnaping constituted a single indivisible act. West's Ann. Pen.Code, §§ 209, 211, 211a.

6. Kidnapping 🔑1

A person is guilty of simple kidnaping if he forcibly steals or arrests any person and carries him out of the county or to any part of county. West's Ann.Pen.Code, § 209.

7. Criminal Law 🔑29

Where defendant burglarized a club and forced a night watchman to tell him where the safe was located and in aid of the burglary and robbery watchman was tied and bound and subsequently released and made to travel about the club through several rooms under force and fear, the night watchman was being kidnaped for purpose of robbery as defined in the statute, and such constituted an independent crime from the crime of robbery and defendant could be convicted for both crimes. West's Ann.Pen.Code, §§ 207, 209, 654.

8. Criminal Law ⚿1172(1)

In criminal prosecution, demonstration by the court in explaining instruction given on circumstantial evidence, and with respect to kidnaping, were not prejudicial. West's Ann.Pen.Code, § 209.

9. Criminal Law ⚿829(1)

Refusal of requested instructions sufficiently covered by the proffered instructions was not error.

◆

Enright, Von Kalinowski & Levet, by William B. Enright, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Morris Schachter, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant-appellant was charged in count 1 of an information with armed robbery of one George Parrocha (violation of sections 211, 211a Penal Code) on the night of December 25, 1956; in count 2 with the crime of burglary while armed with a deadly weapon (violation of sections 459–460 Penal Code); in counts 3 and 4, kidnaping Fred C. Paul and George Parrocha for the purpose of robbery (violation of section 209 of the Penal Code); and in count 5 with armed robbery of $723.15, property of the La Jolla Beach and Tennis Club, taken from the person and possession and immediate presence of its employees therein named. He was further charged with five prior felony convictions and that he served terms therefor in a state's prison. He pleaded not guilty to the charges and admitted the prior convictions. A jury trial resulted in a conviction on all counts as charged. After a new trial was denied he was sentenced to prison on counts 1 and 4 to run concurrently and on counts 3 and 5 to run concurrently, but consecutively with counts 1 and 4, and count 2 to run concurrently with counts 3 and 5.

On Christmas Eve, about midnight, the bartender of the La Jolla Beach and Tennis Club placed about $700 in a bag and deposited it in the company's safe located in a room near the bar. About that time one Denton, a janitor on night duty, arrived and checked the various rooms and found everything in order. He then lay down in the employees' ladies' rest room located near the kitchen, just off from the main dining room. He was later awakened by three men. One had a gun and they ordered him to turn over. They tied his hands and demanded information as to the location of the safe. He told them. About that time the telephone rang and they ordered Denton to answer it. It was the night watchman in the club portion of the building calling. After telling Denton what to say, he was taken back to the rest room, retied, and defendant, who had an automatic caliber pistol, remained with him while the other two, one of whom had a crowbar, located the safe. Later, the chief cook, Parrocha, arrived by the back door entrance and tried to enter the door but found it locked. He started calling to Denton. Defendant again released Denton and he was told to go and open the door to the kitchen. As he did so, Parrocha, who had gone back upstairs, came down, and as he entered the door, defendant held an object at his back and told him to go straight through the kitchen, down the hall, and into the ladies' rest room. He did so and when he arrived his feet and hands were tied. His wallet, containing about $20, was taken from him. One Paul, the pantryman, came to work shortly after this. He was unable to gain entrance to the kitchen. He went back upstairs and someone called to him to come back. He did so and as he approached the door a man wearing a silk stocking mask pulled a gun and ordered him to go to the ladies' rest room with the others. He was tied and searched but he had no money with him. Later, one Dursley, maintenance man, arrived and saw a Mrs. Perkins, the maid, dusting the piano in the dining room. About that time defendant arrived on the scene with a silk stocking mask over his head and with a gun in his hand, ordered her to go to the rest room. She thought he was joking and told him so. He then told her it was "no monkey business" and she followed orders. Dursley went ahead and saw the others tied and lying on the floor of the rest room. He then realized it was a holdup. They were likewise tied up. All three robbers were wearing white waiters' uniform coats which they found there, and all were masked with silk stockings. A light banging noise was heard (banging on the safe in the nearby room). This continued for some time. Before the three robbers left they stacked a table against the restroom door, and the sound of a sudden departing automobile was heard. The employees later gained their freedom and reported the robbery. The manager made an investigation and found one of the windows, which ordinarily was left locked, had been opened and the screen had been taken off. The door to the room where the safe was located was damaged. The safe had been ripped open and about $720, kept in a locked cloth money bag, and certain Christmas money for the employees, consisting of dollar bills in envelopes, was missing. About June 9, 1957, defendant was apprehended and placed in a lineup at the jail with other prisoners. They were required to make certain audible statements within the hearing of these several employees. After a request to have defendant speak in a louder tone the maid, Mrs. Perkins, said she identified the voice of defendant as being the person who held the gun on her and demanded she leave the dining room and go through the kitchen into the rest room with the others, where he tied her up; and that he was the one who did most of the talking. She also said the build of defendant, as she observed him in the courtroom, was pretty much similar; that she could see "pretty clearly" his features, through the silk stocking, and that he had no scars or distinguishing features on his face; that she was not sure as to whether he wore a slight mustache or was clean shaven; that she never before heard a voice like his and she was "certain" of it; that he was wearing a black hat, khaki trousers and a white waiter's jacket; that she recognized his voice in the lineup and selected his photograph from others as being the attacker; that she was certain in her mind of her identification of him and there was "no doubt"; and that had she not recognized his voice she would not say she otherwise recognized him. Other employees would not testify that they recognized any of the voices in the lineup as being that of any one of the three robbers. They did testify generally as to the particulars above described but failed to identify defendant or his voice. They said he was masked and they were too nervous to remember much about it; that it was too dark in the ladies' rest room to see and they were required to lie face downward.

At the trial, one of the robbers, Albert Davis, who was then serving time in Chino for another offense, testified for the prosecution after stating that the officers had agreed not to prosecute him on this charge. He definitely testified that he, defendant O'Farrell, and one Bert Frilot, who lived in Santa Monica, decided that evening to rob some place; that they proceeded to La Jolla and arrived there after midnight; that they had one gun between them, a drill and a bar; that between 3 and 4 a. m. they entered the beach club from a back window and while looking for the safe found the watchman asleep in the rest room on a lounge; that they tied him up and started looking for the safe; that defendant, with the 38 automatic pistol "stood point" watching over him; that while they were drilling the safe the telephone rang and they took the watchman to the telephone and told him what to say; that they returned him and tied him up again; that sometime later they heard a noise from the keys of the piano (the maid dusting), and O'Farrell brought in the maid and another man and tied them up; that another employee or two knocked at the kitchen door and the watchman was untied and let one of them in; that they were taken to the rest room and tied up and one was searched and he had no money; that they took about $600, which was contained in a cloth money bag, from the safe, and certain envelopes containing Christmas money; that they all wore waiters' jackets, silk stocking masks, and garden gloves, and that they had a crowbar and a drill; that O'Farrell gave most of the orders to the employees; that the other robber, Frilot, was, at the time of trial, in custody on a federal charge in Georgia; that after the robbery, which took two or three hours, they pushed a table in front of the door, took off their waiters' coats, and left in their car by way of Warner's Springs and stayed there until dusk; that while in the car they divided the money which had been contained in the cloth money bag and in the envelopes. Defendant failed to take the witness stand and offered no evidence at the trial.

[1] Defendant concedes that identification can be made on the basis of voice recognition, but claims that, as a matter of law, there was no sufficient credible evidence of voice recognition which would corroborate the testimony of the accomplice Albert Davis. In this connection it is argued that different words were used by the defendant in the lineup from those used by the assailant and no proper comparison could be made; that Mrs. Perkins' testimony as to defendant's voice was equivocal, and since the other employees could not identify his voice little credence should be placed on the maid's testimony in this respect. It clearly appears that the employees who testified in respect to the details of the robbery fully corroborated the testimony of the accomplice in every respect except the possible identification of the defendant. From his testimony, which was related in similar detail, it affirmatively appears that defendant was present on that occasion. The maid was quite positive of defendant's identification from his voice and his build. The question of the weight to be given her testimony was for the jury to determine. People v. Waller, 14 Cal.2d 693, 700, 96 P.2d 344; People v. Knowles, 35 Cal.2d 175, 217 P.2d 1. The jury decided adversely to defendant's contention. It cannot be said that the corroborative evidence was insufficient, as a matter of law. People v. Trujillo, 32 Cal.2d 105, 110, 194 P.2d 681; People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720; People v. Williams, 101 Cal.App.2d 624, 628, 226 P.2d 9; People v. Kittrelle, 102 Cal.App.2d 149, 154, 227 P.2d 38.

[2] The next claim is that the court erred in its ruling in respect to certain evidence and in denying a mistrial. During the cross-examination of the people's witness, Davis, the alleged accomplice, a question arose as to how many prior felony convictions he had suffered and as to how long Davis had known defendant O'Farrell. He stated he had known him intimately for about two months previous to the robbery but he believed he "had seen him before * * * prior to that in San Quentin—(he wasn't sure)—I didn't know him there—though." Counsel for defendant moved to strike the answer. It was denied at the time but subsequently, upon counsel's statement that he did not believe defendant was going to testify, the trial court, at defendant's request, granted the motion to strike and the jury was instructed to disregard it. The motion for mistrial then made was denied. The answer was, to some extent, elicited by counsel for defendant. It appears that there was no bad faith on the part of the prosecution, the court, or the witness in answering the question. People v. Willmurth, 77 Cal.App.2d 605, 176 P.2d 102. When the court's attention was called to its probable effect, if the defendant failed to testify, it immediately ordered it stricken and told the jury to disregard it. We must assume the jury followed the instruction. People v. Darnel, 28 Cal.App.2d 122, 127, 82 P.2d 209. It does not affirmatively appear that prejudicial error resulted or that the granting of a mistrial was mandatory.

[3] Stress is laid upon the claim that the district attorney committed prejudicial misconduct during the course of the argument before the jury. It appears from the record that before counsel for defendant completed his argument, he referred to the failure of defendant to take the stand and told the jury that the defendant did not do so on his own initiative; that if there

was any blame to be assessed he, counsel for defendant, should be blamed and not the defendant; that he believed there was no legal evidence presented to the prosecution to sustain a conviction and if he was wrong he was the one who should be penalized. Thereafter the prosecutor commented on defendant's counsel's impassioned plea which he said was made in a forceful "emotion-packed voice" and then remarked: "Now, there is something of a saying amongst defense attorneys that probably is said in jest: 'For a reasonable fee, I will give you a reasonable doubt.'" Defendant's counsel assigned the statement as misconduct and unfair to him, the profession and the defendant. While it may well appear the remark was made in jest, it would have been much better unsaid. Since the court properly ordered the jury to disregard it and considered the question of a mistrial on a motion for new trial and denied it, we conclude that no prejudicial error resulted. People v. Kersey, 154 Cal.App.2d 364, 367, 316 P.2d 52; People v. Britton, 6 Cal.2d 10, 13, 56 P.2d 494; People v. Revenko, 93 Cal.App. 650, 653, 269 P. 980.

Claim is next made that the evidence is insufficient to show kidnaping for the purpose of robbery under section 209 of the Penal Code, as amended in 1951 (Stats.1951, Vol. 2, Chap. 1749, p. 4167, sec. 1) which provides that any person who kidnaps or carries away any individual to commit robbery is guilty of a felony. Defendant cites People v. Taylor, 135 Cal.App.2d 201, 286 P.2d 952; People v. Cluchey, 142 Cal.App.2d 563, 298 P.2d 633; and the dissenting opinion in People v. Knowles, 35 Cal.2d 175, 217 P.2d 1, as authority for his conclusion that, from the facts here related, no active kidnaping is shown other than that necessarily incident to the commission of robbery, and accordingly only a robbery was committed and defendant should not be punished for both crimes.

The pivotal question here is whether there was sufficient evidence to show that there was a kidnaping for the purpose of robbery that could be a separate and distinct offense. The cases decided since the 1951 amendment have not indicated an exact limitation as to the distance the victim would be required to travel before it would constitute kidnaping for the purpose of robbery. They have held that the mere detention of the victim during the commission of a robbery was not sufficient. People v. Cluchey, supra. It was held in People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001, for acts committed prior to 1951, that punishing the defendant separately for the violation of section 209 of the Penal Code (kidnaping) and for the robberies and sex crimes which, under the circumstances of that case were essential parts of those violations, would amount to double punishment which is forbidden by section 654 of the Penal Code. See, also, People v. Randazzo, 132 Cal.App.2d 20, 281 P.2d 289; and discussion in People v. Randazzo, 48 Cal.2d 484, 310 P.2d 413.

[4–6] It has been definitely held that the commission of a kidnaping for the purpose of robbery is separate and distinct from the crime of robbery which is the object of kidnaping. People v. Lombard, 131 Cal.App. 525, 21 P.2d 955. A defendant may be properly convicted of both charges though the robbery is the same as that which the defendant is charged with having intended to commit in perpetrating the kidnaping, provided the robbery was not so inseparable from the kidnaping that it and the kidnaping constituted a single indivisible act. People v. Knowles, 35 Cal.2d 175, 217 P.2d 1; 29 Cal.Jur.2d 659, sec. 2. It has likewise been held that though two victims respond to the same force, such as being ordered about at gun point, and are simultaneously subjected to the same indignities, there are nevertheless two kidnaping offenses. People v. Johnston, 140 Cal.App. 729, 35 P.2d 1074. Although these cases were decided prior to the amendment of section 209 in 1951, these same principles are applicable to that section as amended, and are still valid precedents. (29 Cal.Jur.2d 666, sec. 11, and cases cited.) In the early common law, kidnaping consisted of the forcible abduction or stealing away of a person from his own country and carrying him into another; but this definition has long since become obsolete. Many of the acts now punishable as kidnaping differ as widely from acts that anciently constituted that offense as the social and economic conditions that gave rise to the necessity for enacting penal statutes to protect against dangers peculiar to the times differ from each other. Kidnaping that is subject to a maximum penalty of 25 years is referred to as "simple kidnaping", whereas kidnaping carrying a more severe penalty is called "aggravated kidnaping". A person is guilty of simple kidnaping if he forcibly steals, takes or arrests any person in this state and carries him out of the county or to any part of the same county. People v. Trawick, 78 Cal.App.2d 604, 178 P.2d 45; 29 Cal.Jur.2d 658 et seq., secs. 1, 2 and 3.

In People v. Cluchey, supra (1956) (hearing denied by the Supreme Court) the court sustained a conviction for kidnaping for the purpose of robbery and for robbery. However, in that case defendant forced the victim at gun point to drive around for several blocks until a convenient place for robbing him was found. He was then ordered to stop and the robbery took place. It was held that the transportation or kidnaping was for the obvious purpose of robbery; that the kidnaping and robbery at the place were two separate and distinct offenses; and that the two offenses did not constitute double punishment for one offense. A hearing by the Supreme Court was denied July 24, 1956. It was also held that it is the fact, and not the distance, of forcible removal which constitutes kidnaping, citing People v. Chessman, supra.

[7] From the evidence, viewed in its most favorable light in support of the jury's findings, it fairly appears that the original intent of the three men was to burglarize the club. This they did do. Defendant was properly convicted of the charge. In carrying out this offense they were interrupted by the presence of the night watchman or janitor, found sleeping in another room. At the point of a gun he was forced to tell them where the safe was located. In aid of the burglary and subsequent robbery he was tied and bound and subsequently released and made to travel about the club into and through the several rooms under force and fear. As to Parrocha and Paul and the charges here under consideration, they were not at or in the premises at that time. Their arrival was subsequent thereto and they were taken through the kitchen, hallway, and into the rest room by defendant by means of force and fear so defendant could subsequently rob one of them and assist the others in robbing the safe, as alleged. We conclude that this evidence would justify a finding that the complaining witnesses were being kidnaped within the meaning of section 207 of the Penal Code and for the purpose of robbery as defined in section 209 thereof. Apparently O'Farrell was the one who marched the complaining witnesses over this distance, tied and bound them and stood guard over them so that the three robbers could consummate the robberies described. The kidnaping appears to be an independent effort of defendant O'Farrell not only in aid of the original burglary but, by robbery, to obtain money from one victim and to aid the others in subsequently robbing the safe. We conclude from the authorities cited that the crimes of kidnaping for the purpose of robbery and the crime of robbery were independent crimes. Under proper instructions the jury so found and there is adequate support for its finding. 17 A.L.R.2d p. 1003 and cases cited.

The pivotal question is whether the undisputed evidence shows that defendant is being punished for a single criminal act under section 654 of the Penal Code. In the Knowles case, supra, upon which defendant relies, defendants entered a clothing store and there found the owner and clerk. They displayed guns and compelled them to enter a stockroom in the rear of the store and face the wall. They took their wallets and one defendant then ordered the owner to go back to the cash register where he took the money, and returned the owner to the stockroom. After striking him on the head defendants left. The court held they were properly convicted of violating section 209 of the Penal Code, kidnaping for the purpose of robbery, as it then existed, that the additional conviction of robbery should be reversed, and held that the convictions both rested upon the commission of a single act and that they could not be punished under more than one provision of the code for the same act. See, also, People v. Darcy, 101 Cal.App.2d 665, 226 P.2d 53; and People v. Thwaits, 101 Cal.App.2d 674, 226 P.2d 58. The cases relied upon by defendant involved the offense of kidnaping for the purpose of robbery as defined by section 209 of the Penal Code prior to its amendment in 1951. At that time mere detention while committing robbery was sufficient to constitute the offense. Under those circumstances the robbery and the detention may well have been considered one act.

[8, 9] Lastly, defendant lumps several claimed errors of the court in relation to its rulings, comments, and refusal to give proffered instructions. Suffice it to say we have examined the entire record in relation to them and it does not appear that prejudicial error resulted. One involves a demonstration by the court in explaining the instruction given on circumstantial evidence, i. e., that if jam was found on a boy's face and fingers and he still indicated he had not been in the jam, that would be circumstantial evidence that he had. Another statement was that in respect to section 209 of the Penal Code, as read to the jury, "it is just as much kidnaping to ask a person to walk in front of you if he has a gun at your back and you do what he says, as it is if he would carry you." The instructions given sufficiently cover the proffered instructions refused. No prejudicial error appears.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

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161 Cal.App.2d 31

Guy N. STAFFORD, Plaintiff and Appellant,

v.

G. M. RUSSELL et al., Defendants and Respondents.

Civ. 23162.

District Court of Appeal, Second District, Division 3, California.

May 29, 1958.

As Modified June 4, 1958.

Civil action. From an order of the Superior Court of Los Angeles County striking out the answer and claim of the appellant, the appellant appeals. The District Court of Appeal by the court held that the appeal must be dismissed where appellant had been adjudicated to be in contempt of court consisting of the violation of an injunction issued in another action restraining the appellant from asserting or claiming any interest against defendants to real property, claims to which property, the appellant asserted by his answer and claim.

Appeal dismissed.

See also 325 P.2d 1009.

1. Judgment ⚷649

Where cross claim of appellant in another action was stricken from the files and appellant took an appeal therefrom and the appeal was on motion dismissed, the order was conclusive as a denial of the appellant's right to appeal from an order striking out his claim.

2. Injunction ⚷232

Where appellant had been adjudicated in contempt of court for violation of an injunction issued in another action restraining the appellant from claiming any interest against defendants in real property, claims to which property the appellant asserted by his cross complaint, appeal from an order striking out the answer and claim of the appellant must be dismissed.

◆

Guy N. Stafford, in pro. per., for appellant.

Vaughan, Brandlin & Baggot, Los Angeles, for respondents.

PER CURIAM.

The appeal of Guy N. Stafford herein is from an order of the Superior Court of Los Angeles County made November 18, 1957, entered nunc pro tunc as of July 13, 1956, striking out the answer and claim of said Stafford in an action entitled People, etc. v. Ashby, numbered 648612 in the files of said court. The appeal must be dismissed for the following reasons:

1. July 13, 1956, the cross-complaint of Guy N. Stafford in said action, People, etc. v. Ashby, was stricken from the files and said Stafford was found guilty of contempt of court in filing said cross-complaint; Stafford took an appeal from said order and the whole thereof on September 10, 1956 in 2d Civil 22893; said appeal was on motion dismissed on December 12, 1957. Said order is conclusive as a denial of Stafford's right to appeal herein from the order of November 18, 1957, striking out his claim.

[1] 2. It appears as a matter of record that the claims asserted by Stafford through his said answer and cross-complaint have heretofore been adjudicated to be groundless by judgments of the Superior Court of Los Angeles County which have long since become final.

[2] 3. An additional ground for dismissing the appeal is that Stafford has been adjudicated to be in contempt of court, consisting of the violation of an injunction issued in an action of Stafford v. Russell, Los Angeles Superior Court No. 568668 restraining said Stafford from asserting or claiming any interest against G. M. Russell and others in and to real property, claims to which property said Stafford asserted by his said answer and cross-complaint. In re Stafford, Cal.App., 324 P.2d 967; Stafford v. Russell, 117 Cal.App.2d 319, 255 P.2d 872; Stafford v. Russell, 128 Cal.App.2d 794, 276 P.2d 41; Coburg Oil Co. v. Russell, 136 Cal.App.2d 165, 288 P.2d 305; Coburg Oil Co. v. Russell, 129 Cal.App.2d 214, 276 P.2d 637; Stafford v. Russell, 9 Cir., 220 F.2d 853.

The appeal is dismissed.

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161 Cal.App.2d 33

The PEOPLE of the State of California, acting by and through the Department of Public Works, Plaintiff,

v.

Ernest E. ASHBY et al., Defendants.

Guy N. STAFFORD, Intervener, Cross-Complainant and Appellant,

v.

G. M. RUSSELL et al., Defendants, Cross-Defendants and Respondents.

Civ. 23163.

District Court of Appeal, Second District, Division 3, California.

May 29, 1958.

Civil action. From an order of the Superior Court of Los Angeles County, denying a motion of appellant to annul in part a judgment in another action, the appellant appeals. The District Court of Appeal by the court held that where judgment sought to be modified by motion of the appellant had been adjudicated to be a valid judgment and the motion for modification and appeal from the order as baseless, appeal from order denying the modification must be dismissed.

Appeal dismissed.

See also 325 P.2d 1008.

1. Injunction 🔑232

Where Superior Court order denied motion of appellant to annul in part a judgment in another action by which the appellant was enjoined from asserting any right against defendants to certain property, claims to which the appellant asserted in another action, appellant's appeal must be dismissed where appellant had in asserting claims in the latter action been adjudicated to be in contempt of court through violation of the injunction.

2. Appeal and Error 🔑780(1)

Where judgment sought to be modified by motion of the appellant had been adjudicated to be a valid judgment and the motion for modification and appeal from the order as baseless, appeal from order denying the modification must be dismissed.

Guy N. Stafford, in pro. per., for intervener, cross-complainant and appellant.

Vaughan, Brandlin & Baggot, Los Angeles, for defendants, cross-defendants and respondents.

PER CURIAM.

The appeal of Guy N. Stafford herein is from an order of the Superior Court of Los Angeles County made December 20, 1957, denying the motion of appellant to annul in part a judgment in Stafford v. Russell, Los Angeles Superior Court No. 568668, by which said Stafford was enjoined from claiming or asserting any right or interest as against G. M. Russell and others in and to certain property, claims to which property said Stafford asserted in the action of People etc. v. Ashby, numbered 648612 in the files of the Superior Court of Los Angeles County. The appeal must be dismissed for the following reasons:

[1] 1. That in asserting said claims in said action of People v. Ashby, Stafford was, and has been adjudicated to be, in contempt of court through the violation of said injunction.

[2] 2. A further ground is that it appears as a matter of record that the said judgment sought to be modified by said motion has been adjudicated to be a valid judgment and that the said motion for a modification and the appeal from said order are baseless and without semblance of merit. In re Stafford, Cal.App., 324 P.2d 967; Stafford v. Russell, 117 Cal.App.2d 319, 255 P.2d 872; Stafford v. Russell, 128 Cal.App.2d 794, 276 P.2d 41; Coburg Oil Co. v. Russell, 136 Cal.App.2d 165, 288 P.2d 305; Coburg Oil Co. v. Russell, 129 Cal.App.2d 214, 276 P.2d 637; Stafford v. Russell, 9 Cir., 220 F.2d 853.

The appeal is dismissed.

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161 Cal.App.2d 34

The PEOPLE of the State of California, acting by and through the Department of Public Works, Plaintiff,

v.

Ernest E. ASHBY et al., Defendants.

COBURG OIL CO., a corporation, Intervener, Cross Complainant and Appellant,

v.

Mary Pratt SANDERS et al., Defendants, Cross Defendants and Respondents.

Civ. 23164.

District Court of Appeal, Second District, Division 3, California.

May 29, 1958.

Civil action. From an order of the Superior Court of Los Angeles County striking out a claim and answer of the intervenor and cross complainant, the intervenor and cross complainant appeals. The District Court of Appeal by the court held that where the claims asserted by appellant through its answer had been adjudicated adversely to the appellant by judgments of the Superior Court which had long since become final, the appeal must be dismissed.

Appeal dismissed.

See also 325 P.2d 1009.

1. Appeal and Error ⚿780(1)

Where the claims asserted by appellant through its answer had been adjudicated adversely to the appellant by judgments of the Superior Court which had long since become final, the appeal must be dismissed.

2. Appeal and Error ⚿780(1)

Where it appeared from matters of record that the appeal was baseless and without semblance of merit, the appeal must be dismissed.

◆

James J. Baker and Alfred D. Williams, Long Beach, for intervenor, cross-complainant and appellant.

Vaughan, Brandlin & Baggot, Los Angeles, for defendants, cross-defendants and respondents.

PER CURIAM.

Coburg Oil Company appeals from an order of the Superior Court of Los Angeles County entered March 13, 1958 in the action of People, etc. v. Ashby, numbered 648612 in the files of said Court, striking out a claim and answer of said Coburg Oil Company. The appeal must be dismissed for the following reasons:

[1,2] The claims asserted by said Coburg Oil Company through said answer have been adjudicated adversely to said Coburg Oil Company by judgments of the Superior Court of said County which have long since become final and for the further reason that it appears from matters of record that said appeal is baseless and without semblance of merit. Coburg Oil Co. v. Russell, 100 Cal.App.2d 200, 223 P.2d 305; Sanders v. Howard Park Co., 86 Cal.App.2d 721, 195 P.2d 898; Stafford v. Russell, 117 Cal.App.2d 319, 255 P.2d 872; Coburg Oil Co. v. Russell, 129 Cal.App.2d 214, 276 P.2d 637.

The appeal is dismissed.

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161 Cal.App.2d 35

Donald F. WATSON, Plaintiff and Appellant,

v.

Satoko K. WATSON, Defendant and Respondent.

Civ. 5557.

District Court of Appeal, Fourth District, California.

May 29, 1958.

Action for divorce wherein defendant filed motion to set aside default and interlocutory judgment of divorce on ground of extrinsic fraud or mistake. The Superior Court of Orange County, Kenneth G. Morrison, J., set aside default and interlocutory judgment and husband appealed. The District Court of Appeal, Griffin, J., held that where defendant alleged that she was war bride, brought to United States by plaintiff and was abandoned, that she did not understand or speak English and after she was served with complaint and summons in divorce action, without advice of legal counsel, returned complaint to husband and failed to appear for hearing and thereafter default divorce judgment was entered against wife, trial court did not abuse discretion in setting aside default judgment.

Affirmed.

1. Judgment ⚿153(2)

Order setting aside a default may be made after six months from entry of default and in the same action on ground of extrinsic fraud and/or mistake. West's Ann.Code Civ.Proc. § 473.

2. Appeal and Error ⚿957(1)
Judgment ⚿139

A motion to set aside a default judgment is addressed to sound discretion of trial court and in absence of clear showing of abuse in exercise thereof, an appellate court will not disturb order setting aside default. West's Ann.Code Civ.Proc. § 473.

3. Appeal and Error ⚷957(1)

Appellate court is more inclined to uphold orders vacating defaults upon proper showing than affirming orders denying such motions even though, upon the same showing made, appellate court would have reached a decision opposed to that of trial court, and such conclusion would not necessarily be indicative of an abuse of discretion on part of trial court. West's Ann.Code Civ.Proc. § 473.

4. Judgment ⚷435

Where defendant in divorce action had fairly valuable property rights to protect and plaintiff acquired those rights by what might reasonably be said to amount to defendant's ignorance, mistake or inadvertence and without an opportunity on defendant's part to be present and without a fair adversary hearing, there was basis for equitable relief from default judgment on ground of "extrinsic" mistake. West's Ann.Code Civ.Proc. § 473.

5. Appeal and Error ⚷907(3)

Where appeal is based solely on clerk's transcript, all presumptions are in favor of order appealed from.

6. Appeal and Error ⚷901, 948

On appeal, burden of showing abuse of discretion or error rests on appellant.

7. Divorce ⚷161

Where defendant, in divorce action, allegedly was war bride, brought to United States by plaintiff and was abandoned, did not understand or speak English and, after she was served with complaint and summons, without advice of legal counsel, returned complaint to plaintiff and failed to appear for hearing, and thereafter default divorce judgment was entered against defendant, trial court did not abuse discretion in setting aside default judgment. West's Ann.Code Civ.Proc. § 473.

◆

John Martell, Yucca Valley, for appellant.

Nathan W. Tarr and Winthrop O. Gordon, Santa Ana, for respondent.

GRIFFIN, Justice.

This appeal comes to us on the judgment roll, affidavits and counteraffidavits in respect to the motion. According to defendant's affidavit plaintiff-appellant, a United States Marine who was stationed in Japan, there married defendant-respondent, a Japanese girl, on July 19, 1953. He was later assigned to Hawaii, where they lived together until May, 1955. He was then reassigned to Orange County and they lived in a hotel in Santa Ana. On June 8, 1955, plaintiff abandoned her and on June 10th, filed this action for divorce on the ground of extreme cruelty. He alleged that there were no children the issue of said marriage and that they acquired certain community property; that he had provided an allotment to her in the sum of $240 per month and asked that this allowance be reduced to $125 per month. The prayer was for divorce, division of the community property, a reasonable allowance for defendant's support, and that such payments cease on the entry of the interlocutory decree. Defendant did not read nor speak English sufficiently to understand it and apparently had no knowledge of the legal effect or purport of the copy of the complaint and summons served upon her on June 24, 1955. According to her affidavit she had never been in the United States before and had no friends or relatives. She was without the aid of counsel and did not know of her rights in said action or its nature. She alleged that in despair and without funds to employ counsel, she returned to Hawaii four days after service of this process, where she knew Japanese people and could converse with them. She further alleged that she, without fault on her part, never had her day in court and that plaintiff, knowing full well of the circumstances, took undue advantage of her, to the end that she was prevented from having her day in court. Before leaving for Hawaii she, by registered mail, wrote plaintiff and stated she had received the summons for divorce but did not understand why he was doing such a "dirty action against me"; and that she tried to contact him many times about it without success. She said please "stop that summons and divorce procedures * * * I do not know what to do with these papers, so I am sending enclosed in this letter to you * * * How come that you can cheat me like this? No matter what will happen, I always love you." After default was entered plaintiff, on September 28, 1955, obtained an interlocutory decree of divorce, an award of all community property, including real estate standing in their names as joint tenants. He was ordered to pay defendant the minimum allotment provided by the United States Government for one year.

On May 7, 1956, defendant appeared through her local counsel and moved to set aside the default and interlocutory judgment entered on October 3, 1955, on the grounds of "extrinsic fraud and/or mistake", and prayed for attorney's fees and costs to aid in the prosecution of said motion. About December 14, 1955, she communicated with Japanese lawyers in Hawaii, informed them as best she could about the papers she returned to plaintiff. She told them she was pregnant and had been since May, 1955, and would require hospital and medical aid as well as support and maintenance for herself and child, and desired a settlement of their community property interests. This information was communicated to plaintiff's attorney who, in his affidavit, acknowledged receipt of a letter from the Japanese attorneys in Hawaii about December 14, 1955, informing him that they had been retained by defendant to set aside the decree. He stated that he learned that other attorneys previously informed them they had been so retained but he had heard nothing from them; that he was informed by the legal officer at the base where plaintiff was stationed that he fully advised defendant of her right of defense shortly after she was served with the complaint and summons.

Plaintiff's affidavit states that on June 7, 1955, while they were living in Santa Ana, defendant assaulted and threatened to kill him with a razor; that he left her for fear of his life; that after she was served with summons, his legal officer informed him defendant had consulted with him and wanted plaintiff to drop the divorce proceedings; that he told his attorney to have the legal officer appear for her and that he never heard from defendant since she left the United States and had never been informed that she was pregnant; that if so, he believed the child was conceived while they were living separate and apart.

It is plaintiff's contention on this appeal that the uncontradicted facts show that the trial court abused its discretion in granting the motion; that relief from default should not be granted where defendant knew and understood the nature of the proceedings, and where her failure to appear was due to a change of mind as to defending the action; that ignorance of the law of California, when coupled with gross negligence, would not justify relief from default; that adequate remedy is afforded defendant in another action to determine parentage and support of the child, and no extrinsic fraud or mistake was shown, citing Baratti v. Baratti, 109 Cal.App.2d 917, 242 P.2d 22, and 29 Cal.Jur.2d p. 34, Sec. 118.

It is defendant's argument that she was a war bride, brought to the United States by plaintiff; that within a few days after arriving here he abandoned her in a hotel room without funds, relatives or friends; that she did not understand nor speak English; that she had no sufficient knowledge of her rights after she was served with the complaint and summons and that this was fully corroborated by her actions in returning them to him with the statement that she did not know what to do with them; that she had no advice of legal counsel and did not know the exact nature of the action brought against her by plaintiff, who took advantage of his superior knowledge; that accordingly, when she was informed of her rights she acted promptly, and that it was through plaintiff's fraudulent design and her excusable mistake and inadvertence that she failed to appear within the time prescribed by law to defend her rights.

[1-3] Had the trial court denied the motion, the order, under the facts related,

might well be sustained. Here, we are, in effect, confronted with the finding, in conformity with the motion, that the default and interlocutory judgment were obtained by "extrinsic fraud and/or mistake". The question is whether the showing made by defendant would authorize the order entered. On this ground such an order may be made after six months from entry of default and in the same action. Evry v. Tremble, 154 Cal.App.2d 444, 316 P.2d 49. It is the general rule that a motion to set aside a default judgment is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below. See Stub v. Harrison, 35 Cal.App.2d 685, 96 P.2d 979. It is also stated there that the general policy in reference to section 473 of the Code of Civil Procedure is that the appellate courts are more inclined to uphold orders vacating defaults upon proper showing than affirming orders denying such motions, and that seems to be the general rule, even though, upon the same showing made, the appellate court would have reached a decision opposed to that of the trial court, and that such conclusion would not necessarily be indicative of an abuse of discretion on the part of the trial court.

[4] While the evidence as to actual fraud is somewhat lacking, there are certain circumstances sufficiently indicating that advantage was taken of defendant and she was not sufficiently informed of her rights. It does appear that she had fairly valuable property rights to protect and plaintiff acquired those rights by what might reasonably be said to amount to her ignorance, mistake or inadvertence, without an opportunity on her part to be present, and without a *fair adversary hearing*. This has been held to be a basis for equitable relief and is often called "extrinsic mistake". (Witkin's California Procedure, Vol. 3, pp. 2122–2128. See also Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; Dei Tos v. Dei Tos, 105 Cal.App.2d 81, 232 P.2d 873.

[5–7] The minute entry of the court which is before us indicates that in addition to the affidavits mentioned, witnesses were present at the hearing on the motion on May 22, 1956, and were excused. The motion was then taken under advisement and on May 25th an order was made granting it. Where the appeal is based solely on the clerk's transcript all presumptions are in favor of the order. On appeal, the burden of showing abuse of discretion or error rests on the appellant. Stevens v. Stevens, 129 Cal.App.2d 19, 20, 276 P.2d 139; Hayden v. Hatch, 134 Cal.App.2d 765, 286 P.2d 541. No abuse of discretion here appears.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

161 Cal.App.2d 24

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James B. WOOD, Defendant and Appellant.

Cr. 6130.

District Court of Appeal, Second District, Division 2, California.

May 29, 1958.

Defendant was convicted for violating Penal Code section. From an order denying new trial and from judgment and sentence imposed by Beach Vasey, J., an appeal was taken. The District Court of Appeal, Herndon, J., held that even if documents described as "Dealer's Reports of Sale" and "Certificates of Non-Operation" were "instruments," within meaning of Penal Code section, making it a felony to file a false or forged instrument, the later-enacted Vehicle Code subsection, making it a misdemeanor to make a false statement in any document required to be filed with the Motor Vehicle Department, provided penalty for defendant, who had allegedly filed with Motor Vehicle Department documents answering such descriptions and containing false statements as to dates of sales of automobiles and as to periods of time during which automobiles had been out of operation; and conviction under Penal Code section could not be upheld.

Reversed.

1. Statutes ⟹215

In seeking to discover legislative intent, court could properly consider legal background or legal setting in which statute was enacted, and relevant prior decisions of appellate courts of state would constitute a part of that background.

2. Automobiles ⟹316

Even if documents described as "Dealer's Reports of Sale" and "Certificates of Non-Operation" were "instruments," within meaning of Penal Code section, making it a felony to file a false or forged instrument, the later-enacted Vehicle Code subsection, making it a misdemeanor to make a false statement in any document required to be filed with the Motor Vehicle Department, provided penalty for defendant who had allegedly filed with Motor Vehicle Department documents answering such descriptions and containing false statements as to dates of sales of automobiles and as to periods of time during which automobiles had been out of operation; and conviction under Penal Code section could not be upheld. West's Ann.Pen.Code, § 115; West's Ann.Vehicle Code, § 131(d).

◆

Thomas B. Sawyer, San Pedro, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

Appellant was convicted of eight felonious violations of section 115 of the Penal Code in knowingly procuring and offering to be filed with the Department of Motor Vehicles certain false documents described as "Dealer's Reports of Sale" and "Certificates of Non-Operation". He appeals from the order denying his motion for a new trial and from the judgment and sentence.

The Question of Law Involved

The ultimate question of law presented by this appeal is simply this: Was appellant properly convicted of violations of section 115 of the Penal Code making it a felony to file in any public office within this state a false or forged instrument, which instrument, if genuine, might be filed under any law of this state; or was appellant chargeable only with violations of Vehicle Code section 131(d) declaring it a misdemeanor to make a false statement in any document required to be filed with the Motor Vehicle Department under the provisions of the Vehicle Code?

The Facts

Appellant is the president of Johnny's Used Cars, Inc., a used car dealer licensed by the Department of Motor Vehicles. In connection with the sale of an automobile, a dealer must prepare a "Dealer's Report of Sale" on a quadruplicate form provided by the Motor Vehicle Department. Of the four parts, one is retained by the dealer in the bound form book, one is attached to the windshield of the automobile sold, and the other two must be forwarded to the Department of Motor Vehicles not later than the end of the next business day following the sale. See section 177(b), Vehicle Code. For each failure to submit the form within the required time, the Department of Motor Vehicles assesses a penalty of $3. In connection with the application for transfer of any interest in an automobile of which the registration has expired, the dealer must prepare and forward to the Department of Motor Vehicles a "Certificate of Non-Operation." See section 164.5, Vehicle Code.

These two forms are distinct from and in addition to the Certificate of Ownership, or so-called pink slip, or the conditional sale contract which transfers title to the purchaser. In the instant case the eight counts involved four separate transactions with different buyers, but, except for the names and the dates, the transactions are essentially similar and the relevant issues on this appeal can be discussed in terms of Counts I and II. Count I charges that on or about April 14, 1955, the appellant filed a false and forged instrument, to wit, "a State of California, Department of Motor Vehicle, Dealer's Report of Sale." Count II alleges that at the same time he did knowingly "procure and offer to be filed * * * a false and forged * * * Certificate of Non-Operation." Both of these documents relate to the sale of a motor vehicle by Johnny's Used Cars, Inc., to a Charles Davis. The falsity in the dealer's report of sale is that the report indicates that the sale took place on March 29, 1955, whereas the evidence indicates the sale took place on February 9, 1955. The certificate of non-operation states that the vehicle had not been operated from January, 1955 to March, 1955 and the evidence indicates that the vehicle was operated by the purchaser from and after the sale on February 9, 1955.

The other counts in the information relate to three other sales to three separate purchasers and in each case the date of sale reported in the "Dealer's Report of Sale" and the "Certificate of Non-Operation" was substantially later than the actual date of sale.

The prosecution offered as evidence establishing the dates of sale the appellant's copy of the dealer's record of sale (which showed the correct dates), and the testimony of two witnesses, one of whom, Mrs. Noble, testified that she prepared the "Certificate of Non-Operation" at the direction of appellant and forwarded the documents in question to the Department of Motor Vehicles.

Appellant's Contentions

Appellant urges only two substantial contentions as grounds for reversal: (1) that the offenses charged are punishable only as misdemeanors under section 131(d) of the Vehicle Code, which was enacted more recently than section 115 of the Penal Code; and (2) that the two documents involved are not "instruments" within the meaning of section 115 of the Penal Code.

The Statutes Involved

Section 115 of the Penal Code, under which appellant was convicted, was enacted in 1872 and provides as follows: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this State, which instrument, if genuine, might be filed, or registered, or recorded under any law of this State or of the United States, is guilty of *felony*." (Emphasis added.)

Section 131(d) of the Vehicle Code was first enacted in 1937 (Stats.1937, ch. 148, p. 413). It reads as follows: "Any person who knowingly makes a false statement or conceals a material fact in any document required to be filed with the department as herein provided shall be guilty of a *misdemeanor*." (Emphasis added.)

The Applicable Law

[1,2] We have concluded that appellant's first contention must be sustained. We think it entirely clear that the Legislature intended the more recently enacted section 131(d) of the Vehicle Code to provide the penalty for offenses of the type here involved.

It seems too clear to be reasonably questioned that the acts of the appellant, for which he was prosecuted in this case, amounted simply to the filing with the Motor Vehicle Department of documents containing false statements as to the dates of the sales of certain automobiles, and as to the periods of time said automobiles had been out of operation. Clearly, no forgery was involved. Unquestionably, the acts charged amounted to violations of section 131(d) of the Vehicle Code.

Our conclusion sustaining appellant's first contention renders it unnecessary for us to decide the question posed by appellant's second contention, that is to say, whether or not the documents in question are "instruments" within the meaning of section 115 of the Penal Code. We therefore refrain from deciding that question.

However, in seeking to discover the legislative intent as to the coverage of section 131(d) of the Vehicle Code we may properly consider the legal background or the legal setting in which the statute was enacted. Relevant prior decisions of the appellate courts of California constitute a part of that background because the Legislature presumably acted with full knowledge of their purport. In re Estate of Simpson, 43 Cal.2d 594, 600, 275 P.2d 467, 47 A.L.R.2d 991; Buckley v. Chadwick, 45 Cal.2d 183, 200, 288 P.2d 12, 289 P.2d 242; Freeman v. Jergins, 125 Cal.App.2d 536, 552–553, 271 P.2d 210.

California decisions antedating the enactment of section 131(d) of the Vehicle Code had so defined the word "instrument", as used in section 115 of the Penal Code, as to make it at least questionable whether the term would be held applicable to the various documents required to be filed with the Motor Vehicle Department by the provisions of the Vehicle Code.

Prominent among these earlier decisions defining the term "instrument" is People v. Fraser, 1913, 23 Cal.App. 82, 84–85, 137 P. 276, 277. The defendant in that case was a physician who filed for record a false birth certificate which indicated that the couple intending to adopt the child were its natural parents. The trial court sustained a demurrer to the information which charged a violation of section 115 of the Penal Code. In affirming, the appellate court held that a birth certificate was not an instrument within the meaning of section 115. The decision holds that the word "instrument" as used in the various codes is limited in its application to a class of writings which it defines as follows:

"Generally the term 'instrument' as applied to documents necessarily imports a paper writing; but every paper writing is not necessarily an instrument within the settled statutory meaning of the term. With reference to writings the term 'instrument' as employed in our statutes has been defined to mean an agreement expressed in writing, signed, and delivered by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty. Hoag v. Howard, 55 Cal. 564; Foorman v. Wallace, 75 Cal. 552, 17 P. 680."

In addition to the decisions cited in People v. Fraser, supra, there have been others similarly defining the term "instrument" as used in various statutory provisions. In the light of these decisions, the Legislature undoubtedly intended, when it enacted section 131(d) of the Vehicle Code, to make effective provision for punishment of the type of offense here charged by a statute the application of which would not be open to reasonable question.

If we assume for the purposes of our discussion the correctness of respondent's contention that the documents in question are "instruments" within the meaning of section 115 of the Penal Code, the necessity for a reversal is no less clear. On the basis of that assumption, we are presented with a classic example of an earlier and more general statute being superseded or repealed *pro tanto* by a later and more specific statute which is clearly applicable to the factual situation involved. In County of Placer v. Aetna Casualty & Sur. Co., 50 Cal.2d 182, 323 P.2d 753, 757, the well settled law is stated as follows:

"Where the terms of a later specific statute apply to a situation covered by an earlier general one, the later specific statute controls (People v. Haydon, 106 Cal.App.2d 105, 111, 234 P.2d 720). As we held in Rose v. State, 19 Cal.2d 713, 723, 724, 123 P.2d 505, 512: 'It is well settled, also, that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more par-

ticular provision relates.' (See, also, People v. Moroney, 24 Cal.2d 638, 644, 150 P.2d 888; Coker v. Superior Court, 70 Cal.App.2d 199, 201, 160 P.2d 885; Whittemore v. Seydel, 74 Cal.App.2d 109, 120, 168 P.2d 212.)"

People v. Haydon, supra, 106 Cal.App.2d 105, 234 P.2d 720, presented a closely analogous situation. There the defendant was convicted of presenting for payment a false and fraudulent claim for California unemployment insurance in violation of section 72 of the Penal Code, a felony. This section, which also was enacted in 1872, provides: "Every person who, with intent to defraud, presents for allowance or for payment to any state board * * * any false or fraudulent claim * * * is guilty of a felony."

In reversing the judgment of conviction, the appellate court held that section 72 was repealed *pro tanto* by the amendment in 1943 of section 101 of the Unemployment Insurance Act[1] providing in part as follows: "It is a misdemeanor: (a) Wilfully to make a false statement or representation or knowingly fail to disclose a material fact to obtain, increase, reduce, or defeat any benefit or payment under the provisions of this act * * *".

In People on Complaint of Fleischman v. Zappello, Mag.Ct., 111 N.Y.S.2d 317, the New York court held that a defendant charged with filing a false application for registration of a motor vehicle could not properly be convicted under section 2051 of the Penal Law of New York, McKinney's Consol.Laws, c. 40 (substantially the same in language as our Penal Code, section 115) in view of the later enactment of section 70 of the Vehicle and Traffic Law of New York, McKinney's Consol.Laws, c. 71, which provided in substance that any person making a false statement in an application for registration of a motor vehicle was guilty of a misdemeanor.

It clearly appears, therefore, that appellant was convicted of felonious violations of a penal statute wholly inapplicable to the offenses charged and proved. He should have been charged with misdemeanor violations of the indicated section of the Vehicle Code.

The judgment and the order denying a new trial are reversed, and the purported appeal from the sentence is dismissed.

FOX, P. J., and ASHBURN, J., concur.

160 Cal.App.2d 859

George MIALKOWSKY, Plaintiff and Respondent,

v.

LOS ANGELES TRANSIT LINES, a California corporation, Defendant and Appellant.

Civ. 22782.

District Court of Appeal, Second District, Division 2, California.

May 28, 1958.

Rehearing Denied June 23, 1958.

Hearing Denied July 23, 1958.

Action for injuries allegedly sustained by plaintiff as a result of fall while alighting from defendant's streetcar. The Superior Court, Los Angeles County, Mildred L. Lillie, J., entered judgment on a verdict for plaintiff, and defendant appealed. The District Court of Appeal, Herndon, J., held, inter alia, that instruction given at plaintiff's request that at time of accident defendant was a common carrier operating streetcar on which plaintiff was a passenger for hire did not have prejudicial effect of taking from jury defendant's contention that plaintiff had safely alighted from streetcar prior to fall in view of other instructions given.

Judgment affirmed.

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[1] Stats.1943, ch. 1111, p. 3051; as since amended, see Unemployment Insurance Code, sec. 2101.

1. Appeal and Error ⚿201(2), 259

In action for injuries allegedly sustained as a result of fall while alighting from defendant's streetcar, statement made by trial judge to prospective juror during voir dire examination that judge thought evidence would show that plaintiff was a passenger and that streetcar jerked and threw him to street was not so harmful that its adverse effect could not have been completely nullified by appropriate action taken at the time, and hence any error in making such statement was not available to defendant as ground for reversal of judgment for plaintiff, where defendant did not object or except to statement during trial.

2. Appeal and Error ⚿272(1)

Exception to improper remark made by trial judge during trial must be taken at time remark is made or at some time thereafter before close of trial in order to avail party allegedly injured by such remark.

3. Appeal and Error ⚿1064(2)

In action for injuries allegedly sustained in fall while alighting from defendant's streetcar, instruction given at plaintiff's request that at time of accident defendant was a common carrier operating streetcar on which plaintiff was a passenger for hire did not have prejudicial effect of taking from jury defendant's contention that plaintiff had safely alighted from streetcar prior to fall, in view of other instructions under which jury could not possibly return verdict for plaintiff without consciously rejecting defendant's theory of case and absence of request for any instruction appropriately worded to advise jury as to point at which plaintiff's status as a passenger was legally terminated.

4. Appeal and Error ⚿660(3)

Reviewing court could obtain requested instruction refused by trial court and absent from the record by ordering up the original file on court's own motion pursuant to rule on appeal. West's Ann. Rules on Appeal, rule 12(a).

5. Trial ⚿260(8)

In action for injuries allegedly sustained in fall while alighting from defendant's streetcar, refusal to give requested instruction as to contributory negligence, containing introductory clause which would give jury opportunity to find that plaintiff had completely alighted from streetcar and was no longer a passenger thereon at time he fell, was not error, in view of instructions as a whole, requiring jury to determine whether plaintiff was injured while alighting from streetcar or had fallen after he had safely departed from streetcar and plainly instructing jury to disregard any expression of opinion by trial court on any issue of fact.

◆

David S. Smith, Los Angeles for appellant.

Bernard Echt, and Leonard G. Ratner, Los Angeles, for respondent.

HERNDON, Justice.

Defendant appeals from an adverse judgment on a jury verdict awarding plaintiff damages for personal injuries allegedly sustained as a result of plaintiff's fall while alighting from defendant's streetcar. Plaintiff testified that "[w]hen I stepped, the first step it was, the street car moved sharply and my feet slipped and I fell down."

It was defendant's theory that if plaintiff was injured as a result of a fall, the accident occurred after he had safely alighted from the streetcar. The operator of the car testified that nothing unusual occurred at or about the time, or at the place, as claimed by plaintiff. He had no recollection of any person falling from the car, nor did he remember talking to any such person. A Mrs. Krol testified that she went to plaintiff's home on business unrelated to the accident and that on the occasion of this visit plaintiff told her, and another person present, that after he had gotten off the streetcar he slipped and fell. However, a Mrs. Prismantas gave testimony tending to corroborate plaintiff's version that he fell in the process of alighting and that the operator talked to plaintiff at the scene of the accident.

Defendant does not question the sufficiency of the evidence to sustain the verdict, but contends that the trial court erred (1) in making a prejudicial statement to a juror during the course of the voir dire examination; and (2) in giving and refusing certain instructions. Defendant asserts that by the trial court's remarks and by the instructions given, the jury was in effect instructed "that plaintiff was a passenger at the time he was injured" and thereby defendant's contradictory theory was "judicially obliterated."

During the voir dire examination, the court, in a preliminary statement to a prospective juror, remarked: "Now, I think the evidence will show that Mr. Mialkowsky was a passenger in the streetcar and that the streetcar jerked and threw him to the street outside of the streetcar. That he was a passenger at the time." At the time the quoted statement was made, counsel for defendant remained silent, voicing neither objection nor exception.

[1, 2] Conceding the impropriety of the court's statement, the error is unavailable to appellant as a ground of reversal. The remark was not so harmful that its adverse effect could not have been completely nullified by appropriate action taken at the time. In disposing of a very similar assignment of error, the Supreme Court stated the rule as follows in Hughes v. Hartman, 206 Cal. 199, 206, 273 P. 560, 563:

"An exception to an improper remark made by the trial judge during the trial of an action in order to avail the party claimed to have been injured thereby must have been taken by such party at the time the remark was made, or at some time thereafter and before the close of said trial. Compton-Gardena Milling Co. v. McCartney, 69 Cal. App. 708, 231 P. 764; Franceschi v. Nardi, 77 Cal.App. 78, 246 P. 130. If thus taken, an opportunity is given to the trial judge by an instruction to the jury or otherwise to cure the injury occasioned by such remark. This rule might not apply where the remark was of such a character that its prejudicial effect could not be cured by any subsequent action by the trial court. The remark of the court in the present action, of which complaint is made, is not of such character. Defendant therefore must be held to have waived any right to except to the action of the court in making the remark attributed to it, and quoted above, by his failure to object to the same during the trial of the action."

In Lund v. Pacific Electric Ry. Co., 25 Cal.2d 287, 299, 153 P.2d 705, the same rule was applied in a case where (as appears from a dissenting opinion) the trial judge repeatedly made comments far more prejudicial than that here complained of. To the same effect are: Tossman v. Newman, 37 Cal.2d 522, 526 233 P.2d 1; Redwood City Elementary School Dist. v. Gregoire, 128 Cal.App.2d 766, 773, 276 P.2d 78; and Shivers v. Palmer, 59 Cal.App.2d 572, 582–583, 139 P.2d 952.

Defendant's second assignment of error complains of the following instruction given at plaintiff's request: "At the time of the accident in question, the defendant, Los Angeles Transit Lines, was a common carrier operating a street car on which the plaintiff was a passenger for hire."

The substance of defendant's argument is that the effect of this instruction was to take away from the jury the very heart of defendant's case, namely, the factual contention that if plaintiff was injured in any fall it occurred after he had safely departed from the streetcar and after plaintiff's status as a passenger had been terminated.

[3] Our analysis of the challenged instruction in the context of all the instructions given leads us to the conclusion that it could not have had the prejudicial effect that defendant would charge to it. In the first place, the instruction, at worst, may be regarded as ambiguous. In the second place, the record does not indicate that defendant requested any instruction appropriately worded to advise the jury as to the point at which plaintiff's status as a passenger was legally terminated.

In the third place, and most important, there is the inescapable fact that the jury was so instructed that it could not possibly have returned a verdict for plaintiff without consciously rejecting defendant's theory of the case. After defining negligence, contributory negligence and proximate cause, the court clearly outlined the issues to be determined. The jury was told:

"The issues to be determined by you in this case are these: First: Was the defendant negligent? If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative, you have a second issue to determine, namely: Was that negligence a proximate cause of any injury to the plaintiff? If you answer that question in the negative, plaintiff is not entitled to recover, * * *"

Following the quoted language the stock instruction continues to outline the issues raised by the plea of contributory negligence. Since the only act of negligence on the part of defendant that plaintiff relied upon, or could possibly have relied upon, was the alleged act of suddenly starting the car before plaintiff had alighted, it seems too plain for argument that the jury could not have found for plaintiff without finding against defendant on this issue. So far as liability was concerned, most of the evidence was directed to this issue and we may assume that the arguments of counsel were similarily directed.

It is to be noted that the jurors were given the conventional instruction that it was their "exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose". And in the next to the last instruction the judge told the jury:

"If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion. I have not suggested, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; what facts are, or are not, established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it."

[4] Finally, defendant complains of the refusal of the trial court to give a requested instruction identified as "No. B". Although we granted defendant's motion to augment the record by allowing the filing of a supplement to the reporter's transcript containing all the instructions given, as well as all other proceedings and papers which appellant then sought to have included, said requested instruction No. B remains conspicuously absent from the record. Nevertheless, by the process of ordering up the original file on our own motion pursuant to Rule 12(a) of the Rules on Appeal, we have ascertained that proposed instruction No. B reads as follows:

"If you believe from the evidence in this case that at the time plaintiff was alighting or had alighted from the defendant's streetcar, plaintiff failed to use the care and caution which an ordinarily careful and cautious person under the same circumstances would use, and as a result thereof, either made a misstep, tripped, or lost his balance and fell, then I instruct you that plaintiff was guilty of negligence. If you further believe that such negligence, if any, on his part proximately caused or contributed to his injuries in the slightest degree, then, irrespective of whether you believe the defendant, Los Angeles Transit Lines, a corporation, and/or its streetcar operator, were negligent or not, your verdict must be against the plaintiff and in favor of the defendant, Los Angeles Transit Lines, a corporation."

It is self-evident that the foregoing proposed instruction relates solely to the issue of contributory negligence. Defendant does not contend that the jury was incorrectly or inadequately instructed on this issue. Indeed, the only portion of this instruction that defendant quotes in his brief or that he urges as a harmful omission is the following portion of the prefatory clause: "[I]f you believe * * * plaintiff * * * had alighted from the defendant streetcar, * * *" The essence of defendant's argument on this point is that the giving of this instruction with the quoted introductory clause would have served the purpose of giving the jury "an opportunity to find that plaintiff had completely alighted from the streetcar, was no longer a passenger thereon, and that certain rules therefor applied".

[5] Assuming that the prefatory clause of the refused instruction might have tended to serve the purpose claimed for it, we conclude that the refusal of the instruction was not erroneous. The italicized portion of the following instruction, given by the court on the doctrine of *res ipsa loquitur* was at least as well designed to serve the same purpose:

> *"If, and only in the event, you should find that there was an accidental occurance as claimed by plaintiff, namely, that the street car moved causing plaintiff to fall from the step of the street car on to the street,* and if you should find that from that accidental event, as a proximate result thereof, plaintiff has suffered injury, you are instructed as follows: an inference arises that the proximate cause of the occurance in question was some negligence on the part of the defendant. That inference itself is a form of evidence, and if none other exists tending to overthrow it, or if the inference preponderates over contrary evidence it warrants a verdict for the plaintiff. * * *"

Viewing the instructions in their entirety, we think it would be entirely unreasonable to believe that the jurors could have doubted that it was their sole province to decide whether plaintiff was injured in the manner that he described in his testimony, or whether he had fallen after he had safely departed from the streetcar, as defendant contended. We think the instructions made it perfectly clear that the court had not intended to express or intimate any opinion on any issue of fact, and that if any expression of the court had *seemed* to indicate an opinion relating to the facts, the jury was plainly instructed to disregard it.

The judgment is affirmed.

We concur.

FOX, P. J., and ASHBURN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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161 Cal.App.2d 44

Leonora SHANNON, Plaintiff and Appellant,

v.

W. Asa HUDSON and Helen Moore Hudson, Defendants and Respondents.

Civ. 22914.

District Court of Appeal, Second District, Division 2, California.

June 2, 1958.

Suit for dissolution of joint venture. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., denied any relief and plaintiff appealed. The District Court of Appeal, Fox, P. J., held that refusal to order dissolution of joint venture and sale of joint venture assets was not an abuse of discretion, under evidence that venture had a reasonable prospect of success in operating motel despite previous losses.

Affirmed.

1. Joint Adventures 🔑1.15

Refusal to order dissolution of joint venture and sale of joint venture assets was not an abuse of discretion, under evidence that venture had a reasonable prospect of success in operating motel, despite previous losses.

2. Evidence 🔑18

It is common knowledge that property seldom brings its fair market value at a forced sale.

3. Joint Adventures 🔑1.14

Where parties to joint venture contemplated operation of motel until it could be sold at a profit, though term of the joint venture was not fixed, it was not terminable at will of any one of the parties. West's Ann.Corp.Code, § 15031(1) (b).

4. Joint Adventures 🔑1.15

In action for dissolution of joint venture, finding that purpose of joint venture was building and operation of motel until sale thereof could be effected "at a profit" was not erroneous because of quoted phrase and absence of evidence that parties intended not to sell until they could recover a profit.

5. Joint Adventures 🔑1.14

Deduction for depreciation of motel was not conclusive so as to require dissolution of joint venture for operation of motel on statutory grounds that business could only be carried on at a loss, where there was evidence that venture had a reasonable prospect of success. West's Ann. Corp.Code, § 15032(1) (e).

6. Appeal and Error 🔑945, 989, 996

Reviewing court may not re-evaluate evidence, draw inferences contrary to those drawn by trial court, and direct trial court in exercise of its discretion.

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Neil D. McCarthy, Philip A. Cramer, Beverly Hills, for appellant.

Lester Wm. Roth, Beverly Hills, for respondent.

FOX, Presiding Justice.

This is a suit for dissolution of a joint venture. The trial court determined that a dissolution would be inequitable, and therefore denied any relief. Plaintiff has appealed.

Plaintiff and defendants, Mr. and Mrs. Hudson, were friends. In 1952 the parties entered upon a joint venture. The purpose of this venture was to acquire certain land in Morro Bay, California, and to construct thereon a motel. The parties planned to equip and furnish the motel, operate it for a time, and then sell it. They discussed the future widening of the road in front of the property in question as well as the construction of a Pacific Gas & Electric Company plant in the vicinity. Mr. Hudson, who was a certified architect, was to supervise the construction of the motel and the Hudsons were to operate it. Plaintiff was to supply the major portion of the money.

The parties entered into an agreement[1] in August, 1952, and the real property was acquired in September. Mr. Hudson designed the motel and supervised its construction, receiving no fee therefor. The total cost of the motel, including land, building, furnishings and equipment, was around $53,000. The amounts invested to date by the various parties are: $40,636.40 by plaintiff; $7,308.63 by Mr. Hudson; and $7,308.64 by Mrs. Hudson. Since its completion in June, 1953, the operation of the motel has been supervised by defendants; they have received no compensation therefor. Mr. Hudson kept all receipts from the operations in a separate bank account and drew all checks for the operation of the motel upon this account. Periodic financial statements for the motel were prepared by a firm of certified public accountants.

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[1] The agreement is in the form of a letter:

"August 27th, 1952.

"Mrs. Leonora Shannon
"Dear Mrs. Shannon:

"Have deposited your One Thousand Dollars ($1,000.00) in Security Trust & Savings of Beverly Hills to Mrs. Hudson's account and your Twenty Thousand Dollars ($20,000.00) in the Bank of America at Morro Bay, California, to my account.

"For your own record and that of Mrs. Hudson and myself I have thought it wise to have this letter on record as to the use of the above mentioned sums of money and the use of such monies as you and ourselves invest in properties and buildings.

"I agree to keep a record of expenditures for such property and buildings cost and that at all times such records shall be available to you and any one representing you.

"It is agreed by you and ourselves that completion and sale of any such building, or property, such funds advanced by either of us shall be returned in full and that such profits or losses as may accrue shall be divided as follows:

"1/3 to Helen Moore Hudson
"1/3 to Leonora Shannon
"1/3 to W. Asa Hudson

"Yours truly,
"/s/ W. Asa Hudson

"Concurred in
"/s/ Leonora Shannon
"/s/ Helen Moore Hudson."

From the time the motel opened in June, 1953, until March 31, 1957 (the date of the accountants' last report), its books show a net loss of $11,102.14; however, $9,989.50 of this loss has been due to the deductions for depreciation. Thus, the out-of-pocket loss was about $1,100. The motel bank account contained approximately $1,600 at the time of trial, all current bills having been paid. From March 31 until the time of trial three months later, the motel receipts did not drop below $80 a week, and for the week preceding the trial the receipts were $187. Receipts in the immediate future were expected to be between $500 and $700 per month—receipts were always greater during the summer months. Although there was no evidence as to the market value of the property, its replacement value was $65,000. Mr. Hudson had long been trying to sell the property at a figure which would permit the parties to obtain a profit or at least a return of their investment, but he had not received any reasonable offers by the time the case was tried.

Although delays had been experienced, at the time of trial the widening of the road in front of the property had been completed and work was progressing on the Pacific Gas & Electric Company plant. In addition, a school was going to be built near the motel.

From the above facts the trial court concluded that "it would be inequitable and unjust to all of the parties * * * to order a sale of the joint venture assets and a liquidation of said joint venture."

[1, 2] The basic question in this case is whether or not the trial court abused its discretion in refusing to order a dissolution of the joint venture. In view of the factual picture here presented, we cannot hold as a matter of law that the trial court abused its discretion. The evidence showed that during the four years the motel had been operating there had been an out-of-pocket loss of only $1,100. The motel had a bank balance of some $1,600 at the time of trial. The weekly receipts during the three months preceding the trial were substantially in excess of the average weekly receipts during the previous year. And the receipts were expected to rise sharply in the immediate future because of the usual increase in business during the summer months. Moreover, at the time of trial the road in front of the motel had been widened and work was progressing on the nearby plant. These improvements, which had been slow in materializing, had been expected by the parties to raise the value of their property and to increase the business of the motel. To replace the land and motel at the time of trial would cost $65,000. From these facts the trial court properly could infer that the venture had a reasonable prospect of success and that it was not bound to fail. In view of the completion of the highway improvement, the progress on the nearby plant, the current state of the motel's finances, the prospect of increased business and the intrinsic value of the property, the future sale of the motel at a profit was a reasonable likelihood. It is a matter of common knowledge that property seldom brings its fair market value at a forced sale. It was therefore reasonable for the trial court to conclude that a forced sale of the property at the

present time would be unfair to all parties. Although plaintiff had much more money invested in the venture than the Hudsons, Mr. Hudson had supplied his services as an architect in both designing the motel and supervising its construction; also, the Hudsons have supervised the operation of the motel for four years without salary. Moreover, under the agreement the Hudsons must bear two-thirds of any loss. It is thus manifestly unfair to them to force a dissolution of the venture while it still has a reasonable chance to succeed. The facts adequately support the findings and conclusions necessary to sustain the judgment.

[3] Plaintiff's contention that the venture was terminable at her will (see Corporations Code sec. 15031(1) (b)) is without merit. While the term of the joint venture was not fixed, it is not disputed that the parties contemplated some operation of the motel. Such operation was to continue until it could be sold, presumably at a price and upon terms agreeable to all the parties. Under these circumstances the venture was not terminable at the will of any one of the parties. Owen v. Cohen, 19 Cal.2d 147, 150, 119 P.2d 713; San Francisco Iron & Metal Co. v. American Milling & Industrial Co., 115 Cal.App. 238, 248, 1 P.2d 1008.

[4] Plaintiff contends that the court erred in finding that "the purpose of the joint venture was the acquisition of real property * * * and the building, furnishing and equipping and the operation of a twelve-unit motel until a sale of said motel could be effected at a profit." She asserts that there is nothing in the record which indicates that the parties intended not to sell the motel until they could recover a profit thereby. She argues that this finding would have the parties retain the property indefinitely because continued operation at a loss would make it impossible ever to sell the property at a profit. Plaintiff has misconceived the meaning of the finding. It merely states the obvious objective of the parties to make a profit when they sold the property. There can be no doubt that their *purpose* was to operate the motel to facilitate their selling it at a profit. Plaintiff has placed undue emphasis on the words "at a profit." Obviously if it appears that continued losses are inevitable and that the parties will likely be unable to sell the motel at a profit, then their primary purpose must be abandoned and the property must be sold at any reasonable price that can be obtained. The finding is clearly without error.

[5] Plaintiff's next contention is that Corporations Code section 15032(1) (e) required the trial court to order dissolution of the venture. That section provides that the court shall decree a dissolution on application by a partner whenever it appears that the business of the partnership "can only be carried on at a loss." We have already pointed out that the trial court was justified in concluding from the evidence that the venture had a reasonable prospect of success. It did not appear that the motel business would necessarily be carried on at a loss. In evaluating the evidence at the conclusion of the trial, the court stated that "The only testimony before the Court is that in recent months the place has been paying * * *." This appraisal of the factual picture appears to be justified. Plaintiff argues that the depreciation deduction cannot be ignored and that this deduction will continue to produce a net loss even though no out-of-pocket loss results. But the deduction for depreciation loses much of its significance by virtue of the fact that the replacement value of the motel is $65,000. Of course, the weight to be given to each of these items of evidence was a matter for the trial court to determine. The trial court reasonably could infer that the motel was worth much more than the book value of $43,429.76 which the accountants attributed to it on March 31, 1957. Under these circumstances the depreciation deduction does not present a realistic picture. It may well be that a sale of the motel as a going concern will completely wipe out the paper loss

resulting from deductions for depreciation. Such a sale might even result in a profit.

We need not consider plaintiff's attack on other findings and conclusions of the trial court. Our foregoing discussion adequately disposes of the attack on many of them. The rest are immaterial to a determination of the case. Plaintiff also contends that the court should have made findings on certain other matters. It suffices to say that the court made findings of fact and conclusions of law adequate to dispose of this case.

[6] The basic difficulty with plaintiff's arguments is that she would have this court reevaluate the evidence, draw inferences contrary to those drawn by the trial court, and direct the trial court in the exercise of its discretion. Under firmly established principles we are not at liberty to do this.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

WEST KEY NUMBER SYSTEM

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161 Cal.App.2d 40

Janelle BARRETT, a minor, by B. W. Barrett, her Guardian ad litem, and B. W. Barrett, Plaintiffs and Respondents,

v.

CITY OF SAN JOSE, a municipal corporation, Defendant and Appellant.

Civ. 17549.

District Court of Appeal, First District, Division 2, California.

June 2, 1958.

Rehearing Denied July 2, 1958.

Hearing Denied July 30, 1958.

Action for eye injury sustained by plaintiff, while swimming in defendant municipality's pool, when her face mask was shattered as result of collision with swimming pool patron who had just come down slide head first. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Draper, J., held that it could have been found from evidence that injury had resulted from failure of lifeguards to perform their assigned duties rather than from a dangerous condition; and held that, therefore, it had been prejudicial error to submit to jury question as to whether municipality had been acting in its governmental capacity and to authorize verdict for plaintiffs if municipality had been acting in proprietary capacity and its employees had been negligent.

Reversed and remanded for new trial.

1. Municipal Corporations 🔑742(6)

Whether, under a given state of facts, an act of municipality was performed as part of its governmental function is question of law for court, and it is error to submit that question to jury.

2. Municipal Corporations 🔑734

In operating swimming pool in Alum Rock Park, City of San Jose acted in its governmental capacity. West's Ann.Gov. Code, § 53051.

3. Appeal and Error 🔑1062(1)

Municipal Corporations 🔑742(6)

In action for eye injury sustained by plaintiff, while swimming in defendant municipality's pool, when her face mask was shattered as result of collision with swimming pool patron who had just come down slide head first, it could have been found from evidence that injury had resulted from failure of lifeguards to perform their assigned duties rather than from a dangerous condition; and, therefore, it was prejudicial error to submit to jury question as to whether municipality had been acting in its governmental capacity and to authorize verdict for plaintiffs if municipality had been acting in proprietary capacity and its employees had been negligent. West's Ann. Gov.Code, § 53051.

4. Municipal Corporations 🔑857

In action for eye injury sustained by plaintiff, while swimming in defendant municipality's pool, when her face mask was shattered as result of collision with swimming pool patron who had just come down slide head first, evidence raised jury issue as to whether location of slide and means used to warn swimmers away from area adjoining its foot had constituted, for purposes of Public Liability Act, a dangerous and defective condition. West's Ann.Gov.Code, § 53051.

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Ferdinand P. Palla, Jensen & Zavlaris, Elmer D. Jensen, San Jose, for appellant.

Boccardo, Blum, Lull, Niland & Teerlink, Edward J. Niland, San Jose, for respondents.

DRAPER, Justice.

Plaintiff, a minor, brought this action for damages resulting from injuries sustained in an accident which occurred in a swimming pool operated by defendant city in Alum Rock Park, a municipal park. Plaintiff, playing in the shallow end of the pool, donned a glass face mask and dove under water. She came up at the foot of the slide just as another youthful patron of the pool came down the slide head first. His head struck hers. The glass of the face mask was shattered and a piece of glass was driven into plaintiff's eye, necessitating removal of the eye. Jury verdict was in favor of plaintiff, and defendant appeals from judgment entered upon the verdict.

The trial court instructed the jury as to the elements of negligence, and a defendant's liability therefor, and also as to liability for injury caused by the dangerous or defective condition of public property. Gov.Code, § 53051. It then gave a general instruction on the distinction between the governmental and proprietary activities of a municipality, directed the jury to determine whether defendant city acted in its proprietary or its governmental capacity in operating the swimming pool, and instructed:

> "If you find that it was operating in its governmental capacity, then the rules pertaining to a dangerous or defective condition of public property are solely applicable. On the other hand, if you find that it was operating in its proprietary capacity the instructions relating to negligence and carelessness have application."

[1] Whether under a given state of facts an act of a municipality is performed as part of its governmental function is a question of law for the court, and it is error to submit this question to the jury. Hanson v. City of Los Angeles, 63 Cal.App.2d 426, 147 P.2d 109; see also Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685; Bertiz v. City of Los Angeles, 74 Cal.App. 792, 241 P. 921.

The remaining question is whether the error is prejudicial.

The distinction between governmental and proprietary activities is not sharp and clear. There is no rule of thumb by which to determine the character of an activity not classified by previous decision. Plaza v. City of San Mateo, 123 Cal.App.2d 103, 110, 266 P.2d 523. However, it has been decided that a municipal swimming pool is maintained by a city in its governmental capacity. Crone v. City of El Cajon, 133 Cal.App. 624, 24 P.2d 846. Operation of public parks and playgrounds also is a governmental activity. Schmidt v. City of Vallejo, 122 Cal.App. 5, 10 P.2d 107; Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505. While the mere location of a proprietary activity in a public park does not make it governmental in nature (Rhodes v. City of Palo Alto, 100 Cal.App.2d 336, 223 P.2d 639), the operation of a miniature train as a part of a city park is a governmental activity (Meyer v. City and County of San Francisco, 9 Cal.App.2d 361, 49 P.2d 893.)

[2] In operating the pool in Alum Rock Park, defendant city acted in its governmental capacity. Thus plaintiff could recover only by meeting the requirements of the Public Liability Act (Gov.Code, § 53051), which requires proof that a danger-

ous or defective condition existed, that plaintiff's injuries resulted therefrom, that those having authority to remedy the condition had notice of it, and that they failed to correct it within a reasonable time.

[3] Under the instructions, however, the jury could have based its verdict upon a finding of negligent acts or omissions of individual employees, as distinguished from the more limited liability prescribed by the Public Liability Act. If the record contains any substantial evidence of general negligence, as distinguished from the acts or omissions specified in the Public Liability Act, we cannot tell which theory the jury followed, and must hold the erroneous instruction to be prejudicial. There was evidence that only one of the three lifeguards on duty was present at the poolside, and that the number of persons in the pool was such that, under the rule stated by the superintendent, at least one more guard should have been on such duty. It was also claimed that the one guard stayed in a chair, did not "circulate around" as he was supposed to do, and paid no attention to those in the shallow end of the pool. Under this and other evidence introduced by plaintiff, the jury could well have found that the injury resulted from failure of the lifeguards to perform their assigned duties, on this one occasion, rather than from a dangerous condition. Thus we cannot say that the erroneous instruction was without prejudice to defendant.

[4] Plaintiff suggests that the location of the slide in the pool, and the means used to warn swimmers away from the area adjoining its foot, constituted a dangerous and defective condition as a matter of law. But the evidence is in conflict upon this issue. The question is therefore one of fact for the jury. Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 153, 108 P.2d 989. We are well aware that the term "dangerous or defective condition of public property" is not limited to purely structural or mechanical defects. See Teilhet v. County of Santa Clara, 149 Cal.App.2d 305, 308 P.2d 356; Bauman v. City and County of San Francisco, supra. But under the conflicting evidence here, the question whether such a condition existed remains one of fact.

We cannot hold that the jury would have reached the same conclusion under proper instructions. The judgment is reversed and the case remanded for new trial. As is apparent from our brief discussion of the evidence, defendant's motion for judgment notwithstanding the verdict was properly denied. That order is affirmed. The order denying motion for new trial is not appealable, and the purported appeal from that order is dismissed. Each party to bear own costs on appeal.

KAUFMAN, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.

PEOPLE of the State of California, Petitioner,

v.

The SUPERIOR COURT of the State of California FOR the COUNTY OF LOS ANGELES, Respondent.

City of Los Angeles, Real Party in Interest.

Civ. 23047.

District Court of Appeal, Second District, Division 3, California.

June 2, 1958.

Hearing Granted July 30, 1958.*

Proceeding on petition by state for a writ of prohibition to restrain a superior court from taking any further proceedings against it in connection with a certain pending action wherein state was a defendant. The District Court of Appeal, Patrosso, J. pro tem., held that amended complaint of city seeking an adjudication of state's rights and title to certain waters, and seeking to enjoin the state from taking said waters except in subordination to the city's rights, failed to state a cause of action maintainable against the state.

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* Proceeding dismissed as moot Dec. 23, 1958.

Writ of prohibition issued.

1. States ⚿191(1.5, 1.13)

The state, by reason of its sovereign immunity, may not be sued without its consent, and such consent has to be expressed and found in constitutional or statutory provisions authorizing or permitting suit against the state.

2. Constitutional Law ⚿34
Eminent Domain ⚿266

Section of Constitution providing that private property shall not be taken or damaged for public use without just compensation having first been made therefor is self-executing, and gives an owner of private property the right to maintain an action against the state to recover damages for taking or damaging of private property for public use. West's Ann.Const. art. 1, § 14.

3. Eminent Domain ⚿271, 274(4)

An owner of private property, whose property has been taken for public use without just compensation being paid therefor or otherwise secured, does not have an alternative right either to enjoin or to sue for damages, but a property owner may enjoin the state or its subbodies from taking or damaging property for public use only until his damages have been lawfully ascertained and paid or secured in manner prescribed by the Constitution. West's Ann. Const. art. 1, § 14.

4. Eminent Domain ⚿274(1)
Waters and Water Courses ⚿152(3)

City could not maintain an action to enjoin the state perpetually from taking or diverting waters of river, except subject and in subordination to rights of the city, upon the ground that rights of city to such waters were prior and paramount to the rights of the state.

5. States ⚿191(1.10)

An action to adjudicate the property rights of the state cannot be maintained.

6. Eminent Domain ⚿293(1)

Amended complaint of city seeking an adjudication of state's rights and title to certain waters, and seeking to enjoin the state from taking said waters except in subordination to the city's rights, failed to state a cause of action maintainable against the state. West's Ann.Const. art. 1, § 14.

7. Prohibition ⚿10(2)

A plea of sovereign immunity from suits presents a jurisdictional question, and prohibition may properly issue in such a case under conditions prescribed by applicable section of the Code of Civil Procedure. West's Ann.Code Civ.Proc. § 1102 et seq.

8. Prohibition ⚿3(5)

Where state would have been subjected to delay, burden and expense of lengthy trial in action by city seeking an adjudication of state's rights and title to certain waters, if a writ of prohibition were not entered, appeal did not afford a speedy or adequate remedy, and therefore state was entitled to writ of prohibition. West's Ann.Code Civ.Proc. § 1102 et seq.

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Edmund G. Brown, Atty. Gen., Walter S. Rountree, Asst. Atty. Gen., B. Abbott Goldberg, Albert W. Harris, Jr., Deputy Attys. Gen., for petitioner.

Roger Arnebergh, City Atty., City of Los Angeles, Gilmore Tillman, Chief Asst. City Atty. for Water and Power, Robt. E. Moore, Jr., Ralph Guy Wesson, Dep. City Attys., Los Angeles, for real party in interest.

PATROSSO, Justice pro tem.

The State of California seeks a writ of prohibition to restrain the respondent court from taking any further proceedings against it in connection with a certain pending action wherein the State is a defendant.

Prohibition is sought on the ground that the State possesses sovereign immunity from being sued in an action of the kind and nature brought against it; and that therefore the respondent court has no jurisdiction to entertain said action as against the State. It appears that the State's demurrers to the complaint and amended complaint on said ground have been overruled by the respondent court; and that, unless restrained, the respondent court will proceed to try said action against the State and to render judgment therein.

The action pending below is one commenced by the City of Los Angeles against the State and some 213 other defendants; and, in the title of the amended complaint, it is described as an action "For Declaratory Relief, to Quiet Title to Waters and Water Rights, and for an Injunction."

The essence of the allegations of the amended complaint is: (1) that the City possesses prior and paramount rights in and to waters of the Los Angeles River and its tributaries as successor of the "Pueblo of Los Angeles," and in and to foreign waters brought from distant points and discharged by the City into the drainage area of the Los Angeles River for the city's uses; (2) that each of the defendants claims some right, title or interest in and to said waters; that said claims are without right; and that none of the defendants has any right, title or interest in or to said waters; (3) that, by means of wells and other facilities for the diversion and taking of waters operated and maintained by the defendants on their properties, each of the defendants has been and is continuously diverting and taking, and unless enjoined will continue to divert and take, substantial quantities of said Los Angeles River waters and foreign waters to the City's irreparable damage. By an appendix attached to and made a part of the amended complaint, it is alleged that the State is the owner of a certain described parcel of land upon which an identified well is located.

The prayer of the amended complaint is very detailed and lengthy. The substance thereof is, however, that the defendants be required to set forth the nature of their claims to said waters; that it be declared and decreed that the City has prior and paramount rights to said waters; that it be declared and decreed that none of the defendants has any right, title or interest in or to said waters, except subject and in subordination to the rights of the City; and that the defendants be perpetually enjoined from diverting or taking said waters, except subject and in subordination to the rights of the city.

As hereinafter further discussed, said amended complaint does not set forth any cause of action predicated on allegations and theory that the State has taken or damaged the City's property without payment, or the securing of payment, of just compensation, and that the City is entitled to an injunction restraining said taking or damaging of its property unless and until just compensation therefor has been paid or otherwise secured. On the contrary, the City contends that the State has absolutely no right, whether or not just compensation is paid or secured, to take said waters except subject to and in subordination to the City's rights; and the City is not seeking an injunction to prevent the State from taking said waters until just compensation therefor has been paid or otherwise secured, but rather an injunction to prevent the State perpetually from taking said waters except subject to and in subordination to the City's alleged prior and paramount rights thereto.

It is alleged in the petition for the writ herein, and not denied, that the real property belonging to the State upon which the well is located, was acquired in fee simple by the State through an action in eminent domain for use as a site for a State mental hospital. It is further alleged in the petition herein, and not denied, that the State's fee simple title was acquired subject to an exclusive easement in Mollin Investment Company to operate the well located on the property until said well is abandoned or until the present use of Mollin Investment Company's remaining property be changed to a use other than for agricultural purposes; and that the State's interest is that of an owner of real property overlying underground water with a contingent right to use a well located thereon at some future time.

[1] It is fundamental that the State, by reason of its sovereign immunity, may not be sued without its consent; and that such consent has to be expressed and found in constitutional or statutory provisions authorizing or permitting suit against the State. 23 Cal.Jur. 578, 579; 81 C.J.S. States § 214, pp. 1300–1307; People v. Superior Court, 29 Cal.2d 754, 756–757, 178 P.2d 1, 40 A.L.R.2d 919; State v. Royal Consolidated Min. Co., 187 Cal. 343, 347, 202 P. 133; Liebman v. Richmond, 103 Cal. App. 354, 359–360, 284 P. 1053.

The only constitutional or statutory provision which has been cited by the City in support of the claim that it has the right to maintain its said action against the State is section 14, article I, California Constitution, which provides that private property shall not be taken or damaged for public use without just compensation having first been made therefor, or the payment thereof otherwise secured as therein specified. We also are unable to find any constitutional or statutory provision authorizing or permitting such an action as the one brought herein to be maintained against the State, unless such authorization or permission is to be found in said section 14, article I, of our State Constitution.

[2] There can be no doubt that said constitutional provision is self-executing; and that it gives an owner of private property the right to maintain an action against the State to recover damages for the taking or damaging of private property for public use. Rose v. State of California, 19 Cal.2d 713, 720–726, 123 P.2d 505.

It is however, entirely clear, as shown by the aforestated analysis of the allegations of the amended complaint and as will be further shown hereinafter, that the action herein, whatever its nature may be said to be, is not one to recover damages for the taking or damaging of private property for public use.

[3] The City, however, contends that an owner, whose property has been taken for public use without just compensation being paid therefor or otherwise secured, has an alternative right either to enjoin or to sue for damages (Beals v. City of Los Angeles, 23 Cal.2d 381, 387–388, 144 P.2d 839; Rose v. State of California, supra, 19 Cal.2d at page 726, 123 P.2d at page 513; Wilcox v. Engebretsen, 160 Cal. 288, 299, 116 P. 750); and that, by reason thereof, it has the right to maintain its said action and to obtain injunctive relief against the State.

[4] The City's contention is not well founded for the reason that the cited and other like cases merely hold that, under section 14 of article I, a property owner may enjoin the State or its sub-bodies from taking or damaging his property for public use until his damages have been lawfully ascertained and paid or secured in the manner prescribed by the Constitution, upon the ground that just compensation for such taking or damaging has not been so ascertained, paid or secured. Said contention likewise cannot be sustained for the further reason that the City herein is not seeking upon such ground to enjoin the State from taking or diverting said waters until its damages have been lawfully ascertained, paid for or secured, but rather to enjoin the State perpetually from taking or diverting said waters except subject and in subordination to the City's rights, upon the ground that the City's rights to said waters are prior and paramount.

In other words, the City is seeking to enjoin the taking itself upon the ground that its title to the waters is prior and paramount, rather than to protect any constitutional right it may have to be paid just compensation for the taking; and, as the Supreme Court of Nebraska pointed out in Northwestern Mut. Life Ins. Co. v. Nordhues, 129 Neb. 379, 261 N.W. 687, 689, with reference to a provision of the Nebraska Constitution similar to section 14 of article I of our State Constitution: "The Constitution does not forbid the taking of the land but guarantees just compensation for the taking or damage."

[5] Such being the nature of the action, it is settled that an action to adjudicate the property rights of the State cannot be maintained. State v. Royal Consolidated Min. Co., 187 Cal. 343, 346–347, 202 P. 133; People ex rel. Department of Public Works v. Buellton Development Co., 58 Cal.App.2d 178, 184–185, 136 P.2d 793; see, also, Hoyt v. Board of Civil Service Com'rs, 21 Cal. 2d 399, 403–405, 132 P.2d 804.

In the Nordhues case, supra, 129 Neb. 379, 261 N.W. 687, wherein a state purchased land from plaintiff's mortgagor and used the land as part of a public highway in disregard of the plaintiff-mortgagee's rights and wherein the mortgagee instead of filing a claim for his damage with the state auditor filed suit against the state to foreclose the mortgage, the Supreme Court of Nebraska further pertinently pointed out: "After all, there is a distinction in that this is a suit to foreclose a mortgage and dispossess the state [instead of an action] at law for damages."

[6] Similarly here, there is a distinction between a suit to have it declared and decreed that the State has no right, title or interest in and to said waters and to enjoin the State from taking said waters other than in subordination to the City's rights, and a suit either to recover damages for the taking thereof without payment of just compensation or to enjoin the State from taking until just compensation has been ascertained, paid or otherwise secured. A suit of the latter nature might be maintained against the State; but a suit to adjudicate the State's rights and title to said waters and to enjoin the State from taking said waters except in subordination to the City's rights is not maintainable in view of the authorities above cited and the absence of any constitutional or statutory provisions permitting such a suit against the State.

Accordingly and since the amended complaint on its face only sets forth causes of action of a nature and kind clearly not maintainable against the State, it is unnecessary to consider the State's further contention that compliance with the provisions of section 16041 of the Government Code is required and must be alleged.

For the same reason, it is also unnecessary to discuss the State's contention that the right to use the well on its property is at present reserved in Mollin Investment Company or the City's countercontention that the jurisdiction of the respondent court must be determined solely on the basis of the amended complaint without consideration of denials and matters of affirmative defense in accordance with the principles enunciated in Pianka v. State of California, 46 Cal.2d 208, 293 P.2d 458, and other similar cases.

[7, 8] Finally and as to whether prohibition may properly issue, it is settled that a plea of sovereign immunity from suit presents a jurisdictional question, and that prohibition may properly issue under the conditions prescribed by sections 1102 et seq. of the Code of Civil Procedure. People v. Superior Court, 29 Cal.2d 754, 756, 178 P.2d 1, 40 A.L.R.2d 919. It further clearly appears herein that the State will be subjected to the delay, burden and expense of a lengthy trial; and that therefore an appeal (assuming that there would be a remedy by appeal) is not a speedy or adequate remedy, especially where the trial court has no jurisdiction to proceed with the action. City of San Diego v. Superior Court, 36 Cal.2d 483, 485, 224 P.2d 685.

Let peremptory writ of prohibition issue as prayed for.

SHINN, P. J., and PARKER WOOD, J., concur.

161 Cal.App.2d 10

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Tony ARRELLANO, also known as Anthony Arrelano, Defendant and Appellant.

Cr. 1177.

District Court of Appeal, Fourth District, California.

May 28, 1958.

Defendant was convicted of drawing a check on a bank, knowing that he did not have sufficient funds or credit therein. The Superior Court of San Bernardino County, Carl B. Hilliard and Edward P. Fogg, JJ., entered judgment on the verdict and an order denying a new trial, and the defendant appealed. The District Court of Appeal, Griffin, J., held that evidence sustained conviction.

Judgment and order affirmed.

False Pretenses ⚿49(3)

Evidence sustained conviction for drawing a check on a bank, knowing that defendant did not have sufficient funds or credit therein. West's Ann.Pen.Code, § 476a.

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Broderick & Delatore, Victorville, for appellant.

Edmund G. Brown, Atty. Gen., and Joe J. Yasaki, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant-appellant was charged in an amended information in count one, with violating section 476a of the Penal Code, drawing a check on the "California Bank, Pacific and Leonis, Los Angeles," knowing he did not have sufficient funds or credit therein; and in count two, in the alternative, with violating section 476 of the Penal Code, passing a check drawn upon the "California National Bank, Vernon and Pacific, Los Angeles" when in fact there was no such bank in existence. A prior conviction of a felony (bogus checks) was charged and admitted. After a plea of not guilty a trial by jury resulted in a conviction on count one and not guilty on count two. Defendant was sentenced to state's prison. On this appeal from the conviction on count one and from an order denying a motion for new trial he claims that in fact there was no such bank as that charged in the check in count two and located at the address given; that there was a California Bank located at Pacific and Leonis, but the check was not drawn on that bank; that the evidence therefore would not support a conviction on count one, and that since he was acquitted on count two a judgment of reversal must follow.

The evidence shows that a salesman for the Carmen-Chrysler-Plymouth, Inc., Payee, in San Bernardino, took a car to defendant in Colton to demonstrate it. Defendant agreed to buy it the next day and came to the lot to negotiate the sale for $1,655. Papers were drawn up and defendant gave the salesman a check for $100 deposit drawn on the Citizen's National Bank of Colton, with the agreement to hold the car until the following Thursday. On January 27, 1957, a few days later, defendant returned to the lot to pick up his car. He agreed to pay the balance of the down payment ($448.80) by check. After a credit statement was taken, defendant said he did not have a check on him so the salesman obtained an ordinary blank countercheck which he said he would fill out for him. Defendant gave the necessary information and the agent did the writing. Defendant was asked what bank he wanted it drawn on and he said "The California Bank". The agent then wrote the name of that bank and defendant then said "No, that is the California National Bank", so the agent added the word "National" between the words "California" and "Bank". Defendant was asked what branch and what city and he answered "Vernon and Pacific" Los Angeles, and the salesman wrote that down. He then inserted the date, January 26, 1957, one day predated, because it was Sunday, The name "Carmen-Chrysler-Plymouth, Inc." was stamped in as payee and defendant signed the check. He then gave it to the salesman, signed an agreement and left with the car. The salesman testified there was no conversation about holding the check or any indication that it was not then good or properly drawn on an existing bank at that address. Defendant told him the funds were there to meet it. The next day the automobile agency tried to call the bank indicated and found there was no such bank located at the place designated but there was a branch of the "California Bank" located at Pacific and Leonis, in Los Angeles, about two blocks distant from the address given. Defendant and his wife had previously had a checking and savings account in that branch bank but it had been closed as of September 7, 1954. There was no account of defendant in this or the Citizens National Bank of Colton at the time the checks were issued and he had no credit at either bank.

It appears that defendant was arrested for violating Section 502 of the Vehicle Code shortly after taking delivery of the car, and he was sent to jail for 90 days. Defendant testified at the trial that he resided in Colton on January 27, 1957; that he sent for this salesman to demonstrate the car to him; that the next day he agreed to take it if the salesman would accept his check for $100 and hold it and the car until Friday; that he called the next day and wanted the car at that time; that after some discussion as to payment, the salesman filled out the countercheck at his request; that he had no funds in the Colton bank; that as to the other check he gave instructions to the salesman to fill it out; that he formerly had an account with the "California Bank"; that he told him to write "California Bank" and he may have told him to change it to "National" because he did not remember exactly whether it was called California Bank or California National Bank; that he had the California Bank "Vernon Branch", located at Pacific and Leonis in Los Angeles, in mind at the time and it was his error, but he told the salesman to hold the check until the following Wednesday because there were no funds to cover it at that time; that he intended to come back and pay for the car or make arrangements to run that check through the California Bank, as drawn, which was the bank where he was known and had done business, and that he forgot to ask for the return of the $100 check.

In the argument before the jury the prosecutor and the trial court thoroughly admonished the jury that defendant could not be convicted on both counts; that it must determine from the evidence whether the named bank was a fictitious bank or whether the check was drawn on the bank charged in the first count, with intent to defraud, and that defendant had no account therein at the time or credit with it. Apparently the jury believed that there was a mere error in naming the bank, and that the bank charged in count one was the branch bank intended. The jury might well have believed that the California Bank, at its Mount Vernon Branch at Pacific and Leonis, would have paid the check upon presentation if defendant had had an account there at the time. Finding defendant not guilty on the second count fully justified the conclusion that it did not believe the bank named was, in fact, fictitious. The evidence supports the conviction and a new trial was properly denied. People v. Kerr, 37 Cal.2d 11, 16, 229 P.2d 777; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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160 Cal.App.2d 809

Lee COMBS, Plaintiff and Appellant,
v.
Euldene F. HUGHES, Defendant and Respondent.

Lee COMBS, Plaintiff, Respondent and Cross-Appellant,
v.
Euldene F. HUGHES, Defendant, Appellant and Cross-Respondent.
Nos. 22552, 22553.

District Court of Appeal, Second District, Division 3, California.
May 26, 1958.
Hearing Denied July 23, 1958.

Actions to recover attorney's fee wherein defendant filed a cross-complaint for declaratory relief. The first action was dismissed and from the judgment of the Superior Court, Los Angeles County, Wilbur C. Curtis, J., the plaintiff and defendant cross-appealed. The District Court of Appeal, Nourse, J. pro tem., held, inter alia, that in attorney's action to recover contingent fee of one third of portion of property distributed to widow as result of will contest, presumptions that property acquired by husband from his brother during the marriage was community property supported findings and judgment of trial court that attorney was entitled only to an amount equal to one third of one half of the value of such property distributed to the widow.

Affirmed.

1. Attorney and Client 🔑162

Where by his complaint in action to recover attorney's fees plaintiff interpreted his contract with defendant as entitling plaintiff to payment of fee only when property to which defendant was entitled from estate of defendant's husband was distributed to defendant, and decree of distribution, by which property was distributed to defendant and upon value of which amount of fee depended, was not entered until October 1, 1954, action commenced on July 14, 1954 was properly dismissed as premature since repudiation of the contract did not accelerate the time at which plaintiff was entitled to performance by defendant.

2. Abatement and Revival 🔑78

A plea that an action is prematurely brought is in the nature of a plea in abatement and may be waived.

3. Action 🔑57(1)

Where attorney's action to recover contingent fee under contract as interpreted by the attorney in his complaint was prematurely brought, and defendant's plea which was in nature of plea in abatement was not waived but was asserted in demurrers to original and amended complaints and at time motion was made to consolidate the actions and at trial, trial court did not err in failing, of its motion, to consolidate such action with a subsequent action for all purposes.

4. Divorce 🔑255

Where the only title to property with which court was concerned in wife's divorce action was title vested in husband or the community at time of commencement of that action, and title acquired pendente lite was not put in issue by the complaint in divorce action and no supplemental pleadings were filed, and husband and his brother through extrinsic fraud prevented wife from putting that title in issue, the interlocutory decree of divorce was not res judicata as to character of such property and did not preclude wife from asserting, in subsequent action by attorney to recover contingent fee, that title acquired pendente lite by the husband was community property.

5. Deeds ⚿195
Husband and Wife ⚿262(1)

Where title to property by deed from husband's brother was acquired during existence of marriage, and no evidence was offered as to what consideration was given by husband for such deed, it was presumed that there was a good and sufficient consideration given for it and, there being no evidence that conveyance was a gift, presumption was that it was community property. West's Ann.Code Civ.Proc. § 1963, subd. 39; West's Ann.Civ.Code, § 164.

6. Attorney and Client ⚿166(3)

In attorney's action to recover contingent fee of one third of portion of property distributed to widow as result of will contest, presumptions that property acquired by husband from his brother during the marriage was community property supported findings and judgment of trial court that attorney was entitled only to an amount equal to one-third of one-half of the value of such property distributed to the widow. West's Ann.Code Civ.Proc. § 1963, subd. 39; West's Ann.Civ.Code, § 164.

7. Interest ⚿39(1)

Where amount of fee which attorney was entitled to recover under contract with client depended upon value of property distributed to client which value could not be determined by calculation from face of contract, and property distributed did not have well established market value, but could only be determined by court from evidence produced by respective parties at trial, attorney was not entitled to interest until value of property distributed had been established.

8. Appeal and Error ⚿1071(6)

In attorney's action to recover fee under contract providing for contingent fee wherein defendant filed a cross-complaint for declaratory relief based on allegations that attorney breached the contract, judgment for the attorney would not be reversed because of alleged failure of trial court to find upon material issue that attorney had breached his contract where trial court expressly found that attorney had "fully performed all things required of him by said contract" which finding negatived allegations made by defendant that attorney had breached the contract.

9. Attorney and Client ⚿123(1)

The presumptions of undue influence and of insufficient consideration which arose from confidential relationship between attorney and client were not conclusive. West's Ann.Civ.Code, § 2235.

10. Attorney and Client ⚿147

Where contingent fee contract between attorney and client relative to will contest was the only contract put in issue by the pleadings, alleged fact that attorney might have in other transactions overreached the client did not subject such contract to any infirmity. West's Ann.Civ.Code, § 2235.

11. Attorney and Client ⚿166(3)

In attorney' s action to recover fee under contract whereby defendant agreed to pay one third of an amount distributed to defendant by reason of will contest or by settlement thereof, substantial evidence supported finding that certain property was part of property affected by the contingent fee contract sued upon.

12. Attorney and Client ⚿166(4)

In attorney's action to recover fee under contingent fee contract, evidence sustained finding that attorney fully performed his contract and did not breach it by refusing to represent his client in action through which title was quieted in husband's administrator to certain property.

13. Costs ⚿169

An allowance of $92 on account of premiums upon "bonds to cover attachment 7/5/55, $46 and 11/28/56 $46.00" was not improper on ground that one attachment was levied in first action which had been dismissed because prematurely brought, so that first charge of $46 must have been incurred in first action and hence not taxable where it appeared that the only evidence as to such item was affidavit of attorney for plaintiff that such item of costs was necessarily incurred, and that annual premiums were charged upon attachment bonds and both of such payments were made after commencement of the second action.

14. Costs ⚷256(1)

Where successful party on appeal by designation to clerk had caused to be included in clerk's transcript extraneous matter having no bearing upon questions raised on appeal or which might justifiably have been raised on it, and such extraneous matter covered approximately one-half of the matter printed in clerk's transcript under circumstances recovery of costs would be limited to $150. West's Ann.Rules on Appeal, rule 5(b).

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Harned Pettus Hoose, Combs & Hoose and Wallace B. Scales, Beverly Hills, for appellant and cross-appellant.

John D. Miller, Long Beach, for respondent and cross-respondent.

NOURSE, Justice pro tem.

The above-entitled actions were consolidated for trial only. A separate judgment was rendered in each action. The actions will hereafter be designated by the number that the appeal therein bears in this court.

The complaint in each action alleges substantially the same facts and in both actions the plaintiff seeks to recover upon a written contract for attorney's fees, the right to those fees being based upon a contingency.

The following undisputed facts are relevant to the questions involved on these appeals.

Defendant Euldene F. Hughes (hereinafter called Euldene) is the widow of one A. P. Hughes. In 1943 defendant commenced an action against her husband for divorce. She joined as defendants in this action, in addition to her husband, one Toney, alleged corespondent, and her husband's brother, J. L. Hughes. In her complaint she alleged that certain real property which will hereinafter be referred to as the Western Avenue property and which stood of record in the name of J. L. Hughes was community property of herself and her husband. At the trial of this action she was granted a divorce and awarded certain property but the court found and decreed that the Western Avenue property was not property of the community but was the property of the defendant J. L. Hughes. On appeal by Euldene the judgment of the trial court that the Western Avenue property was the property of J. L. Hughes was affirmed.

The plaintiff (hereinafter called Combs) in this action was attorney for the defendant herein in the divorce action. After the commencement of the action for divorce but before the trial thereof and under date of October 2, 1944, J. L. Hughes conveyed the Western Avenue property to his brother A. P. Hughes. This deed was not recorded. Its existence was not disclosed to Euldene or to the court but on the contrary both A. P. Hughes and J. L. Hughes testified that J. L. Hughes was the owner of the Western Avenue property and had acquired it prior to the divorce action for a valuable consideration.

The interlocutory decree of divorce was entered on April 3, 1945. On the 29th of September, 1945, A. P. Hughes died leaving a will by which nothing was devised or bequeathed to the defendant here.

On October 22, 1945, the plaintiff herein by letter agreement undertook to contest the will of A. P. Hughes on behalf of the defendant herein and to accept as compensation (as the contract is interpreted by Combs in the complaints in both actions), one-third of the amount *distributed* to the defendant *by reason of the contest* or *by settlement thereof*. Pursuant to this contract plaintiff here successfully prosecuted the contest of the will but a new trial was granted. During the pendency of the will contest, Combs, on behalf of Euldene, prosecuted an action in ejectment against J. L. Hughes in which he sought to eject him from the Western Avenue property claiming that Euldene had a community interest therein. He also prosecuted an action against J. L. Hughes and the surety upon his bond as a notary based upon the allegation that Euldene had not appeared before J. L. Hughes as a notary and acknowledged her signature to the deed by which J. L. Hughes received title to the Western Avenue property from his brother, A. P. Hughes. In each of these actions J. L. Hughes pleaded the judgment in the divorce action as res judicata and, upon the court in those actions having filed a memorandum opinion indicating that it would sustain this defense in each action, the actions were dismissed. Plaintiff Combs acting as attorney for the defendant here also filed an action against J. L. Hughes and Toney seeking to set aside the deed from A. P. Hughes to J. L. Hughes on the grounds of fraud and undue influence. This action did not come on for trial until October, 1948, and during the progress of that trial a compromise of the will contest was arrived at between the parties as a result of which Toney assigned to defendant here all of her right, title and interest under the will of A. P. Hughes. (Toney was the residuary devisee and legatee under that will.) [1]

Pursuant to the terms of the agreement settling the will contest and the assignment to Euldene of Toney's interest in the estate of A. P. Hughes a partial distribution was made under which certain real property known as the "Florence Avenue property" was distributed to defendant. After that distribution she deeded to plaintiff Combs an undivided one-third interest in the property distributed. In April, 1949, Toney revealed to the administrator of the estate of A. P. Hughes the fact of the execution by J. L. Hughes to A. P. Hughes of the deeds to the Western Avenue property heretofore mentioned and delivered those deeds to the administrator. Thereupon the special administrator commenced an action against J. L. Hughes, the defendant herein Euldene and others to quiet title to the Western Avenue property and for an accounting of the rents, issues and profits thereof.

Combs refused to defend this action on behalf of Euldene unless a retainer fee was paid and she agreed to pay a certain per diem fee for his appearances in court. This Euldene refused to do, she made no appearance in the action and her default was entered. On the trial of this action the court found and decreed that the California Trust Company, as administrator of the estate of A. P. Hughes, was the owner for the purposes of administration in the estate of A. P. Hughes and entitled to possession of the Western Avenue property and as such administrator was entitled to judgment against J. L. Hughes in the sum of $24,680.34 received by him on account of the rents, issues and profits of the Western Avenue property. It was further adjudged and decreed that Euldene had no right, title or interest in or to said real property except such interest as she might have in the estate of A. P. Hughes. After this judgment was affirmed on appeal the money judgment was settled by the conveyance and transfer by J. L. Hughes to the administrator of certain real and personal property.

After the judgment in the action brought by the administrator became final but before any further distribution of the estate of A. P. Hughes had been made, Combs demanded of defendant that she execute to him an assignment of one-third of her interest in the estate of A. P. Hughes. Upon Euldene's refusing to execute such an assignment he commenced the first action (No. 22552 in this court) by which in the first count of his complaint he sought specific performance and a judgment of the court compelling his client, Euldene, to convey to him one-third of her interest in the estate. By the remaining counts he sought a money judgment in the sum of $23,000 that being the alleged value of one-third of Euldene's interest in the estate.

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[1] Combs charged and received payments of substantial fees for the prosecution of the ejectment action, the bond action and the fraud action. In each of the mentioned actions Combs asserted on behalf of Euldene that the Western Avenue property was community property.

Upon the commencement of this action Combs caused an attachment to be levied on property of Euldene including her interest in the estate. After demurrers had been sustained to his complaint in this first action and to his amended complaint in this action upon the grounds that his action was premature, the residue of the estate was ordered distributed to Euldene and Combs then filed a second amended complaint in the first action alleging such distribution and commenced a second action (No. 22553 in this court) by the complaint in which he alleged substantially the same facts which he alleged in the first action and he again caused defendant's property to be attached.

Combs sought to have the actions consolidated for all purposes but upon opposition by the defendant that the first action was premature the court refused to so consolidate them but did consolidate them *for purposes of trial only.*

At the termination of the trial of the subject actions the trial court dismissed the first action (No. 22552) and entered written findings of fact and conclusions of law and judgment in the second action only.

By its judgment in the second action the trial court found that plaintiff had fully performed all of the terms and conditions of his contract relative to the prosecution of the will contest but found that the property distributed to defendant, Euldene, by the final order of distribution in the estate of A. P. Hughes (which consisted only of the Western Avenue property and the rents, issues and profits thereof from J. L. Hughes) was the community property of A. P. Hughes and the defendant herein and that therefore defendant herein received only half of that property under the will of A. P. Hughes and took the other one-half thereof as community property, with the result that plaintiff was only entitled to recover from the defendant one-third of one-half of the value of the property distributed to her, to wit, the sum of $10,285.08 without interest.

Plaintiff appeals from the judgment dismissing the first action and from the judgment in the second action insofar as it limits his recovery to the amount above mentioned.

Defendant appeals from the entire judgment in the second action.

Plaintiff's appeal in No. 22552. By this appeal plaintiff attacks the minute order judgment dismissing the first action filed by him. If we understand appellant Combs' brief correctly, the ground upon which he seeks to reverse this judgment is that the first action was not prematurely brought and that as the cause of action sued upon therein was the same cause of action sued upon in the second action which was brought after his cause of action admittedly accrued, the court abused its discretion in not, of its own motion, completely consolidating the two actions and rendering but one judgment. He makes no complaint that the court did not make written findings of fact and conclusions of law before rendering its judgment dismissing the first action.

[1] We are of the opinion that the trial court acted properly in dismissing this action. By his complaint in this action plaintiff interpreted his contract with the defendant as entitling him to the payment of his fee when, and only when, the property to which the defendant was entitled from the estate of A. P. Hughes was distributed to her.

The subject action was commenced on July 14, 1954. The decree of distribution by which the Western Avenue property was distributed to the defendant and upon the value of which the amount of plaintiff's fee depended, was not entered until October 1st of that year. There can be no doubt therefore, that the action was premature, for inasmuch as the contract had been fully performed by plaintiff and nothing remained to be done by the defendant except the payment of the fee, the repudiation of the contract did not accelerate the time at which plaintiff was entitled to performance by the defendant. Rest., Contracts, § 318 (e); Tatum v. Ackerman, 148 Cal. 357, 360, 83 P. 151, 3 L.R.A.,N.S., 908; Cobb v. Pacific Mutual Life Ins. Co., 4 Cal.2d 565, 573, 51 P.2d 84.

[2, 3] It has been held that a plea that an action is prematurely brought is in the nature of a plea in abatement and may be waived.[2] It is clear, however, that in the present case the defendant did not waive this plea. It was asserted in the demurrers to the original complaint, the amended complaint, at the time the motion was made to consolidate the action and asserted at the trial. Clearly the trial court did not err in failing, of its motion, to consolidate for all purposes, and a judgment of dismissal of the first motion was proper. Tatum v. Ackerman, supra; Schoolcraft v. B. O. Kendall Co., 108 Cal.App. 546, 550, 291 P. 659.

Plaintiff's appeal in No. 22553. By its findings in the second action filed by plaintiff, the judgment in which is attacked on this appeal, the court found that the property distributed to defendant by the final decree of distribution had a net value[3] of $61,710.50. It found that all of the property distributed was the community property of defendant and A. P. Hughes and that she therefore took one-half of that property as her community interest therein and not by reason of the compromise of the will contest and the assignment to her of the residue of the estate by Toney, and that plaintiff was entitled to only an amount equal to one-third of one-half of the value of the property distributed and rendered judgment accordingly.

It is plaintiff's contention that by the interlocutory decree of divorce, it was decreed that the Western Avenue property was not the property of the community but was the property of J. L. Hughes and is therefore res judicata and conclusive as to the character of that property, and that he is, as a matter of law, entitled to one-third of the total net value of that property. There is no merit in this contention.

[4] The only title to the Western Avenue property with which the court was concerned in the divorce action was the title vested in A. P. Hughes or the community at the time of the commencement of that action. Title acquired pendente lite was not put in issue by the complaint in the divorce action and no supplemental pleadings were filed. To the contrary, A. P. Hughes and J. L. Hughes through extrinsic fraud prevented the plaintiff in the divorce action from putting that title in issue. The judgment therefore did not preclude the plaintiff in that action from asserting in this action that the title acquired pendente lite by A. P. Hughes was community property. Brown v. Brown, 170 Cal. 1, 6–7, 147 P. 1168; Yager v. Yager, 7 Cal.2d 213, 217, 60 P.2d 422, 106 A.L.R. 664; Metropolis Trust & Sav. Bank v. Barnet, 165 Cal. 449, 452–454, 132 P. 833.

[5, 6] The title acquired to the Western Avenue property by the deed from J. L. Hughes was acquired during the existence of the marriage. No evidence was offered or received in the pending action as to what consideration was given by A. P. Hughes to J. L. Hughes for that deed. It is presumed that there was good and sufficient consideration given for it (Code Civ.Proc. § 1963, subd. 39; In re Estate of Hobart, 82 Cal.App.2d 502, 509, 187 P.2d 105; Albertson v. Schmidt, 128 Cal.App. 344, 347, 17 P.2d 158), and there being no evidence that the conveyance was a gift, the pre-

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[2] Radar v. Rogers, 49 Cal.2d 243, 317 P.2d 17.

[3] In order to secure this distribution the defendant was compelled to pay to the administrator of the estate of A. P. Hughes the sum of $8,000 in order that the administrator might pay the accrued costs of administration consisting principally of special fees and commission incurred and allowed because of the prosecution of the action by the administrator against J. L. Hughes, and this sum the court deducted from the full value of the property distributed in determining the net value.

sumption is that it was community property. Civ.Code, § 164. These presumptions support the findings and judgment of the trial court.

[7] Combs also contends that the court erred in not awarding him interest on the amount of the judgment from October 12, 1954, the date of the final decree of distribution in the estate of A. P. Hughes. The amount which Combs was entitled to recover under the contract he sued upon depended upon the value of the property distributed to his client. This value could not be determined by calculation from the face of the contract and the property distributed did not have a well-established market value. It could only be determined by the court from evidence produced by the respective parties at the trial. Combs was therefore not entitled to interest until the value of property distributed had been established. Lineman v. Schmid, 32 Cal.2d 204, 209–212, 195 P.2d 408.

Defendant's appeal in No. 22553. In this action Euldene filed an answer in which she denied she was indebted in any sum to Combs and alleged affirmatively the contract was entered into during the existence of the confidential relationship of attorney and client between herself and Combs under the influence of that relationship; that Combs had breached that contract by refusing to represent her in the action brought by the administrator through which the title to the Western Avenue property was quieted and judgment obtained against J. L. Hughes for the rents, issues and profits of that property.

She also filed a cross-complaint for declaratory relief. In this cross-complaint she alleges so far as the allegations are material to the questions presented on this appeal that the contract sued upon by Combs was executed by her under the influence of Combs arising out of the confidential relationship existing between him and her; that the parties to the contract sued upon did not intend that the Western Avenue property should be considered a part of the estate of A. P. Hughes in determining the amount upon which Combs' contingent fee was based under that contract; that the Western Avenue property was recovered as a part of the estate of A. P. Hughes solely through the efforts of the administrator of that estate and its attorneys and that Combs was in nowise instrumental in recovering said property as a part of the estate; that the property recovered was community property of Euldene and A. P. Hughes; that at the commencement of the action by the administrator to quiet title to the Western Avenue property Combs advised her that she should appear in said action; that it was Combs' duty under the contract sued upon to appear and represent her in that action and that he refused so to do without further compensation and by so refusing breached his contract.

She alleged that a bona fide and actual controversy existed between Combs and herself as to the meaning, existence, validity and enforceability of the contract sued upon and of the rights and liabilities of the parties thereunder; that she contended that the contract was the product of undue influence exerted upon her by Combs; that the Western Avenue property was not a part of the property which was subject to the contract sued upon, that Combs' breached the contract by refusing to appear for her in the action brought by the administrator and she further alleged that all of her claims and contentions were disputed by the plaintiff and prayed judgment that the conflicting claims of the parties be adjudicated.

During the trial of the action Combs introduced into evidence (Plaintiff's Ex. 3) a letter contract dated January 31, 1946. This was a letter written by Combs to Euldene in which he recites the different matters in which he is representing Euldene and the fee arrangements that have theretofore been made and after this recitation suggests an adjustment of the entire matter on a basis therein stated. Under this adjusted basis the fees for the will contest were to remain upon "present contingent basis," and it was further agreed that all other litigation that "may develop from this matter" be handled on the basis of 20 per cent of the amount of the recovery.

[8] The defendant contends that the judgment must be reversed because of the alleged failure of the trial court to find upon material issues. The first issue which Euldene asserts the court failed to find upon was the allegations of affirmative defenses set forth in her answer and the allegations of her cross-complaint that Combs had breached his contract. There is no merit in this contention. The trial court expressly found that Combs had "fully performed all things required of him by said contract." This finding completely negatives the allegations made by Euldene, in her answer and her cross-complaint, that Combs had breached the contract.

The second issue as to which Euldene asserts that the court failed to find is as to undue influence being exercised over her by Combs and his bad faith in dealing with her. It is her contention that the evidence showed that a confidential relationship existed between the parties at the time of the execution of the contract and that therefore it was presumed to have been the result of undue influence exercised by Combs upon her and to have been without sufficient consideration and that the evidence shows that in transactions other than that relating to the will contest Combs overreached her and is thereby precluded from any recovery.

[9, 10] We find no merit in these contentions. The presumptions of undue influence and of insufficient consideration which arose from the confidential relationship which existed between Combs and Euldene (Civ.Code, § 2235) are not conclusive. The court found contrary to both presumptions. It found that the contract was not the product of undue influence on the part of Combs and this finding is amply supported by the evidence. The court found that Combs had fully performed the terms of the contract on his part to be performed and it having been stipulated at the trial that the fees fixed by the contract were reasonable no further finding was necessary as to the sufficiency of the consideration. The contingent fee contract relative to the will contest was the only contract put in issue by the pleadings, and the fact, if it be a fact, that Combs may have in other transactions overreached the plaintiff, does not subject this contract to any infirmity. We are not called upon to pass upon the other dealings between Combs and Euldene which are discussed in Euldene's briefs.

Appellant Euldene also asserts that the findings of the trial court are not supported by substantial evidence. She does not point out which of the findings she thus attacks but we assume that the findings attacked are those including the Western Avenue property as a part of the property affected by the contingent fee contract sued upon and the finding that Combs fully performed his contract and did not breach it by refusing to represent Euldene in the action through which title was quieted in the administrator to the Western Avenue property. These contentions cannot be sustained.

[11] As a result of Combs' efforts and services a compromise of the will contest was arrived at through which Euldene became entitled to take under the will of her husband and without this compromise having been consummated she would not have had any right in her husband's share of property which he was entitled to dispose of by his will. The contention that the parties did not contemplate, at the time the contract was entered into, that the Western Avenue property was subject to administration in the estate of A. P. Hughes and consequently that a half of it at least might pass under his will borders on the frivolous, for at the time the contract was entered into Euldene was contending on the appeal from the interlocutory decree of divorce that the finding that this property was not community property of the parties was erroneous and she had pending or in contemplation other litigation in which the sole issue was the char-

acter of this property as the community property of herself and her husband. If she had, in any of these actions, established that the Western Avenue property was the community property of herself and her husband, one-half of it would have been subject to her husband's will and all of it would have been subject to administration in his estate and as we have pointed out it was only through the will contest and the resulting compromise thereof that she acquired her interest in her husband's one-half of the property.

[12] The contention that the evidence fails to sustain the finding that Combs fully performed his contract is likewise without merit. There is nothing in that contract which placed any burden on Combs to prosecute any litigation to bring in to the estate of A. P. Hughes any property and the letter contract (Plaintiff's Ex. 3) makes it clear that if he did perform services to bring property in to the estate he was to have a further fee of 20 per cent of the value of the property thus recovered. The result is that not only was Combs not obligated by the contract sued upon to appear on Euldene's behalf in the action brought by the administrator but that he would have been doing his client a disservice so to do. Euldene had no interest adverse to the administrator in the action brought by it against J. L. Hughes and herself. The administrator, in prosecuting this action, did so as the trustee of an express trust of which trust Euldene was the beneficiary. In re Estate of Kessler, 32 Cal.2d 367, 369, 196 P.2d 559. Any judgment rendered in favor of the administrator would necessarily redound to the benefit of Euldene. The administrator was represented by competent counsel and Combs could render no real service in the litigation. If he did not render any services his fee was limited to that given to him by the trial court in the present action, i. e., an amount equal to one-sixth of the value of the property recovered and distributed to Euldene. If he did appear he would have been entitled not only to that amount but to an additional 20 per cent of that portion of the property which she took by virtue of her community interest.

We need not decide here whether Combs breached the obligation assumed under the agreement of January, 1946, (Plaintiff's Ex. 3) to undertake any further action concerning the Western Avenue property on a contingent fee basis of 20 per cent for that contract is not in issue in this action and his breach of it, if there was one, did not result in damage to his client.

[13] Euldene also appeals from the order taxing costs. There is but one item of these costs that merits attention. Item 35 of the amended memorandum of costs filed by Combs is in the sum of $92 on account of premiums upon "bonds to cover attachment 7/5/55, $46 and 11/28/56 $46.000." It is Euldene's contention that, as there were two attachments levied, one in the first action filed and one in the second action, the first charge of $46 must have been incurred in the first action which was dismissed and therefore was not taxable in this action. The only evidence in the record as to this item of costs is the affidavit of the attorney for Combs that this item of costs was necessarily incurred in this action and while this is somewhat contradicted by the fact that the cost bill refers to "bonds" instead of "a bond" and there was but one bond for attachment in the present action, this conflict was one to be determined by the trial court and in view of the fact that annual premiums are charged upon attachment bonds and as both of these payments were made after commencement of the present action this court cannot disturb the decision of the trial court that this item of costs was taxable herein.

[14] The judgment in case number 22-552 is affirmed, Euldene, respondent on this appeal, to recover her costs not to exceed $150. While ordinarily the successful party on appeal is entitled to recover all taxable costs, in this case respondent by her designation to the clerk under rule 5(b) of the Rules on Appeal has caused to be included in the clerk's transcript ex-

traneous matter having no bearing upon the questions raised on appeal or which might justifiably have been raised on it. This extraneous matter, as nearly as we can estimate, covers approximately one-half of the matter printed in the clerk's transcript. In limiting the costs which the respondent may recover on this appeal we have in mind that there was not a separate reporter's transcript on this appeal and that but little of the contents of that transcript was pertinent to any questions raised upon this appeal.

The judgment in case number 22553 is affirmed, each party to bear his own costs.

SHINN, P. J., and VALLÉE, J., concur.

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160 Cal.App.2d 850

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Floyd Jackson HUDSON, Defendant and Appellant.

Cr. 1174.

District Court of Appeal, Fourth District, California.

May 27, 1958.

Hearing Denied July 23, 1958.

Defendant was convicted of attempted burglary and from an order of the Superior Court, Orange County, Robert Gardner, J., denying defendant's motion for new trial the defendant appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that evidence sustained jury's implied finding that the defendant aided, advised and encouraged a boy in attempted burglary of cafe and hence was sufficient to sustain conviction of attempted burglary in the second degree.

Affirmed.

1. Burglary 🔑41(10)

Evidence sustained jury's implied finding that defendant aided, advised and encouraged a boy in attempted burglary of cafe and hence was sufficient to sustain conviction of attempted burglary in the second degree.

2. Criminal Law 🔑1202(7)

Where defendant had admitted six prior convictions but claimed certain errors in way they were alleged as result of which they were corrected by amendment, under the circumstances and in view of evidence supporting conviction it could not be held either that a different verdict could reasonably have been expected in absence of alleged error in trial court divulging to jury details concerning one of the prior convictions, or that a miscarriage of justice appeared. West's Ann.Const. art. 6, § 4½.

3. Criminal Law 🔑1144(3)

Under statute providing that information may be amended at any stage of proceedings and that defendant shall be required to plead to such amendment forthwith and trial or other proceedings shall continue as if pleading had been originally filed as amended, in absence of any showing to the contrary it must be presumed that the court did its duty in that regard. West's Ann.Pen.Code, § 1009.

4. Criminal Law 🔑1202(7)

Where it did not appear that any postponement was asked for, defendant had opportunity just before jury was impaneled to avoid effect of amendment of information at a later time and, after being told by court what was to be expected if prior convictions were denied, defendant stated in effect that he had no objection to having the matter of the prior convictions brought out, and instead of standing on his rights as they would have existed under original information defendant took an active part in bringing about the corrections and changes as regards the prior convictions, under such circumstances defendant's substantial rights were not prejudiced by reading of the original information or by fact that trial proceeded "as if the pleading had originally been filed as amended". West's Ann.Pen.Code, § 1009.

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Dennis D. Hayden, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., John A. Vander Lans, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the attempted burglary of a building known as the "Right Road Cafe" on May 13, 1957. He was also charged with prior convictions as follows: first degree robbery in San Bernardino County on June 19, 1927; second degree robbery in Tehama County on November 4, 1929; escape in Marin County on May 24, 1935; manslaughter in Sacramento County on July 24, 1939; escape in Lassen County on January 29, 1944; second degree burglary in Riverside County on August 5, 1947; and attempted burglary in Midland County, Texas on August 12, 1954. While he was represented by the public defender the defendant pleaded not guilty and denied all the prior convictions alleged. At the request of the defendant the public defender was relieved as his counsel, but was instructed to appear at the trial, and the defendant conducted the trial in propria persona. A jury found the defendant guilty of attempted burglary as charged, finding it to be burglary in the second degree, and also found that he had suffered six prior convictions as set forth in the information, as amended. His motion for a new trial was denied and in sentencing him to prison the judge found that the defendant *"was not* adjudged a habitual criminal." He has appealed from the order denying his motion for a new trial.

It is first contended that the evidence was insufficient to establish the crime of attempted burglary. After closing his place at 2:00 a. m. on May 13, the owner of the Right Road Cafe proceeded to pick up the night's receipts including some checks. He also picked up a .38 pistol which was in the place where he kept the checks. Hearing a noise at the skylight above his head he fired a shot in that direction. After firing the shot he did not hear any further noises. About daylight that morning the defendant found the body of his nephew, Jackie Ecord, in a lumber yard which adjoined the building in which this cafe was located. A pile of lumber near this building gave easy access to the roof of the cafe. A little later the defendant informed an officer of the finding of Jackie's body, and he was taken to the scene and then detained.

The officers found that portions of the metal stripping which held the glass in this skylight had been removed and were lying on the roof of the cafe. Blood was found on the skylight, which had a hole in it indicating that a bullet had passed from the inside toward the outside. There was a trail of blood leading from the skylight for a distance of 215 feet, to the place where Jackie's body was found. On the roof of the cafe near the skylight the police found a screwdriver, a short crowbar, a hatchet, a pair of pliers, a piece of rope, a roll of masking tape, and a piece of lumber 14 feet long. They also found a flashlight along the path of blood and near the edge of the roof. The defendant admitted that Jackie had told him that he (Jackie) was planning to enter this place to get money which he had been told the owner kept secreted there. The uncontradicted evidence is amply sufficient to establish an attempt on the part of Jackie to enter this building for the purpose of committing theft.

Jackie, who was 15 years old, lived with the defendant and the defendant's mother, although the mother was not at home at this time. The wife of the owner of this cafe testified that the defendant and a boy about 15 or 16 years old entered the cafe about 6:00 p. m. on May 12, and stayed fifteen or twenty minutes; that they bought nothing while there; that when they left they crossed the street and looked up toward the cafe; and that they then recrossed the street to their car and drove away. A witness who lived across the street from the defendant testified that he went to the defendant's home shortly before 1:00 a. m. on May 13, to ask Jackie to baby-sit for him while he went to this cafe to pick up his wife who worked there; that when he went there the defendant was dressed and Jackie was lying on the bed; that Jackie refused his request saying that he was pretty tired and wanted to go to sleep; that he got another baby-sitter and then went to this cafe; and that when he arrived the defendant was there. The wife of this witness testified that she saw the defendant enter this cafe about 1:00 a. m. on May 13; that he stayed until the cafe closed; that as she left she saw the defendant talking to a man outside the cafe; and that at 3:00 a. m. she saw the defendant return to his home.

Two officers and a deputy district attorney had a conversation with the defendant on May 16. At that time the defendant stated that he had recently returned from a trip back east and discovered that Jackie was knee-deep in crime; that he tried to talk the boy out of it but was unsuccessful; that he decided that as long as he could not talk the boy out of becoming a criminal he would give him the benefit of his experience, in an attempt to help the boy escape detection and possible injury while on one of his burglaries; that just prior to his going to this cafe that night Jackie talked to him about his plan to burglarize this cafe, saying that he had information that the owner kept a substantial sum of money hidden on the premises; that he tried to persuade Jackie not to commit the crime, but when he was unable to do so he felt that he should at least go look the place over and see what it looked like; that he went down to check the joint over and he had told the boy to hit it just before daylight, as that was the best time; that when he left the cafe he helped a man who had been injured in a fight there; that he then returned to his home and found that Jackie was gone; that he then remembered that he had told Jackie not to pull the job early in the evening but the best time would be around daylight when there would be less chance of being caught; that he then returned to the cafe, drove around to the back and gave the signal that he and Jackie always used; that he would flip his lights on high, then on low and then back on high and look for Jackie's return signal; that Jackie would return the signal by flashing a light back at him when he wanted to come down and meet him; that Jackie had the flashlight on the roof for that purpose; that when Jackie did not answer his signal he became worried and drove around to the front of the cafe, and got out and looked in the door to see if a rope was hanging down and to see whether Jackie was there or not; that he could not see a rope and Jackie was not there, so he returned home and then went out to search for Jackie at other places where he might be pulling a burglary; that he was unable to find Jackie after driving around and again went home but was unable to sleep; that he then drove out again to look for the boy and at that time observed a body lying in the lumber yard; that he found the boy was not alive and pulled off the gloves the boy had on his hands; that he then returned to his home but being nervous and excited he left again and went back to the area; and that he then observed a police officer and informed him of the incident as best he could. About a week later the mother, who had returned, turned over to the officers a pair of gloves which she had found in the house. These were rubber gloves with a dark colored substance on them, which she had found folded in between a tablecloth. The mother told the officers that she had never seen the gloves, that from the way they were hidden among her good linens she felt they did not belong in the house, and that for this reason she reported it to the officers. The defendant stated that he knew nothing about the gloves but that they looked like a pair of gloves which he owned and which he used in his work. He had first told the officers that there were no gloves on the boy's hands when he found the body, and later told them that he had removed the gloves from the boy's hands, but did not remember what he had done with them.

[1] The defendant testified that the boy had talked to him about entering this cafe and getting the money he had heard was kept hidden there; that he himself only talked to the boy about burglaries in general; and that he had not talked to the boy about this particular burglary. His defense was that he had merely tried to persuade the boy not to engage in crime, and that the officers had misconstrued the statements he had made to them. He made evasive answers to many questions which called for a direct answer on material facts and his extended explanation of what he had said and done in connection with this incident was far from satisfactory. The manner in which the defendant testified and what he there said would naturally tend, in many respects, to support the testimony of the officers as to what the defendant had told them. The evidence, with the inferences which could reasonably be drawn therefrom, was amply sufficient to sustain the implied finding of the jury that the defendant aided, advised and encouraged Jackie in the attempted burglary of this cafe. In fact, the evidence to that effect appears from the record to be very strong.

It is next contended that error was committed by the trial court in divulging to the jury details concerning one of the alleged prior offenses. It is argued that in reading from the record of the conviction in Lassen County the judge stated that the information charged the defendant with stealing a Plymouth coupe owned by one Ada Mae Stephens, and that the judge by his later questions brought out the length of time the defendant had served in certain prisons. The case of People v. Wynn, 44 Cal.App.2d 723, 112 P.2d 979 is relied on in support of the contention that this error requires a reversal. In that case the appellant had admitted the prior conviction and there was no occasion for proving that conviction or for interjecting the erroneous matter into the record. Moreover, the record disclosed that the question as to the guilt of that appellant was a very close one, the jury having disagreed on two previous trials, and the district attorney had also charged a parole violation for which there was no support in the evidence.

A quite different situation appears in the instant case. It does appear here that there were errors in the allegations of prior convictions in the original information on which the defendant went to trial. At some time during the trial, the exact time not being disclosed by the record, the information was amended by interlineation in the following respects. In the first prior the crime charged was changed from first degree robbery to second degree robbery, and the date of judgment from June 19, 1927 to February 11, 1928; in the second prior the crime charged was changed from second degree robbery to escape; the third prior was eliminated; in the fourth prior the date was changed from July 24, 1939 to December 9, 1935; in the fifth prior the crime charged was changed from escape to grand theft, and the date from January 29, 1944 to January 24, 1944; in the sixth, the date was changed from August 5, 1947 to August 28, 1947; in the seventh prior the date was changed from August 12, 1954 to August 3, 1954. The matters were submitted to the jury and the verdicts returned, based on the allegations in the information as amended.

On his arraignment the defendant had denied all the prior convictions alleged. On the first day of the trial, in chambers and before the jury was impaneled, the court told the defendant that he wanted to get the matter of the priors straightened out "before we get in there before the jury." The court explained to the defendant that evidence would have to be put on concerning the priors if they were denied; that if he admitted the priors and did not take the stand the jury would know nothing about the priors; that if he took the stand he could be asked about the priors for the purpose of impeaching his testimony; and that if he planned on eventually admitting the priors this was the time to do it. The court then asked the defendant if he was still denying the priors and the defendant replied that he was, "because they are not true in the record", but did not indicate in any way what he referred to. The defendant also stated that he intended to take the witness stand; that as far as the priors were concerned he had made a good rehabilitation and people would testify in the case to that effect; that he saw no reason to hold back anything; and that "I see no reason to hold back those priors".

After the People rested the defendant called the minister of his mother's church, who testified that he had known the defendant for a year and that during that time his reputation was good. The defendant then took the stand and the judge told him to give his testimony in narrative form, but stated that he first would like to go through the priors to get them "in order and so the jury may know exactly what the situation is". The judge then stated "As I understand the situation, you don't deny your previous difficulties with the law, you merely want to get them straight?" The defendant replied that this was correct, and when asked if he claimed that the way it was set forth in the information was not correct, he replied "Yes". The judge then went through the certified copies which had been introduced in this connection, taking them in chronological order and asking the defendant whether they were correct. Instead of denying them the defendant admitted six of them with certain changes which he suggested. It was thus brought out that in the first prior in San Bernardino County a reversal was followed by a second trial resulting in a conviction of second degree robbery, and the judge stated that this was only one conviction. The defendant admitted that he had been convicted of escape in Tehama County on November 24, 1929, but explained that this was in Tehama County and not in Marin County. He admitted a conviction of manslaughter in Sacramento County on December 9, 1935, a conviction of grand theft in Lassen County on January 24, 1944, and a conviction in Riverside County on August 28, 1947. He also admitted a conviction in Midland County, Texas, in 1954, explaining that after an appeal that sentence had been reduced from seven years to two years. The statement that an automobile belonging to Ada Mae Stephens had been stolen came through a reading of a part of the record in the Lassen County case, and the remarks about the length of time served came in connection with the effort of the judge to straighten out the dates of the various convictions, in which the defendant cooperated freely and twice pointed out that he had served more time than the judge had stated.

[2] It clearly appears that the defendant willingly admitted six prior convictions while on the stand, but claimed certain errors in the way they were alleged, as a result of which they were corrected by amendment. The defendant was given ample opportunity to point out any such errors and have them corrected before the jury was impaneled, but at that time denied the priors without informing the court of his real contentions in that regard. It was here necessary to prove the priors, and apparently the judge had then ascertained that the defendant admitted that he had suffered prior convictions but claimed that certain errors existed in the way they were alleged. The defendant expressed a desire to have these errors corrected and he freely stated the facts which led to the corrections. Whether or not the defendant was intentionally using his past experience in convictions and in appeals for the purpose of laying the foundation for a claim of error here, it rather clearly appears that he invited any errors in this connection on which he now relies. Under these circumstances, and in view of the evidence, it cannot be held either that a different verdict could reasonably have been expected in the absence of such error or that a miscarriage of justice appears, within the meaning of Article VI, Section 4½ of the Constitution.

The final contention is that the fact that the information contained errors in alleging the prior convictions caused the defendant to deny the prior convictions and thus led to the reading of the original information to the jury, thereby depriving him of a fair trial. In support of this contention People

v. Colombo, 70 Cal.App. 489, 233 P. 413 is cited. In that case, the court stated that when a defendant is arraigned on a charge alleging a certain prior conviction he is not called upon to state he has suffered a different prior conviction. It was held, under the circumstances of that case, that the substantial rights of the defendant were prejudiced, but it was pointed out that where the defendant has had an opportunity to admit the previous convictions his rights would not be prejudiced.

[3, 4] We do not regard that case as controlling under the circumstances which here appear. Much of what we have previously said is applicable in considering the contention here made. Section 1009 of the Penal Code, after providing that an information may be amended at any stage of the proceedings, provides in part that "The defendant shall be required to plead to such amendment or amended pleading forthwith, * * * and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, * * * may be granted." In the absence of any showing to the contrary it must be presumed that the court did its duty in this regard. It does not appear that any postponement was asked for, nor that the rights of the defendant were prejudiced by the failure to grant a postponement. The defendant had an opportunity just before the jury was impaneled to avoid the effect of an amendment at a later time and, after being told by the court what was to be expected if the priors were denied, he stated in effect that he had no objection to having the matter of his prior convictions brought out. While he apparently intended to admit six prior convictions when he took the stand, he did not inform the court of the existence of the errors at that time, when the matter could have been easily corrected. Again, when he took the stand, in reply to a question asked by the judge he stated that he merely wanted to get the priors straight. He then cooperated in bringing out the true facts. Instead of standing on his rights as they would have existed under the original information he took an active part in bringing about the corrections and changes of which he now complains, and in a very real sense invited the situation which resulted. In our opinion, his substantial rights were not prejudiced under these circumstances by the reading of the original information, or by the fact that the trial proceeded "as if the pleading had originally been filed as amended." While error appears, it would be unreasonable, in view of the record as a whole, to believe that this error in any way affected the verdict, and we are far from convinced that any miscarriage of justice has occurred.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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160 Cal.App.2d 779

Eva Jane WARDROP, a minor by Ebell Wardrop, her Guardian ad litem, George C. Wardrop and Ebell Wardrop, Plaintiffs and Appellants,

v.

CITY OF MANHATTAN BEACH, a municipal corporation, Ray Baker, B & B Development Corp., a corporation, Frank A. Barso and Harry Barron, individually and as co-partners doing business under the fictitious firm name and style of B & B Homes, Frank A. Barso and Harry Barron, individually and as co-partners doing business under the fictitious firm name and style of B & B Construction Co., Defendants.

Frank A. Barso, Harry Barron, Roy Baker, B & B Homes and B & B Construction Company, Respondents.

Civ. 22599.

District Court of Appeal, Second District, Division 1, California.

May 26, 1958.

Rehearing Denied June 23, 1958.

Hearing Denied July 23, 1958.

Trespass action by minor plaintiff against landlords, and their superintendents for personal injuries sustained as a result of contracting poliomyelitis from fecally contaminated waters which were pumped from an open sump in the vicinity of such plaintiff's home into the backyard of her home, along with action by minor plaintiff's parents for consequential damages. The Superior Court, Los Angeles County, Paul Nourse, J., entered judgment for defendants notwithstanding verdict for plaintiffs, and they appealed. The District Court of Appeal, White, P. J., held that evidence presented a question for the jury as to whether there was a causal connection between acts of defendants in pumping water in question onto plaintiffs' land, and contracting of poliomyelitis by minor plaintiff.

Judgment reversed and cause remanded with directions.

1. New Trial ⚷70

A trial court should grant a motion to set aside a verdict when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.

2. Health ⚷28

In trespass action for damages sustained as result of minor plaintiff's contracting of polio, all that plaintiffs were required to do to present a question for the jury as to whether source of minor plaintiff's infection was polluted sump water, which was allegedly pumped on their land by defendants, was to present evidence from which the jury could reasonably have inferred that such sump water was the probable cause of polio contracted by minor plaintiff, and plaintiffs were not required to prove by direct evidence the existence of polio virus in the sump water and that minor plaintiff's illness was occasioned by her falling into it.

3. Health ⚷28

In trespass action by minor plaintiff against landlords, and their superintendents for personal injuries sustained as a result of contracting poliomyelitis from fecally contaminated waters which were pumped from an open sump in the vicinity of plaintiff's home into her back yard, along with action by minor plaintiff's parents for consequential damages, evidence presented a question for the jury as to whether there was a causal connection between acts of defendants in pumping water in question onto plaintiffs' land, and contracting of poliomyelitis by minor plaintiff.

◆

Gray, Glass & Allen, Gardena, and Martin, Hahn & Camusi, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiffs instituted this action against defendants to recover damages for crippling injuries sustained by minor plaintiff Eva Jane Wardrop, in contracting bulbar poliomyelitis from fecally contaminated waters allegedly contained in an open sump in the vicinity of plaintiffs' home. Prior to trial, the action was dismissed as to all defendants except Harry Barron, Frank A. Barso doing business as B & B Homes, a co-partnership, and Roy Baker.

The complaint contains six causes of action, the first three of which are on behalf of minor plaintiff, and the first of which alleges the existence of a nuisance occasioned by the mere maintainance of the aforesaid sump. The second alleges a trespass by the intentional pumping of the sump water into the backyard of plaintiffs' home where, it is alleged, the minor plaintiff came into direct contact with said water. The third cause of action is predicated on the alleged negligent maintenance of the sump and its contents.

The first, second and third causes of action on behalf of the adult plaintiffs, parents of the minor plaintiff, are based, respectively, on the three causes of action brought on behalf of the minor plaintiff, and by them, the adult plaintiffs seek to recover special damages for hospital and medical expenses incurred for the care of minor plaintiff.

At the outset of the trial the first cause of action on behalf of all plaintiffs, founded on a claimed nuisance by reason of the mere maintenance of the sump, was dismissed.

The cause proceeded to trial before a jury. Upon conclusion of plaintiffs' case, the court granted a motion for nonsuit as to plaintiffs' third cause of action, based on negligence. A similar motion by defendants as to plaintiffs' second cause of action (trespass by the intentional pumping of the sump water into the backyard of plaintiffs' home) was denied, and when both sides had rested their case, the court denied defendants' motion for a directed verdict as to the second cause of action.

The jury returned verdicts in favor of the minor plaintiff in the amount of $54,000, and in favor of the adult plaintiffs, in the sum of $12,530.49. Judgment on the verdicts was accordingly entered. Thereafter, defendants filed written notice of motion for judgment notwithstanding the verdict (alternative or under Code Civ. Proc., secs. 629 and 659), and defendants also filed their notice of intention to move for a new trial. The court granted the motion for judgment notwithstanding the verdict. As to the motion for a new trial, the minute order thereon reads: "No action is taken by the Court on Defendants' Motion for New Trial herein". The trial judge stated: "I am going to say this, counsel. I am going to bring an end to this lawsuit. If the Supreme Court holds that there is sufficient evidence to take this case and uphold the verdict, then I am going to go along with the jury. So I will not make any order granting the motion for new trial, if the order non obstante is reversed. If the Supreme Court holds that the evidence is sufficient under this record to take the case to the jury, then I am going to hold that the jury found properly. In my opinion, the record on proximate cause is devoid of evidence, for the reasons I have stated, but if my reasoning is wrong, then the jurors' verdict is correct."

Judgment vacating the former judgment entered on the verdict and granting judgment notwithstanding the verdict was thereupon entered. From such judgment plaintiffs prosecute this appeal.

Concerning the factual background surrounding this litigation the record reflects that plaintiffs George C. Wardrop and Ebell Wardrop are husband and wife and the parents of the minor plaintiff Eva Jane Wardrop and three other children ranging in age between 3 and 8 years. In June, 1954, the minor plaintiff herein, then within a month of her fourth birthday, was stricken with poliomyelitis. Plaintiff father is a welder by trade. In March, 1954, he, with his family established their home at 819 Meadows Avenue, Manhattan Beach, in Los Angeles County. They rented the home on a month-to-month tenancy from defendants Frank A. Barso and Harry Barron, doing business as B & B Homes. These defendants, doing business as a copartnership, were engaged in the business of constructing tract houses in the Manhattan Beach area. The aforesaid house rented and occupied by plaintiffs, was one of the first constructed by B & B Homes. During the period here in question, defendant Roy Baker was employed as Superintendent for B & B Homes, which co-partnership had been in the building business since 1937 and continued to construct houses in the Manhattan Beach area until the latter part of 1954 or early in 1955. (Unless otherwise stated herein, use of the words "defendants" or "appellants" will indicate Frank A. Barso, and Harry Barron doing business under the name and style of B & B Homes.)

Approximately in February, 1953, defendants signed a bond with the City of Manhattan Beach, under the terms of which they agreed to excavate a sump at the rear of the property rented from them and occupied by plaintiffs, which excavation was to be 150 feet long, 50 feet wide and 6 feet deep. The sump was required as a condition to the construction by defendants of a tract of 65 homes just east of Meadows Avenue and across the street from the property rented by plaintiffs. The sump is located one and one-half miles from the ocean.

The sump was constructed in the lowest elevation in the neighborhood. From a survey of the area it is apparent that there is a bowl or saucerlike condition with the sump located in the lowest point thereof. This saucer-shaped area all drains into the lowest area where the sump is located. There was evidence that there was surface drainage from the surrounding area into the sump and that a considerable portion of the area surrounding the 65 homes naturally drained into the sump. All of the 65 houses were equipped with cesspools and there were no sewers in the area. Actual construction of the sump was commenced about December, 1953. It seems fair to state that defendants were required to construct the sump for the purpose of catching all waters in the drainage area, including the increased accumulation of water which would be caused by the construction of the aforesaid 65 homes. The theory of the sump was thus described by Frederick C. Butcher, City Engineer of the City of Manhattan Beach: (1) The sump would have a capacity to contain a certain amount of water and prevent the same from encroaching on and damaging private property in the vicinity. (2) In digging through the overlayer of impervious soil it was felt that a more sandy soil would be reached, thus permitting more adequate drainage and percolation of water from the area. The sump was designed, stated Mr. Butcher, with the idea that it would reach soil coarse enough for water to seep away; that this was the original intention. But, for reasons not necessary here to narrate, the sump did not function as had been planned and on May 24, 1954, City Engineer Butcher advised defendants by letter that they would have to pump the water out of the sump and complete the installation of seepage pits; that the water in the sump could not evaporate or soak into the ground and was becoming stagnant; that complaints had been made to Mr. Butcher that the water was creating a stagnant odor and drawing flies and mosquitoes. Mr. Butcher concluded his letter with the statement: "It is earnestly hoped that you will be able to wind this work up so that we can accept the improvements and therefore release you from your bond,".

The seepage pits could not be installed until the water had been drained out of the sump. After receiving the letter of May 24, 1954, from the City Engineer, defendant Barso called the former and asked what could be done. Barso spoke to defendants Barron and Baker concerning this problem. Mr. Baker advised Mr. Barso that he, Baker, would pump the sump water out into the surrounding ground and Mr. Barso advised Mr. Baker to proceed to do so.

Plaintiff Mrs. Wardrop first observed Mr. Baker pumping the water from the sump into her backyard at approximately 8:00 a.m., Monday morning, June 14, 1954. The pumping went on for five days, from approximately 8:00 o'clock in the morning to 4:30 in the afternoon. Mrs. Wardrop asked Mr. Baker to stop pumping the water into her backyard, but Mr. Baker replied he had his orders. Mr. Wardrop also tried to stop the pumping of the water into the backyard with rather expressive words, but likewise failed. He spoke with defendant Barron the evening of June 14, and warned Mr. Barron that he was endangering the lives of the Wardrop children. Mr. Wardrop had advised Mr. Barron in the latter part of April that it would be wise to put fish in the sump to purify the water, and Mr. Wardrop did in fact put some catfish into the sump water thereafter. Baker testified that he was attempting to channel the water from the backyard to the front of the house where a seepage pit had been installed on the southerly side of the driveway. This seepage pit in the front of the yard was approximately 30 feet from the cesspool which was located in the front of plaintiffs Wardrop's house.

When the pumping operation ceased, plaintiffs Wardrop's yard contained puddles of water, mud, or both, for a period of ten days. After the pumping stopped, the Wardrop yard was filled with green blow flies. These blow flies also managed to get into the house in considerable numbers and continued to exist on the premises until after minor plaintiff Eva Jane went to the hospital with bulbar poliomyelitis. (Eva Jane went to the hospital on August 1, 1954.) There had been no blow flies on the premises prior to the time of the pumping. Adult plaintiffs testified they did everything possible to eliminate the blow flies and were finally successful after Eva Jane was taken to the hospital, by using a large spray gun with special powder recommended by the Health Department. During and after the pumping, the yard of the Wardrop home was littered with bits of green substance and other muck.

Defendant Baker testified that he noticed debris in the water when he was pumping it out. City Engineer Butcher also testified that he inspected the water prior to writing his letter of May 24, 1954, and that the water was in a stagnant condition and had a greenish, oily film on the surface and greenish moss. From the time the Wardrops moved in, March, 1954, to the time of pumping in June, Mrs. Wardrop observed that the sump water was dirty, with bits of debris, and green scum on the surface. She also observed that the sump had a "sour" odor.

Donald Marshall, police officer for the City of Manhattan Beach, to whom Mrs. Wardrop complained, testified that he observed the pumping on one occasion, that the water from the sump was very dirty, that there were foreign objects floating in the water and that there was an "unpleasant odor". He observed water on the front porch of the Wardrop home. Mr. Marshall was on the premises on the 16th day of June, 1954. He testified on cross-examination that he observed toilet paper in the sump water in the backyard of the Wardrop home and all kinds of small particles of rubbish. The water was never disinfected by defendants at any time.

As heretofore noted, the area here in question was serviced by cesspools and there were no sewers. There is in the record evidence concerning the overflowing of these cesspools. James S. Parkinson who lived four houses west of plaintiffs' home testified that rains interfered with completion of the sump. That he saw the sump water later being pumped out and then in the backyard of plaintiffs' home. This witness further testified that while the sump was being dug and its completion interrupted by the rains his neighbor's cesspool "looked like the cesspool had blowed up and water had come up fully six feet high". "It spouted up like a geyser". His neighbor's yard was "all flooded around there at the time". The offensive odor was very strong at that time and Mr. Parkinson complained to city authorities. Mr. Parkinson stated that his backyard has flooded every winter he has lived there. During the rainy season the cesspool could not hold any more water and drained down toward the lower land.

During the five days in which the sump water was pumped into the Wardrop backyard, Mrs. Wardrop kept the children in the house. *However, on the third day of pumping operations, June 16, 1954, the minor plaintiff, Eva Jane Wardrop, ran out of the house to greet her father coming home from work, and she fell in the muddy water which got into her nose, mouth, eyes and hair.* During this period none of the Wardrop children were going to school, as they were of a pre-school age. After the pumping operation ceased Mrs. Wardrop had a difficult time keeping the four children in the house. The children were restless from being confined and the mother had two small babies to take care of so she could not watch the two older children all the time. Eva Jane got out into the backyard and into the mud caused by the pumping of the water. Mrs. Wardrop had to change Eva Jane's dress three or four times a day because of the muddy condition of the yard.

The minor plaintiff Eva Jane had never been to the market nor to the beach. The only place the children were taken was to the home of Mrs. Wardrop's mother-in-law and father-in-law in the City of Redondo Beach. There were several children who lived in the neighborhood of 819 Meadows. Also, Mrs. Wardrop had never taken her children to a motion picture theatre.

On the subject of poliomyelitis, plaintiffs called two qualified expert witnesses, Dr. A. F. Rasmussen and Dr. Milton Rosenthal. Defendants called Dr. Albert G. Bower. We regard the following as a fair epitome of the testimony given by plaintiffs' expert witnesses. The germ connected with poliomyelitis is called the virus of poliomyelitis. It affects human beings only. The virus grows only in the human body. It grows all along the digestive tract, from the mouth all the way to the bowel. The two major areas where it proliferates in large amounts are in the tonsils and in the walls of the small bowel. The virus usually enters through the mouth and proliferates in the mouth and tonsils and persists there in fairly large quantities for a few days. The virus is usually found in the mouth and tonsils for only two or three days and then the virus goes rapidly down to the stomach and to the bowel and proliferates in the small bowel and it will persist or exist there for several days, in most individuals for a week or 10 days but sometimes longer, and even occasionally for several weeks and months. In fact, in one or two documented cases the virus has persisted in the bowel for a period in excess of a year. Dr. Rasmussen testified that he treated one patient in whom the virus persisted in the bowel in excess of six weeks.

The virus then accumulates in the large bowel along with other waste products of digestion, and is discharged by the body through the bowel waste; and also during the early phase of the infection, the virus is discharged from secretions of the mouth.

There are so many virus in the bowel that the raw sewage of any large city during the late summer is likely to contain large amounts of virus, so much that one teaspoonful would contain four to five billion microbes of virus particles. *The bowel wastes are by far the largest source of the virus.* Experimentation has shown that flies, blow flies in particular, carry the virus and can infect food. However, the importance of flies in the transmission of the disease is still a matter of conjecture. *Dr. Bower testified that the virus is found in sewage, that is from excretions of the human body in sewage systems or in outhouses or toilets.* Dr. Bower agrees that it is much easier to capture the virus from the human stool rather than a person's throat because it remains in the throat a relatively short time, *but it may be found in the stool for many weeks and in a few cases many months.* Dr. Bower stated that he "could see how it would be possible" for the virus to travel several miles in a stream of water but that he could not "speak from any knowledge". *He also testified that the poliomyelitis virus exists at times in contaminated water supplies and sewage.* Dr. Bower stated he had particular reference to rivers, lakes, and the ocean where sewage outfalls exist and grossly contaminate the water.

The experiments of some scientists have shown that *the virus exists for weeks, at least, in cesspools, can be found in sewage, and will persist in storage sewage water.* Dr. Rosenthal testified that the virus can live for as long as seven months. As to the length of life of the virus in cesspools or sewers, Dr. Bower testified, "I would expect it to live longer—I say I would expect it, but that is based on what I know of the organism, and what I know of its life habits". In his book entitled, "Communicable Diseases for Nurses", Dr. Bower states that the polio virus "will survive in the body secretions at ordinary temperatures outside the body for long periods of time". He also explained that the stool and the urine are the principal secretions from the body.

As to the incubation period of the virus, Dr. Bower testified that in many textbooks such period has been stated to vary from two to thirty-five days; that his personal opinion is "10 to 12 days at the outside". By incubation period is meant the period of time dating from the time the virus entered the mouth, to the time of the onset of the first illness. From the first sign of illness to the time paralysis develops, may involve a further period as long as 25 days. Dr. Bower explained that a child in the biphasic type may have a headache, backache and fever and be sick from 2 to 4 days; then the child is well from 2 to 18 days, and then has the symptoms all over again accompanied by weakness or paralysis and it may be fully 25 days between the time the first symptom appeared until the time the patient is paralyzed.

As to the symptoms of the minor plaintiff Eva Jane Wardrop there is testimony in the record that prior to the time of the pumping, the child enjoyed good health. Her mother noticed that on July 4, 1954, Eva, who was present at a fireworks display, which she had looked forward to with keen anticipation, complained of being very tired and expressed a desire to be taken home. From the time the child arrived home, her mother observed a worsening of her health. Eva suffered a loss of energy and of appetite. On July 24th she made no effort to get out of bed. Her temperature was up and she complained of pain in her legs. The mother first noticed fever in Eva Jane around July 11. The child's temperature went up and down and back to normal. During this time, the child complained of headaches, not being able to sleep, and not feeling hungry. She ran a fever as the month of July progressed and she vomited and had diarrhea. On or about July 24, Eva Jane Wardrop became noticeably worse. The child had no strength at all. The father, George C. Wardrop, first noticed Eva Jane's sickness on the 4th day of July. He had planned quite an event for her that evening. Also, on her birthday, on July 16th, the child refused her birthday cake. Eva Jane Wardrop was seen by Dr. Julius Strauss, Dr. Lorenz and Dr. Greenhut. She was taken to Dr. Strauss approximately July 11th. Dr. Lorenz saw the child on July 15, 24, and 31. She last saw Dr. Lorenz on July 31, and then the child was taken to Dr. Greenhut at 4:00 a. m. on August 1st.

The other Wardrop children were taken ill and had the same symptoms as Eva Jane, although none of them had any permanent ill effects. The other children were suffering from vomiting and febrile temperature. Little Nancy Jo had temperature and was "fussing" on July 11.

Since no claim is made on this appeal that the damages awarded are excessive, we deem it unnecessary to narrate the condition of the minor plaintiff at the time of the trial nor to detail testimony as to prognosis. It will suffice to say that the child was taken to the Los Angeles County General Hospital on August 1, 1954. Her case was diagnosed as that of bulbar poliomyelitis. She remained at this hospital for approximately five weeks. She was placed in an iron lung. She was then taken to Rancho Los Amigos and was there for approximately one and one-half years. After staying there for approximately one year, she was able to go home on weekend passes.

At the time of trial in March, 1957, almost three years from the time of her infection, her whole body from the neck to her knees and legs, was enclosed in a cast. Each leg was in a separate cast. The child could not bend at the waist. She has had three surgical operations and there are three contemplated surgical procedures. With reference to her future the testimony was that the possibility of return of muscle function is slight after two and one-half years. "The main thing is to give the child a stable trunk". If this can be done she will be able to sit in a wheelchair. In order to walk, she will need braces from foot to hip and crutches for support. "It is possible that she would be able to stand and to walk to some extent perhaps with this apparatus". The ability to walk will depend on the outcome of the future operations

It will be difficult for her to stand for any length of time.

We are not here concerned with a case wherein the appeal is taken from a judgment rendered by the duly constituted arbiter of the facts, or based upon conflicting evidence, but are confronted with an appeal taken after a jury verdict in favor of plaintiffs and wherein a judgment predicated thereon was set aside by the trial court and judgment ordered in favor of defendants notwithstanding the contrary verdict of the jury.

[1] The rule governing the trial court when, as in the case at bar, it is confronted with a motion to set aside a judgment notwithstanding the verdict, is thus stated in Card v. Boms, 210 Cal. 200, 202, 291 P. 190, 191, "The right of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its right to grant a nonsuit [citations]. The court should therefore grant such a motion when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." See also Estate of Green, 25 Cal.2d 535, 546, 154 P. 2d 692; Hunt v. United Bank & Trust Co., 210 Cal. 108, 117, 291 P. 184; Free v. Furr, 140 Cal.App.2d 378, 381, 295 P.2d 134; Martin v. Ideal Packing Co., 156 Cal.App. 2d 232, 319 P.2d 95.

Recognizing this rule, respondent concedes that "The issue on this appeal is whether there was sufficient evidence of a causal connection between the acts of the defendants and the disease of poliomyelitis suffered by the minor plaintiff to sustain a finding in favor of the plaintiffs".

Respondents urge that the record is barren of any evidence distinguishing between the sump water and the conditions it created as transmitting agents and the many and various modes of transmission from other sources to the end of establishing a foundation for a reasonable belief that the former was probably responsible instead of the innumerable other sources. In other words, that under the evidence in this case it was just as probable that the minor plaintiff contracted poliomyelitis from a source other than the sump water. However, we do not regard the burden of proof resting upon plaintiffs to require demonstrable or direct proof that the polio virus was found in the sump water and that as a result thereof, the minor plaintiff's contact therewith infected her with the disease. Plaintiffs satisfied the burden of proof which the law imposed upon them if they presented such facts and circumstances from which it could reasonably appear that the minor plaintiff's fall into the sump water and contact therewith was the probable efficient cause of her affliction. The cases of Ritterbusch v. City of Pittsburg, 205 Cal. 84, 269 P. 930, 61 A.L.R. 448, involved a situation wherein defendant city supplied water for drinking purposes from the New York Slough, an off-shoot of the San Joaquin River. The water taken from the slough passed through a chlorination plant, but the plant broke down for a 12-hour period and unchlorinated water passed into the city's water mains during this 12-hour period. Plaintiff's intestate succumbed. It was claimed that plaintiff's intestate's death was due to typhoid contracted from the drinking of the unchlorinated water. Defendant city argued that the infection of typhoid "might have had its origin in other sources such as the use of water from wells in various parts of the city * * *". The court, however, 205 Cal. at page 88, 269 P. at page 931 states that such an argument "creates at best but a conflict in the evidence as to the source of infection, and this evidence is weakened as to its inferences by the fact that, while these other sources of water supply had existed for a considerable period of time prior to the month of June, 1920, no epidemic had resulted until the particular period following the pollution of the municipal water supply."

[2] Before discussing the facts from which we believe the jury could reasonably conclude that the source of infection was from the sump water rather than from some other source, we feel impelled to further point out with reference to respondents' contention that the case of the minor appellant "as to causal connection rests only upon coincidence and speculation", that appellants were not required to prove by direct evidence the existence of polio virus in the sump water and that her illness was occasioned by her falling into it. As heretofore stated, all that appellants were required to do was to present evidence from which the jury could reasonably have inferred that the sump water was the probable cause of polio contracted by Eva Jane Wardrop.

Strikingly similar to the question now presented to us is the case of McAllister v. Cosmopolitan Shipping Co., 2 Cir., 169 F. 2d 4, which involved an appeal from a general verdict after a jury trial of an action by a seaman under the Jones Act (46 U.S.C.A. § 688) against the defendant for negligence in causing plaintiff to contract poliomyelitis while working on a vessel in Chinese waters. When the ship arrived in Shanghai, the crew was warned of an epidemic of poliomyelitis in that city and they were admonished not to associate with the Chinese while ashore and to take their meals only in certain places available to seamen. It appears that passengers and other people boarded the vessel at Shanghai, the latter for the purpose of performing stevedoring work. They used common toilet facilities and a common drinking fountain. Two Chinese cooks who came on the ship at Shanghai used the same cooking utensils and handled the same food as other cooks. No evidence was presented that any of these people boarding the vessel at Shanghai were actually infected with the virus of poliomyelitis. In affirming a judgment for $100,000, Mr. Justice Hand noted that the jury could properly find that plaintiff's infection was caused "by conditions negligently permitted to exist on shipboard at that time * * * and which were conducive to polio". In the cited case the important issue was predicated on the claim of defendants that they were not liable if plaintiff had contracted the disease while frequently ashore during the month the ship was docked at Shanghai. Defendant contended that it was just as probable that plaintiff contracted polio while ashore and exposed to it. In rejecting this contention, the court, 169 F.2d at page 7, said: "The defendant argues however that plaintiff might have contracted polio when he took shore leave at Shanghai as he frequently did during that period. It is undoubtedly true that no one can be certain where he contracted the disease, but he had been warned by notices posted on the ship that there was danger of contracting polio in that port and to avoid associating with coolies when on shore and to eat his meals at American clubs available to seamen. This warning coupled with the fact that there was no evidence that the plaintiff did not give heed to it made it permissible for the jury to find that he became infected on shipboard due to negligence of the defendant rather than on shore."

While this decision was reversed by the United States Supreme Court (Cosmopolitan Shipping Co., Inc., v. McAllister, 337 U.S. 783, 69 S.Ct. 1317, 93 L.Ed. 1692), the ground of reversal was that the General Agent could not be sued as the "employer" under the Jones Act since the United States was the employer.

In County of Los Angeles v. Industrial Accident Commission, 13 Cal.App.2d 69, 56 P.2d 577, 578, a nurse employed at the Los Angeles General Hospital as a graduate student nurse consumed her meals with other nurses in what was known as the contagious diseases building and which dining room was used by nurses from the ear and nose clinic wherein treatment was accorded to polio patients. The afflicted nurse also worked three days in the ear and nose clinic where she was also exposed to polio, characterized in that case by medical testimony as a "most infectious and contagious" disease. In that case, as in the one at bar, the contention was advanced by the county, "that the finding of the commission that the employee contracted poliomyelitis * * * in the course of and arising out of her employment is unsupported by substantial evidence and *is mere speculation and conjecture*". (Emphasis added.) In rejecting this argument it was said by this court, 13 Cal.App.2d at page 73, 56 P.2d at page 579: "There was an abundance of evidence adduced before the commission upon which it could reasonably find that the employee's exposure to this contagious disease in the course of her employment resulted in her affliction." See also Industrial Commission v. Corwin Hospital, 126 Colo. 358, 250 P.2d 135; Ritterbusch v. City of Pittsburg, supra.

In Stubbs v. City of Rochester, 226 N.Y. 516, 124 N.E. 137, 140, 5 A.L.R. 1396, plaintiff drank tap water and contracted typhoid fever. He offered evidence that dirty water from the Genessee River was entering the water lines, and that the water was "oily and of unusual appearance". The defense proved that typhoid fever could be due to drinking polluted water, eating raw fruits and vegetables fertilized by raw excrement, consumption of shell fish, infected milk and vegetables, personal contract with infected persons, and other causes known and unknown to medical authorities. Defendant argued that plaintiff must prove his injury was due in whole or in part to the cause for which it was responsible and that plaintiff should eliminate the other causes for which defendant was not responsible. The court rejected this contention, stating: "If the argument should prevail and the rule of law stated is not subject to any limitation, the present case illustrates the impossibility of a recovery in any case based upon like facts. One cause of the disease is stated by counsel to be 'personal contact with typhoid carriers * * * whereby bacilli are received and accidentally transferred by the hands or some other portion of the person or clothes to the mouth.' * * * To prove the time when he was attacked with typhoid, then find every individual who traveled on the same car with him, and establish by each one of them that he or she was free from the disease even to his or her clothing is impossible * * * If two or more possible causes exist, for only one of which a defendant may be liable, and a party injured established facts from which it can be said with reasonable certainty that the direct cause of the injury was the one for which the defendant was liable, the party has complied with the spirit of the rule."

For other cases establishing the rule that if the plaintiff is able to establish with *reasonable certainty* that the direct cause of injury was the one for which the defendant was liable, the jury will be permitted to say whether they are satisfied with the proof made, and in the case at bar, determine therefrom, that the source of minor appellant's infection was the polluted sump water, see Hamilton v. Madison Water Co., 116 Me. 157, 100 A. 659, 660; Boguski v. City of Winooski, 108 Vt. 380, 187 A. 808, 811; Forbes v. City of Jamestown, 212 App.Div. 332, 209 N.Y.S. 99, 102.

We find nothing in the cases cited by respondents that militates against what we have herein stated or the authorities relied upon by us.

[3] It is true, as stated by respondents, that difficulty of proof will not serve as an excuse for substituting speculation for evidence, but in the instant case, to insist that appellants must establish by positive proof that the minor appellant's infection came from the sump water would be to require an impossibility. All that is required is that appellants present testimony from which the triers of fact could by reasonable inference, reach a conclusion to that effect. McAllister v. Cosmopolitan Shipping Co., supra, 169 F.2d at page 7; County of Los Angeles v. Industrial Accident Commission, supra, 13 Cal.App.2d at page 73, 56 P.2d at page 578. We are satisfied that from the evidence in the case now engaging our attention, the minor appellant coming into direct contact with fecal matter in the sump water was more likely to have become infected therefrom than from some type of

indirect contact or infection. In the case at bar, there was evidence that the condition of the sump, the surrounding drainage area, the number of houses and cesspools remained unchanged between the time of the pumping of the water into appellants' backyard in June of 1954 and the time when tests were made of the sump water on August 8, 1955 showing that the sump water, into which the minor plaintiff fell, actually contained fecal matter. If, as respondents contend, there is no causal connection between the sump water and the minor appellant's polio, why did she become infected shortly after her exposure to the particular sump water, which period of exposure coincides with the incubation period of poliomyelitis?

Respondents' contention that the expert medical testimony was insufficient because no doctor testified that in his opinion this particular sump water was the infecting agent of Eva Jane's poliomyelitis is not borne out by the record because, as the trial judge stated during the argument on the motion for nonsuit, "Now, as I review the testimony of Dr. Rasmussen, he has in effect testified that that is a reasonable medical possibility. He did not apply it to this case, but taking his testimony as a whole, that is the effect of his testimony."

And as the court further observed, "If that opinion is merely the ultimate reasoning drawn from the medical facts that are established, it seems to me the Jury could draw that conclusion, and its duty is to draw that conclusion rather than the doctor."

The evidentiary features of this case are herein set forth in detail, and it would unduly prolong this already lengthy opinion to here again narrate them. We are satisfied that the learned trial judge correctly epitomized the evidence, when, in denying the motion for nonsuit he said:

"The evidence shows that the defendants, in order to complete the performance of their contract for the construction of the sump, wilfully and intentionally pumped the water from the sump onto the land which was occupied in tenancy from month to month by the Wardrop family. * * *

"It shows that there was a source of contamination of that water with human fecal matter, as I have heretofore pointed out, by the rainfall, and also I think it is possible here to suppose—that it is reasonable to suppose that there was some subsurface flow of water from those cesspools, as shown by the growth of vegetation there. *It shows that this water—and this could be a finding by the jury—was contaminated with human fecal matter. It shows that human fecal matter often carries the polio virus, and that the polio virus is taken into the human system through the mouth; that this child fell into this water and got water in her face and in her mouth and in her nose,* as I remember the mother's testimony, and all over her clothing. * * *

"It shows that the child commenced about seven days after the fall into the water—I have this exact in my notes, but I do not believe I need to refer to them now. The evidence shows that the child became listless about seven days after the fall, and there was a loss of appetite; and on July 4th, which was about eighteen days after the time she fell into the water, she had marked loss of strength. That shortly after that she started to have recurrent fever, and constantly lost strength until the symptoms of paralysis and the degenerative symptoms of polio appeared, and poliomyelitis was diagnosed on August 1st.

"Now, this takes two reasoning processes. You have the reasoning process by which the jury could find that there was fecal matter, and they could find that there was a reasonable probability that that matter contained the virus of poliomyelitis. And then they could reason back from the fact that she contracted it from the result to the cause, that she contracted it by the inducement into her mouth of the contaminated water.

"Therefore, it seems to me that, although sketchy, I cannot say that it is not a question of fact for the jury." (Emphasis added.)

Then, after pointing out that there are many other sources of infection and that some of them were just as reasonably probable as the pumping of the water from the sump into appellants' backyard, such as the fact that the minor appellant had been playing with children who came from a source of infection that was closer to the cesspools than the sump, the trial judge continued: "But under the law, where there are two or more probable sources, I do not believe I could take away from the jury the question as to whether or not there is a reasonable probability—and, after all, that is all the preponderance of the evidence means—that this was the source of infection." In answer to respondents' counsel that any medical expert "would have had to testify that there was a reasonable possibility that she (minor appellant) got the germ from her father, from her mother, from a child, from playing with other children", the trial judge correctly observed, "Oh, that is true, there is no doubt about that. That was brought out in the typhoid cases that were cited * * * There is this evidence Mr. McGee: that, with the exception of playing with the neighborhood children, and there is no evidence that any of those children were afflicted with the disease, and there was no other source of exposure except the parents." The court then pointed out that under the evidence, on motion for nonsuit, the inference must be drawn that the sump water actually contained the polio virus, and "we have to draw the further inference, which is one that I think under the evidence could be reasonably drawn, that this colon bacilli came from human rather than animal excrement. Whether or not the jury will draw that inference, I don't know."

All of the foregoing evidence and the inferences reasonably deducible therefrom were present at the time the motion for a nonsuit was properly denied, and also when with equal propriety, the motion for a directed verdict was denied. It is therefore, manifest to us that the case was properly submitted to the jury, and that under well established rules (Card v. Boms, supra, 210 Cal. at page 202, 291 P. at page 191), the trial court erred in granting the motion for judgment notwithstanding the verdict.

The judgment is reversed and the cause remanded with directions to the court below to enter judgment in favor of the plaintiffs in accordance with the verdicts of the jury rendered in this action.

FOURT and LILLIE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

160 Cal.App.2d 832

Mike RAGAN, Plaintiff and Respondent,
v.
John SIRIGO, Defendant and Appellant.
No. 17501.

District Court of Appeal, First District, Division 1, California.
May 27, 1958.

Hearing Denied July 23, 1958.

Action by one of owners of patent for royalty allegedly due under licensing agreement which provided that licensee might terminate agreement upon 60 days notice in writing. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., rendered judgment for owner, and licensee appealed. The District Court of Appeal, Fred B. Wood, J., held that owner's attorney's letter to licensee's attorney stating that owner had asked that his attorney reply to licensee's attorney's letter which stated that licensee felt that he must give up his agreement did not demonstrate that required notice of termination had been given, in absence of licensee's attorney's letter into evidence, and in view of later correspondence between attorneys reflecting an attempt to effect a termination of contract by mutual agreement and of their failure to agree.

Affirmed.

1. Patents ⚷219(5)

In action by one of two joint owners of patent rights against alleged licensee for royalties due under contract which plaintiff signed but other owner did not sign, evidence sustained finding that parties entered into contract whereby plaintiff gave defendant a license to manufacture and sell patented devices.

2. Patents ⚷207

A joint owner of a patent may, without the concurrence of his co-owner, grant a third party the right to use the invention covered by the patent.

3. Patents ⚷219(1)

Fact that plaintiff and another together owned patent did not make the other owner an indispensable party in suit by plaintiff to enforce his rights under his sole contract for licensing patent with a third person, and even if other owner were a third party beneficiary under the contract, he still would not be a necessary party to the action. West's Ann.Code Civ.Proc. § 369.

4. Patents ⚷214

Patent owner's attorney's letter to licensee's attorney stating that owner had asked that his attorney reply to licensee's attorney's letter which stated that licensee felt that he must give up license agreement did not demonstrate that notice required under licensee agreement providing that licensee might terminate agreement upon notice in writing had been given, in absence of licensee's attorney's letter, and in view of later correspondence between attorneys reflecting an attempt to effect a termination of agreement by mutual agreement and of their failure to agree.

◆

Theodore M. Monell, San Francisco, for appellant.

Todd & Todd, San Francisco, for respondent.

FRED B. WOOD, Justice.

The judgment awarded plaintiff $3,100 for royalties due him pursuant to a contract dated August 8, 1941, whereby he granted defendant the right and license to manufacture and sell (with right of assignment and sublicense to others) certain patented devices claimed in a certain patent application, throughout the United States and its territories, dependencies and possessions, for the full term of any Letters Patent that might issue and all renewals and reissues thereof.

The contract reads as if there were two grantors, "William P. Murphy and Mike Ragan" and that the two of them owned the patent rights involved. Of the two, Ragan only, not Murphy, signed.

From these circumstances defendant would have us conclude that no contract came into existence; also, that there is a fatal defect of parties because of the failure to join Murphy or his personal representative (Murphy having died). Defendant further claims that the contract was terminated at such a time as would leave due as royalties the sum of $300 and no more. Our examination of the record convinces us that none of these claims is sound. The judgment should be affirmed.

(1) *Did the parties enter into a contract whereby plaintiff gave defendant the license described? Yes.*

[1] The trial court so found and the record supports the finding. That support is furnished largely by the conduct of the parties. For several years they treated it as a contract and recognized the obligations which it imposed upon them, respectively. It is a reasonable inference that the absence of the signature of Murphy or his personal representative was of no significance to them and that they intended and regarded it as a contract solely between themselves. See Cavanaugh v. Casselman, 88 Cal. 543, 549, 26 P. 515; Winter v. Kitto, 100 Cal.App. 302, 306–308, 279 P. 1024; John v. Marshall, 103 Cal.App.2d 172, 178, 229 P.2d 367; 12 Cal.Jur.2d 247–248, § 49.

[2] It happens that it was entirely competent for plaintiff to make such a contract without his co-owner joining therein. A joint owner of a patent may, without the

concurrence of his co-owner, grant a third party the right to use the invention covered by the patent. Blackledge v. Weir & Craig Mfg. Co., 7 Cir., 108 F. 71; Lalance & Grosjean Mfg. Co. v. National Enameling & S. Co., C.C., 108 F. 77; Drake v. Hall, 7 Cir., 220 F. 905, 906; Talbot v. Quaker State Oil Refining Co., 3 Cir., 104 F.2d 967, 968; Gibbs v. Emerson Electric Mfg. Co., D.C., 29 F.Supp. 810.

(2) *Neither Murphy nor his personal representative is an indispensable party to this action.*

[3] The basis of defendant's claim in this regard is not entirely clear. The mere fact that Murphy and Ragan together owned the patent would not make Murphy an indispensable party in a suit by Ragan to enforce Ragan's rights under his sole contract with a third person. If Murphy were a third party beneficiary under the contract, he still would not be a necessary party to the action. Code Civ.Proc. § 369. Lewis v. Hayes, 177 Cal. 587, 171 P. 293, is not analagous. There, a partner was attempting to collect tort damages for injury to the partnership property.

As in Morrow v. Superior Court, 9 Cal. App.2d 16, 48 P.2d 188, 50 P.2d 66, the trial "court did not find, and the record does not indisputably show, that in the pending action in the court below the controversy cannot be completely determined without the presence [of the claimed indispensable party]." 9 Cal.App.2d at page 27, 50 P.2d at page 67 opinion of Supreme Court upon denying a petition for a hearing by that court. See also Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 671–672, 284 P. 445; Jollie v. Superior Court, 38 Cal.2d 52, 56–59, 237 P.2d 641.

(3) *Was the contract terminated as claimed by the defendant? No.*

[4] Defendant contends that the contract was terminated by mutual consent of the parties at a time when the accrued liability of defendant was $300. Paragraph (11) of the agreement provided: "* * * Licensee may terminate this agreement at any time upon sixty (60) days' notice in writing to Licensors, but such termination shall not relieve Licensee from any obligations or royalties accruing prior to the date of said termination." Defendant argues that a letter of September 27, 1948, from plaintiff's attorney to defendant's attorney demonstrates that defendant had already terminated the contract. In his letter of the 27th plaintiff's attorney wrote in part: "Mr. Ragan has asked me to reply to your letter of September 2nd which states that Mr. Sirigo feels that he must give up his license agreement with Mr. Ragan." This falls far short of demonstrating that Sirigo had given the required notice of termination; also, the letter of September 2d was neither introduced nor offered in evidence. Moreover, there ensued later correspondence between the attorneys for the parties which reflects an attempt to effect a termination of the contract by mutual agreement and that they failed to agree upon mutually satisfactory conditions for such termination.

It does appear that under another clause* of the agreement plaintiff on January 10, 1949, gave defendant notice of default and intention to cancel upon the expiration of thirty days if the default were not cured within that period of time. However, the plaintiff did not follow this up by an act of cancellation. Instead, by a letter of February 17, 1949, he notified defendant that he elected to stand on the contract.

The trial court found that plaintiff had terminated the agreement by written notice and that the minimum royalties of $100 per month for the period extending from April 1, 1948, to October 31, 1950, amounted to $3,100. We might infer an implied finding that plaintiff gave written notice of cancellation on or about October 31, 1950. The amended complaint, which was filed November 30, 1950, alleged that plaintiff had terminated the agreement by written notice and that defendant was indebted for the amount of the minimum royalties which accrued between the period extending from April 1, 1948, to October 31, 1950. The record before us does not show when the original complaint was filed. If it was filed on or about October 31, 1950, the trial court may have treated the complaint as written notice of termination. However that may be, there is no evidence of an earlier termination by either party. Accordingly, defendant-appellant is not aggrieved by having his obligation to pay minimum royalties terminated as of the date impliedly found by the trial court. Plaintiff-respondent is not complaining nor would he be in a position to complain in view of the allegations in his amended complaint and in view of his failure to appeal.

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* Paragraph (8) of the agreement declared that if either party defaulted in the making of any payment or committed other breach of the agreement "and shall not cure said default or breach within thirty (30) days after receipt of written notice thereof, then the injured party may forthwith terminate this agreement by written notice thereof * * *."

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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160 Cal.App.2d Supp. 867

**CITY OF LOS ANGELES, etc., et al.,
Plaintiffs and Appellants,
v.
J. Kenerson McNEIL, etc., et al., Defendants and Respondents.**

Civ. A. 9482.

Appellate Department, Superior Court,
Los Angeles County, California.
May 15, 1958.

Action against administrator. The Municipal Court of the Los Angeles Judicial District, Elisabeth Eberhard Zeigler, J., rendered judgment for administrator, and the plaintiffs appealed. The Appellate Department of the Superior Court, David, J., held that where decedent was killed when his plane crashed into a portion of city's electrical system, and city presented timely claim for damages to system to administrator and claim was rejected, the claim was "then due" within statute providing that suit on claim then due must be brought within three months of notice to claimant of rejection of the claim.

Affirmed.

1. Executors and Administrators 🔑224

Where statute providing that all claims arising out of contract must be filed or presented against estate within the time limited in the notice was amended in 1949 to include all claims for damages for physical injuries or death or injury to property, the nonamendment in 1949 of the statute requiring suit against estate to be brought within three months after date of service of notice if claim is then due, or if claim is not then due, within two months after claim becomes due, disclosed no legislative intent to exclude tort claims from the limitation of the latter statute. West's Ann.Prob.Code, §§ 707, 714.

2. Statutes 🔑223.2(12)

The court must harmonize and give effect to statute relating to time to file claims against estate and to statute relating to time to file action upon rejected claims in the light of the revealed and accepted policies followed as to probate claims. West's Ann.Prob.Code, §§ 707, 714.

3. Statutes 🔑212.1

In amending statute relating to time to file claims against estate and in failing to amend statute relating to time to file action on rejected claims, the legislature was presumed to have acted knowing the existing judicial construction of the first statute in relation to the other statutes pertaining to presentation of claims against estates. West's Ann.Prob.Code, §§ 707, 714.

4. Limitation of Actions ⚿55(5)

A cause of action arises and the general statute of limitations begins to run on tort actions for injury to property at the time the injury is sustained. West's Ann. Code Civ.Proc. § 338.

5. Executors and Administrators ⚿437(3)

Both tort and contract claims are covered by statute relating to time to file action against estate on rejected claims. West's Ann.Prob.Code, § 714.

6. Executors and Administrators ⚿437(7)

Where decedent was killed when his plane crashed into a portion of city's electrical system, and city presented timely claim for damages to system to administrator and claim was rejected, the claim was "then due" within statute providing that suit on claim then due must be brought within three months of notice to claimant of rejection of the claim. West's Ann.Prob.Code, §§ 707, 714.

See publication Words and Phrases, for other judicial constructions and definitions of "Then Due".

7. Executors and Administrators ⚿459

A basic objective of probate is to settle the estate of decedents at the earliest possible time.

◆

Roger Arnebergh, City Atty., Gilmore Tillman, Chief Asst. City Atty. for Water and Power, Desmond J. Bourke, Stephen R. Powers, Jr., Deputy City Attys., Los Angeles, for appellants.

Spencer & Harris, Inglewood, for respondents.

DAVID, Judge.

Decedent Thomas A. McNeil was killed when his plane crashed into a portion of the plaintiff City's electrical system. Appellant City presented its claim for damages to its system to defendant J. Kenerson McNeil, as administrator of decedent's estate as required by Probate Code sec. 707. The claim was rejected but suit was not filed thereon within the three months' period prescribed in Probate Code sec. 714, for claims "then due". Judgment followed for the administrator, and the City of Los Angeles appeals, urging that the three months' limitation for suit upon a rejected claim under Probate Code sec. 714 does not apply.

[1] That section provides: "When a claim is rejected either by the executor or administrator or by the judge, written notice of such rejection shall be given by the executor or administrator to the holder of the claim or to the person filing or presenting it, and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due; otherwise the claim shall be forever barred."

Probate Code sec. 707, prior to its amendment in 1949, required presentation of "All claims arising upon contract, whether they are due, not due, or contingent * * * must be filed or presented within the time limited in the notice * * *".

In 1949, the section was amended to include "all claims for damages for physical injuries or death or injury to property * * *". By comparison of the language of the two sections prior to the 1949 amendment, it is urged by appellant that the limitation in section 714 requiring suit "within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due" referred strictly to contractual claims; and that not having been amended, there is no limitation in sec. 714 pertaining to tort claims. The nonamendment of sec. 714 when sec. 707 was amended is said to reveal a legislative intent to exclude tort claims from the limitation. By the same token, it may as easily be inferred that the lawmakers did not amend the section because of a belief tort claims would fall within the existing provisions of sec. 714; or what is equally probable, the effect of the amendment of Probate Code sec. 707 on sec. 714 may not have been considered at all.

[2] It is our duty to harmonize and give effect to both sections in the light of the revealed and accepted policies followed as to probate claims.

[3] The Supreme Court in National Auto. & Cas. Ins. Co. v. Ainge, 1950, 34 Cal.2d 806, 808–809, 215 P.2d 13, 15, construing Probate Code sec. 707 prior to the 1949 amendment held, "Ever since what is now section 707 was amended to include the phrase 'arising upon contract', it has been regarded as defining what claims are meant by the other sections [of this chapter of the Probate Code]." It is submitted that since sec. 707 modified the other sections of that chapter before the 1949 amendment, that likewise the 1949 amendment to the same section must be held to govern the applicability of Probate Code sec. 714 now. The legislature is presumed to have acted knowing the existing judicial construction of Probate Code sec. 707 in relation to other sections pertaining to claims. In re Estate of Moffitt, 1908, 153 Cal. 359, 361, 95 P. 653, 1025, 20 L.R.A.,N.S., 207; McColgan v. Jones, Hubbard & Donnell, 1938, 11 Cal.2d 243, 247, 78 P.2d 1010.

The definition of "claim" is not limited to claims arising upon a contract, or a "debt". An early California Supreme Court case construed the term "claim" to mean a "legal demand for money." Gray v. Palmer, 1858, 9 Cal. 616, 636. In Fallon v. Butler, 1862, 21 Cal. 24, 32, it was held that the term "claim" in the Probate Act "has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered." Accord: In re McCausland's Estate, 1878, 52 Cal, 568, 576; cf. Boulden v. Thompson, 1913, 21 Cal.App. 279, 131 P. 675; Tinkham v. Tinkham, 1942, 112 Ind. App. 532, 45 N.E.2d 357, 360; In re Quinney's Estate, 1939, 287 Mich. 329, 283 N.W. 599, 600; Chabre v. Page, 1941, 298 Mich. 278, 299 N.W. 82, 85; cf. Caiola v. Hammer, 1936, 186 A. 434, 435–436, 14 N.J. Misc. 576; Sherwood v. City of Bridgeport, 1937, 123 Conn. 348, 195 A. 744, 745. A "claim" sometimes is synonymous with "cause of action". Riddoch v. State, 1912, 68 Wash. 329, 123 P. 450, 451, 42 L.R.A., N.S., 251. Newberry v. Wilkinson, C.C., 1911, 190 F. 62, 67. "Claim" embraces tort claims, Williams v. Williams, 1940, 217 Ind. 581, 29 N.E.2d 557, 558; even against an estate, Chabre v. Page, supra, 1941, 298 Mich. 278, 299 N.W. 82, 85; Bishop v. Big Sandy Lumber Co., 1917, 199 Ala. 463, 74 So. 931, 932.

A tort claim in California may be a claim or demand against the estate. Cf. George v. McManus, 1915, 27 Cal.App. 414, 150 P. 73, 75.

[4] The cases indicate that the cause of action arises, and the general statute of limitations begins to run on tort actions for injury to property (Code of Civil Procedure sec. 338) at the time the injury is sustained. Roth v. Cottrell, 1952, 112 Cal.App.2d 621, 246 P.2d 958; Smith v. City of Los Angeles, 1944, 66 Cal.App.2d 562, 583, 584, 153 P.2d 69; Gale v. McDaniel, 1887, 72 Cal. 334, 13 P. 871; Centerville & Kingsburg Irr. Ditch Co. v. Sanger Lumber Co., 1903, 140 Cal. 385, 73 P. 1079.

[5] The purpose of filing a tort claim is to permit investigation and possible settlement without expenses of extensive litigation. This purpose having been served, followed by rejection of the claim, the bar to suit is then removed. If it were not contended that some amount was "due" from the estate, there would be no claim at all. A tort claim is not contingent even when damages are unliquidated. But here, the damage items pertain to property and are specific, and the cause of action has accrued. We hold both tort and contract claims are covered by the provisions of California Probate Code sec. 714. Radar v. Rogers, 49 Cal.2d 243, 317 P.2d 17, impliedly recognizes the applicability of Probate Code sec. 714 to tort claims.

[6] Since sec. 714 is applicable to tort claims the appellant must stand or fall upon its second contention. Is compensation for a tort asserted in a probate claim, which is rejected, a claim "then due" within the

meaning of sec. 714, so as to make applicable the three-month limitation?

Is an unliquidated claim "now due?" If it is not, then appellant might bring suit after rejection of the claim at any time within the general statute of limitations. The delays in trial would require the estate be kept open for perhaps one to three years. If a final judgment is necessary before the claim "becomes due" then section 714 is nonsense, because forsooth the two-month statute of limitations for suit set up therein would only run after suit is terminated.

[7] In Pierce v. Johnson, 1939, 136 Ohio St. 95, 23 N.E.2d 993, 125 A.L.R. 867 (and Annotation at page 871), the Supreme Court of Ohio held, that a tort claim was not a contingent claim and was "then due". The court held that an action thereon would be barred if not commenced within two months of the notice of rejection by the executor. The term "due" should be construed in the light of the purpose of the statute in which it is found. It is a basic objective of probate to settle the estates of decedents at the earliest possible time. Hence there is reason for holding a tort liability is within the special statute of limitations in Probate Code sec. 714, and we conclude the legislature so intended.

The judgment is affirmed.

BISHOP, P. J., and SWAIN, J., concur.

50 Cal.2d 480

In the Matter of the ESTATE OF Joseph Vincent DE LAVEAGA, also known as J. V. de Laveaga, Deceased.

Juanita Valerie De Laveaga SOMAVIA, remainderman-beneficiary of the trust created by the last will & testament of Joseph Vincent de Laveaga, deceased, Appellant,

v.

Margaret Broyer BETTS, as Executrix of the last will and testament of Gertrude C. de Laveaga, deceased, Respondent.

S. F. 19579.

Supreme Court of California,
In Bank.

June 6, 1958.

Rehearing Denied July 2, 1958.

Proceeding on final account of trustor's estate wherein executrix of estate of life tenant filed objections to account and claimed that amount of probate income distributed to trustee should be paid to estate of life tenant. The Superior Court, San Mateo County, Edmund Scott, J., rendered judgment for executrix of estate of life tenant, and remainderman-beneficiary of trust appealed. The Supreme Court, Schauer, J., held that where decree of distribution merely distributed trust property to trustee as an aggregate and did not purport to make an allocation between corpus and income or declare property to be entirely corpus, executrix of life tenant was not precluded by decree from asserting claim to predistribution income, but that trustee was entitled to credit for income attributable to, or earned by, predistribution income and paid to life tenant in computing unpaid interest on predistribution income.

Judgment affirmed except insofar as interest and cause remanded with directions to recompute award of interest.

McComb, J., dissented in part.

Opinion, 317 P.2d 147, vacated.

1. Wills ⚷684(7)

In case of testamentary trust, unless will provides otherwise, life tenant's right to income dates from death of testator rather than date of distribution.

2. Wills ⚷684(7)

Income earned by trust property during period of probate administration inures to benefit of trust and is payable by executor to the trustee upon distribution, regardless of who may be entitled to receive that income from the trustee.

3. Wills ⚷705

In case of a testamentary trust, trust property need not be allocated between income and corpus in proceedings which result in decree of distribution, and if issues are raised concerning ultimate disposition of predistribution income, court's determination of those issues is res judicata, but if no allocation is made in such proceedings and trust property is merely distributed to trustee as an aggregate, the trustee comes under a duty to make appropriate allocation and later litigation is not precluded.

4. Executors and Administrators ⚷315(6)

Where decree of distribution merely distributed trust property to trustee as an aggregate and did not purport to make an allocation between corpus and income or declare property to be entirely corpus, executrix of life tenant was not precluded by decree from asserting claim to predistribution income, and settlements of trustee's previous accounts, which did not purport to allocate predistribution income as such and did not indicate that probate income was included, did not constitute adjudication that life tenant had no right to predistribution income and were not res judicata of executrix' action for such income even though life tenant had not objected to such settlements. West's Ann.Prob.Code, § 162.

5. Executors and Administrators ⚷513(9)

Settlement of an account is not conclusive except as to such items as are included in it and are actually passed upon by probate court. West's Ann.Prob.Code, § 162.

6. Limitation of Actions ⚷103(3)
Trusts ⚷289

The possession of voluntary trustee of property of an unrepudiated express trust is not adverse to beneficiaries, the obligation of such trustee to account is a continuing duty, beneficiary's right to demand an accounting runs with that duty and may be asserted so long as that duty remains unperformed, and trustee's mere failure to account, without more, may not be deemed an entire repudiation of trust and does not start statute of limitations running.

7. Trusts ⚷311

Where predistribution income was improperly included by trustee in corpus of trust estate and administered in good faith for benefit of life tenant throughout term of trust, and income from all of trust was accounted for and paid to life tenant during her life, trustee was entitled to credit for income which was attributable to or earned by the predistribution income and paid to life tenant, in computing unpaid interest on such income. West's Ann.Prob.Code, § 162; West's Ann.Civ.Code, §§ 1915, 3294.

8. Interest ⚷9

"Interest", other than contractual, is simply form of compensation or damages allowed for wrongful detention of money. West's Ann.Civ.Code, §§ 1915, 3294.

See publication Words and Phrases, for other judicial constructions and definitions of "Interest".

◆

Burnham Enersen, Robert Edmondson, Katherine M. Griffin and McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, for appellant.

Richard I. McCarthy, C. J. Goodell and Ralph Bancroft, San Francisco, for respondent.

SCHAUER, Justice.

The remainderman of a testamentary trust appeals from a judgment which, insofar as is here material, directs the trustee to pay $26,240 from the trust assets to the executrix of the estate of the life tenant, together with accumulated and unpaid interest thereon in the sum of $31,066.43. A cross-appeal was taken by the respondent executrix, but has been abandoned.

The sum of $26,240 (the principal here) represents income earned during the probate administration of the trustor's estate and distributed to the trustee (without segregation from the corpus) on October 20, 1932; it was not paid over to the life tenant by the trustee but was administered as part of the trust corpus, the income from all of which was regularly accounted for, but not segregated as to source, and paid to the life tenant. The sum of $31,066.43 represents interest which the trial court determined[1] had accumulated, under the provisions of section 162 of the Probate Code, for detention of the principal sum ($26,240) during the nearly 23 years of trust administration.

Appellant-remainderman concedes that the life tenant of a testamentary trust is entitled to the income earned by trust corpus during the period of probate administration but contends that respondent-executrix is now precluded from asserting her claim to such income by the doctrine of res judicata and the statute of limitations. Appellant-remainderman also questions the trial court's allowance of interest, pointing to the fact that the life tenant received all the income from the trust, including income from the very fund upon which the court below has now allowed her estate some 23 years' interest.

For reasons hereinafter stated we have concluded that respondent's claim is not precluded and that the judgment should be affirmed to the extent that it orders payment of the principal sum but that insofar as the judgment awards $31,066.43 interest as compensatory damages for the wrongful withholding of principal, it should be reversed and the cause remanded with instructions to recompute the damages due, allowing the trustee credit for all monies earned by the principal sum and accounted for and paid over to the life tenant.

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[1] The interest was computed by the court at the rate of 7 percent per annum from October 20, 1932 (the date of distribution to the trustee), to September 13, 1941, and at 4 percent per annum from September 14, 1941, to the date of the trial court's decree (September 22, 1955), in accordance with the provisions of section 162 of the Probate Code as those provisions read during the periods specified.

Joseph Vincent de Laveaga died testate on October 2, 1931. His will devised and bequeathed one third of the residue of his estate in trust, with directions that the income be paid to his second wife, Gertrude C. de Laveaga, for life or until her remarriage, remainder to his daughter by his first marriage, Juanita Valerie de Laveaga Somavia, the appellant herein.

On October 7, 1932, the executor filed his first and final account and petition for distribution of the decedent's estate. The account included an itemized statement of receipts and disbursements and a summary showing that the total receipts exceeded total disbursements by $145,024.12. On October 20, 1932, the account was settled, approved and allowed as rendered, and as provided in the will an undivided one third of the residue of the estate was ordered distributed to the trustee to be held under the terms of the trust. The cash distributed to the trustee included a one third share of the income earned during the period of probate administration but no segregation or designation was made as to the portion representing the original estate assets and the portion representing the income earned by such assets. The parties to this proceeding have stipulated that $26,240 of the sum distributed to the trustee represented predistribution (probate) income, but this fact did not appear in the petition for distribution or in the decree. The life tenant received the required notice of the filing of the executor's account and petition for distribution. She made no objection, nor did she appeal from the decree approving the account and distributing the estate.

On December 13, 1933, the trustee filed its first account and report and petition for settlement. The account included receipts and disbursements from November 10, 1932, to October 20, 1933. All of the assets received under the terms of the decree of distribution were designated as "principal" but there was no segregation of the predistribution (probate) income or allocation of it as such. The account showed that the trustee had invested almost the entire amount of cash received under the decree of distribution in stocks and bonds which were listed as "assets" of the trust. The account also showed that no portion of the predistribution income had been paid to the life tenant.

Notice of the filing of the account was given to the life tenant but she advanced no objection nor did she appeal from the order settling the account. The same is true concerning ten other accounts filed by the trustee and approved by the court prior to the death of the life tenant on January 23, 1953. None of the accounts segregated predistribution income and each continued to treat as corpus all assets received under the probate decree of distribution.

On July 15, 1953, the trustee filed its final account and petition for decree declaring the trust terminated. The executrix of the estate of the life tenant filed objections to the account and for the first time claimed that the amount of probate income distributed to the trustee should be paid to the estate of the life tenant. The trustee and remainderman filed answers to the objections and a hearing was held. The lower court concluded that the estate of the life tenant is entitled to payment of (1) the predistribution income (stipulated to be $26,240), plus (2) interest thereon computed according to the provisions of section 162 of the Probate Code. Judgment was thereupon entered awarding the life tenant's estate the principal sum of $26,240 plus interest thereon in the sum of $31,066.43 computed at the statutory rate and without allowing credit for the net earnings on the principal which, as above indicated, had been regularly accounted for and paid over to the life tenant during the term of the trust. The remainderman appeals.

[1] It is settled law that in the case of a testamentary trust, unless the will provides otherwise, the life tenant's right to income dates from the death of the testator rather than the date of distribution. (In re Estate of Platt (1942), 21 Cal.2d 343, 346–

348, 131 P.2d 825 [1].) Appellant does not quarrel with that rule but contends that respondent is now precluded from claiming its benefit. Appellant urges that the question of the life tenant's right to predistribution income is res judicata since, it is argued, that question was presented to the court at the time of distribution and the decree of distribution effectively and finally determined that all of the property distributed to the trust was distributed as corpus. The argument, which conceivably could have prevailed in the trial court, cannot on the state of the record support a reversal here.

[2, 3] Income earned by trust property during the period of probate administration inures to the benefit of the trust and is payable by the executor *to the trustee* upon distribution. (In re Estate of Marre (1941), 18 Cal.2d 184, 190 [5], 114 P.2d 586; In re Estate of Dare (1925), 196 Cal. 29, 35–36, 235 P. 725 [1]; In re Estate of Hardy (1944), 62 Cal.App.2d 958, 961–962, 145 P.2d 910 [4].) This is so regardless of who may be entitled to receive that income from the trustee. (In re Estate of Peterson (1949), 92 Cal.App.2d 677, 682–683, 207 P.2d 607.) It follows that the trust property need not of necessity be allocated between income and corpus in the proceedings which result in the decree of distribution. If issues are raised concerning the ultimate disposition of predistribution income, the court's determination of those issues is res judicata. (In re Estate of Tynan (1954), 129 Cal.App.2d 364, 366–368, 276 P.2d 809 [2].) But if no allocation is made in such proceedings and the trust property is merely distributed to the trustee as an aggregate, the trustee comes under a duty to make the appropriate allocation and later litigation is not precluded. (In re Estate of Hill (1957), 149 Cal.App.2d 779, 784 [4], 309 P.2d 39.)

[4] In the present case the decree of distribution by its terms merely distributed the trust property to the trustee as an aggregate and did not purport to make an allocation between corpus and income or declare the property to be entirely corpus. Appellant, however, argues that the facts of this case are indistinguishable, in legal contemplation, from those involved in Re Estate of Tynan (1954), supra, 129 Cal. App.2d 364, 276 P.2d 809, wherein a life tenant unsuccessfully attempted, on the settlement of the testamentary trustee's first account, to assert his right to predistribution income after the decree of distribution had become final. But in the Tynan case it was found that the life tenant "acquiesced in the consumption during the executorship of all estate income received during the executorship." That finding shows that the probate court had before it an issue concerning the ultimate disposition of the predistribution income, determined the amount of such income and approved its consumption by the executor, with the result that none was left for distribution to the trustee. As indicated at page 368 of the opinion (129 Cal.App.2d), 276 P.2d at page 812, after the decree of distribution became final it was no longer material whether the life tenant actually acquiesced in the executor's consumption of the predistribution income. The issue concerning the disposition of such income was res judicata. In the present case no issue concerning the ultimate disposition of predistribution income was raised prior to or determined by the decree of distribution; hence, respondent-executrix is not precluded by such decree.

[5] Appellant-remainderman contends that the doctrine of res judicata compels the conclusion that the life tenant's claim is precluded by the orders settling the trustee's previous accounts. But the settlement of an account is not conclusive except as to such items as are included in it and are actually passed upon by the probate court. (In re Estate of Clary (1928), 203 Cal. 335, 340, 264 P. 242 [3]; In re Estate of Ross (1918), 179 Cal. 358, 362, 182 P. 303; In re Estate of Adams (1901), 131 Cal. 415, 417, 63 P. 838; In re Estate of Hovland (1940), 38 Cal.App.2d 439, 446 [3], 101 P.2d 500.) The subject accounts did not pur-

port to segregate or allocate predistribution income as such; they did not indicate that probate income was involved. They raised no issue concerning the segregation or allocation of any such income and the orders settling the accounts do not constitute adjudications that the life tenant had no right to predistribution income.

[6] Appellant-remainderman's contention that the life tenant's claim is barred by the statute of limitations is on this record likewise without merit. As indicated above, when the decree of distribution failed to effect an allocation the trustee came under a duty to make the appropriate allocation in its accounts. The possession of the voluntary trustee of an unrepudiated express trust is not adverse to the beneficiaries. The obligation of such a trustee to account is a continuing duty and the beneficiary's right to demand an accounting runs with that duty and may be asserted so long as that duty remains unperformed; the trustee's mere failure to account, without more, may not be deemed an entire repudiation of the trust so as to start the statute running. (In re Estate of Clary (1928), supra, 203 Cal. 335, 341–343 [4], 264 P. 242; Elizalde v. Murphy (1912), 163 Cal. 681, 684, 126 P. 978; Estate of Sanderson (1887), 74 Cal. 199, 215–216, 15 P. 753; 21 Cal.Jur.2d, Executors and Administrators, §§ 687 and 693, pp. 40 and 48.) It follows that the claim of respondent-executrix is not barred by the statute of limitations and the trial court did not err in determining that the estate of the life tenant is entitled to payment of the $26,240 of predistribution income.

[7, 8] As hereinabove mentioned the trial court also determined that the estate of the life tenant is entitled to payment of $31,066.43 interest on the withheld principal (probate income) computed in accordance with the applicable provisions of section 162 of the Probate Code. It is undisputed that such principal sum ($26,240) was included by the trustee in the corpus of the trust estate and administered in good faith for the benefit of the life tenant throughout the term of the trust, the income from all of such trust corpus being accounted for and paid to the life tenant during her life. Despite this fact, no credit was allowed to the trustee for the income attributable to or earned by the $26,240, and paid to the life tenant, in computing the unpaid interest which the trial court has ordered that the trustee pay. It appears to us to be an elementary principle of accounting and of justice and of compensatory damages that such credit should be allowed. As hereinafter developed in more detail, interest (other than contractual) is simply a form of compensation or damages allowed by law for the wrongful detention of money.

Although this court has indicated that interest due a legatee pursuant to section 162 of the Probate Code is due "as a part of or an accretion to the legacy itself" (In re Estate of Hubbell (1932), 216 Cal. 574, 578 [3], 15 P.2d 503), this court has also stated that there is no impropriety "in designating as 'damages' the amount of money recovered in any judgment,—for 'every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.' (Civ.Code, sec. 3281.)" (Keyes v. Moy Jin Mun (1902), 136 Cal. 129, 131, 68 P. 476.)

"The primary object of an award of damages in a civil action, and the fundamental principle or theory on which it is based, is just compensation or indemnity for the loss or injury sustained by complainant, and no more." (25 C.J.S. Damages § 3, p. 461; other statements of the principle may be found in Avery v. Fredericksen and Westbrook (1944), 67 Cal.App. 2d 334, 336–337, 154 P.2d 41.) It follows that "If the wrongful act of the defendant at once confers a benefit and inflicts an injury, the loss actually caused will be the net result of the act to the plaintiff; and this net result will be the measure of damages." (Sedgwick on Damages (9th ed.), vol. 1, § 63, p. 98; McCormick on Damages, § 40, p. 146, and cases therein cited.) As stated in Mayo v. City of Springfield (1884), 138 Mass. 70, 71, "An allowance for such benefits is not in the nature of recoupment or set-off, but a method of determining the actual damages sustained." Section 1915 of the Civil Code defines interest as "the compensation allowed by law * * * for the * * * detention of money." There is nothing in the law which suggests that in a case such as this, where there is no suggestion of oppression, malice or fraud (see Civ.Code, § 3294), the court may award as such "compensation * * * for the * * * detention of money" both interest on, and all the earnings of, the detained money. The benefit to the recipient of money is the same, whether such money be denominated "earnings" or "interest."

In the present case the trustee wrongfully but in good faith withheld predistribution income from the life tenant and treated that income as corpus, faithfully administering it as such. The Legislature, by means of section 162 of the Probate Code, has in effect provided that the estate of the life tenant should be compensated for this detention by the payment of interest at a certain rate. But by wrongfully withholding the predistribution income ($26,240) from the life tenant and treating it as corpus for the term of the trust, the trustee also conferred a benefit upon the life tenant, viz., the profitable administration of, and the payment to the life tenant of the income earned by, the wrongfully detained $26,240. Under the authorities cited above the estate of the life tenant will be fully compensated for the detention of the money by payment of the interest due under section 162 of the Probate Code, less the amounts paid the life tenant as a result of that detention, viz., the income earned by the $26,240, or by retention of such earnings if they should exceed the interest.

The allowance of the credit does not depend on any claim of set-off; it is, rather, implicit in computing the amount of compensation due for the detention of the principal sum. The life tenant (or her estate) is entitled to retain whatever payments she received in the form of "earnings" from the principal sum whether or not such payments prove in excess of the interest due under section 162 of the Probate Code, but she may not have double recovery (two compensations) for one detention of one sum.

The judgment appealed from is affirmed in all respects except insofar as it awards $31,066.43 interest on the principal sum of $26,240 as damages for the wrongful detention of such principal; as to the award of damages the judgment is reversed and the cause is remanded to the trial court with directions to take such further proceedings as may be necessary or expedient to enable it to recompute the award in a manner not inconsistent with the views hereinabove expressed and, having had such proceedings, to thereupon make the computation and enter judgment in the appropriate amount. The cross-appeal is dismissed. Each party shall bear his own costs on appeal.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

McCOMB, Justice (concurring and dissenting).

I concur in the majority opinion in so far as it affirms the judgment of the trial court.

I dissent from the portion of the opinion reversing the trial court's awarding of interest to the respondent.

In the present case the parties filed a written stipulation, which was approved by the court and read as follows: "That the sum referred to in the court's opinion as 'approximately $24,000.00' is hereby fixed at the sum of $26,240.00."

As pointed out in the majority opinion, the interest was computed by the court at the rate of 7 percent per annum from October 20, 1932 (the date of distribution to the trustee), to September 13, 1941, and at 4 percent per annum from September 14, 1941, to the date of the trial court's decree (September 22, 1955), in accordance with the provisions of section 162 of the Probate Code as those provisions read during the periods specified.

I would affirm the judgment in its entirety.

50 Cal.2d 502

PAO CH'EN LEE and Gwendolyn T. Lee, Plaintiffs and Respondents,
v.
James GREGORIOU and Stamatia Gregoriou, Defendants and Appellants.
S. F. 19926.

Supreme Court of California, In Bank.
June 6, 1958.

Action by purchasers of two-story house against vendors on theory purchasers had relied on fraudulent oral representations to effect vendors did not intend to build on retained adjoining lot so as to obstruct purchasers' view, and that thereafter vendors had built one-story extension to house on lot and obstructed purchasers' view. The Superior Court, Monterey County, Stanley Lawson, J., entered judgment for purchasers and vendors appealed. The Supreme Court, McComb, J., held that where vendors permitted proof of oral representations to be made, without objection, by five witnesses and did not make any motion to strike testimony, vendors waived right to urge, on appeal, error in reception of oral evidence on theory that promise of vendors not to build so as to obstruct view was unenforceable under statute of frauds and that evidence was an attempt to vary written contract by parol testimony.

Affirmed.

Opinion, Cal.App., 320 P.2d 177, vacated.

1. Pleading 🔑420(3)

Where, after purchasers' amended complaint was filed, vendors filed answer and went to trial without making any objection, error, if any, of trial court in making order permitting filing of amended complaint without notice to vendors and without ruling on vendors' demurrer to original complaint, had been waived by vendors.

2. Appeal and Error 🔑704(2)

In action by purchasers of two-story house against vendors on theory purchasers had relied on vendors' fraudulent oral representation to effect that vendors did not intend to build on retained adjoining lot so as to obstruct purchasers' view and thereafter vendors built a structure which obstructed view, record did not establish that trial court amended its findings, without notice to vendors, in material respects, after they had been signed and filed.

3. Appeal and Error 🔑768

Where purchasers of two-story house, in appeal brief, stated that there were no other findings signed or filed by judge, and statement was not contradicted by vendors, vendors had conceded correctness of purchasers' statement and appellate court would assume that alleged error to effect that trial court, without notice to vendors, changed its findings of fact, in material particulars, after findings had been signed and filed, did not exist.

4. Fraud 🔑62

In action by purchasers of two-story house against vendors on theory purchasers relied on fraudulent oral representations to effect that vendors would not build on retained adjoining lot so as to obstruct purchasers' view and thereafter vendors built a structure which obstructed view, evidence that value of property at time of purchase, with unobstructed view, was $24,900 and value of property after view was obstructed was $20,000 supported finding that purchasers suffered damages in sum of $4,900.

5. Fraud 🔑36

Where purchasers of two-story house relied on fraudulent oral representation to effect vendors did not intend to build on retained adjoining lot so as to obstruct purchasers' view, vendors built a one-story extension to house on adjoining lot and obstructed view, value of real property at time of purchase, with unobstructed view was $24,900 and value of property after view was obstructed was $20,000, offer by vendors' son, in open court, to purchase property for $26,000 and tender of cashier's check for $10,000 in part payment did not preclude purchasers from recovering damages for fraud.

6. Appeal and Error ⚷204(3), 237(2)

Where purchasers bought two-story house in reliance on vendors' fraudulent oral representation that vendors did not intend to build on retained adjoining lot so as to obstruct purchasers' view, vendors built a one-story extension to house on adjoining lot which obstructed purchasers' view and vendors permitted proof of oral representations to be made, without objection, by five witnesses and did not make any motion to strike testimony, vendors waived right to urge, on appeal, error in reception of oral evidence on theory that promise of vendors not to build so as to obstruct view was unenforceable under statute of frauds and that evidence was an attempt to vary written contract by parol testimony. West's Ann.Civ.Code, § 1624, subds. 1, 4.

7. Frauds, Statute of ⚷152(1), 157

A defendant waives his right to rely upon any provisions of statute of frauds by failing to demur to complaint, object to introduction of testimony to prove oral agreement at time of trial, or make a motion to strike such testimony.

8. Appeal and Error ⚷204(3)

Admission of parol evidence to vary or add to a written instrument cannot be objected to for the first time in appellate court. West's Ann.Civ.Code, § 1624, subds. 1, 4.

◆

James C. Purcell, Michael Riordan and S. Lee Vavuris, San Francisco, for appellants.

Gordon Campbell, Monterey, and Patricia Lane, Carmel, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover damages for fraudulent misrepresentation, defendants appeal.

The trial court found, supported by substantial evidence, that plaintiffs bought a two-story house and lot from defendants in reliance on their fraudulent *oral* misrepresentation that they did not intend ever to build on an adjoining lot (owned and retained by defendants) so as to obstruct plaintiffs' view; that defendants thereafter built a one-story extension to the house on their lot, obstructing plaintiffs' view from the lower story; and that plaintiffs suffered damage in the sum of $4,900.

Defendants contend:

[1] *First: The trial court committed error in making an order permitting the filing of the first amended complaint without notice to defendants, since a demurrer had been filed to the original complaint and not ruled upon.*

This contention is devoid of merit. After the amended complaint was filed, defendants filed an answer thereto and went to trial without making any objection. The error, if any, was thus waived by defendants. (Cf. McClure on Behalf of Caruthers v. Donovan, 33 Cal.2d 717, 731 [12], 205 P.2d 17; Baker v. Southern Cal. Ry. Co., 114 Cal. 501, 505, 46 P. 604.)

[2] *Second: The judgment is void because the trial court, without notice to defendants, changed its findings of fact in material particulars.*

This contention is likewise devoid of merit for the reason that the record fails to show that the trial court amended its findings after they had been signed and filed.

[3] Plaintiffs state in their brief that there were no other findings signed or filed by the trial judge. This contention is not contradicted by defendants. Therefore, we assume that defendants concede the correctness of plaintiffs' statement and that the

alleged error does not exist. (Blanton v. Curry, 20 Cal.2d 793, 810, 129 P.2d 1; H. Moffat Co. v. Rosasco, 119 Cal.App.2d 432, 443 [13], 260 P.2d 126; Castriotis v. Cummins, 93 Cal.App. 654, 656, 269 P. 1115.

[4] *Third: The evidence fails to show that plaintiffs suffered any damage and thus the finding of the trial court to the contrary is not sustained by the evidence.*

This contention is also untenable. The purchase price of the property was $25,500, including some furniture. Deducting the value of the furniture, the court found the value of the real property at the time of the purchase, with an unobstructed view, to be $24,900. A witness testified that the value of the property after the view was obstructed was $20,000. This evidence supports the trial court's finding that plaintiffs suffered damages in the sum of $4,900. (See Primm v. Primm, 46 Cal.2d 690, 693 [1], 299 P.2d 231.)

[5] *Fourth: Plaintiffs did not suffer any damage, because during the trial a son of defendant Mrs. Gregoriou offered in open court to purchase the property for $26,000 and tendered a cashier's check for $10,000 in part payment.*

The check and offer were properly received as evidence of the present value of the property. (County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680.) However, it was not conclusive on the court, since the weight of such evidence and the bona fides of the offer were questions of fact for the determination of the trier of fact. (Muller v. Southern Pac. B. Railway Co., 83 Cal. 240, 243, 23 P. 265.) In the instant case the trier of fact may well have concluded, in view of the offeror's relationship to one of the defendants, that the offer was a mere attempt to accomplish restitution by indirection, thus avoiding the payment of damages for the fraud, and that it did not represent the true value of the property.

[6] *Fifth: Since the promise of defendants not to build on their property so as to obstruct plaintiffs' view was oral, it was unenforceable (1) under the statute of frauds (Civ.Code, § 1624, subds. 1 and 4*) and (2) as an attempt to vary a written contract of the parties by parol evidence.*

In their answer defendants pleaded as a defense the statute of frauds as set forth in section 1624, subdivisions 1 and 4, of the Civil Code. However, defendants permitted proof of the oral representations to be made, without objection, by five witnesses. Also, they did not make any motion to strike this testimony.

[7, 8] They thus waived the right to urge on appeal error in the reception of the oral evidence, since it is settled that (1) a defendant waives his right to rely upon any provisions of the statute of frauds (Civ.Code, § 1624) by failing to (a) demur to the complaint, (b) object to the introduction of testimony to prove the oral agreement at the time of trial, or (c) make a motion to strike such testimony (Howard v. Adams, 16 Cal.2d 253, 257 [4], 105 P.2d 971, 130 A.L.R. 1003; Nunez v. Morgan, 77 Cal. 427, 432, 19 P. 753; Coleman v. Satterfield, 100 Cal.App.2d 81, 83, 223 P.2d 61; Aaker v. Smith, 87 Cal.App.2d 36, 43 [7], 196 P.2d 150; Ingraham v. Smith, 83 Cal.App.2d 807, 808 [1], 189 P.2d 721) and (2) the admission of parol evidence to vary or add to a written instrument cannot be objected to for the first time in the appellate court (Jacoby v. Wolff, 198 Cal. 667, 676 [3], 247 P. 195; Nunez v. Morgan, supra; Graham v. Smither, 53 Cal.App.2d 701, 706 [5], 127 P.2d 1024; Palm v. Smither, 52 Cal.App.2d 500, 507 [6], 126 P.2d

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* Section 1624 of the Civil Code reads in part as follows: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

"1. An agreement that by its terms is not to be performed within a year from the making thereof;

* * * * *

"4. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged."

428; Bonner v. Finney, 110 Cal.App. 518, 521 [2], 294 P. 466; Tennant v. Wilde, 98 Cal.App. 437, 441 [2], 277 P. 137; Anthony v. Crocker First Nat. Bank, 95 Cal.App. 347, 350 [2], 272 P. 767; Inner Shoe Tire Co. v. Tondro, 83 Cal.App. 689, 693 [2], 257 P. 211; Caine v. Polkinghorn, 54 Cal. App. 387, 390 [1], 201 P. 936; McComish v. Kaufman, 43 Cal.App. 507, 510 [3]), 185 P. 476. Any statements in Lifton v. Harshman, 80 Cal.App.2d 422, 182 P.2d 222, to the contrary are disapproved.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, J., concurs in the judgment.

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50 Cal.2d 491

Leo Aubrey SULLIVAN, Petitioner,

v.

STATE BAR OF CALIFORNIA, Respondent.

S. F. 19879.

Supreme Court of California,
In Bank.
June 6, 1958.
Rehearing Denied July 2, 1958.

Disciplinary proceeding. The Board of Governors of the State Bar recommended suspension from practice for a period of three years and the attorney sought review. The Supreme Court held that attorney's conduct in accepting fees and payments on account of fees for rendition of future professional services and in failing to devote necessary attention to matters involved and in neglecting to give satisfactory reports to or make adjustments to the clients and in most instances retaining the sums paid to him justified suspension.

Order accordingly.

1. Attorney and Client 🔑58

Attorney's conduct in accepting fees and payments on account of fees for rendition of future professional services and in failing to devote necessary attention to matters involved and in neglecting to give satisfactory reports to or make adjustments to the clients and in most instances retaining the sums paid to him justified suspension. West's Ann.Bus. & Prof.Code, § 6083; Rules of Procedure of State Bar, rule 29.1, West's Ann.Bus. & Prof.Code following section 6087; West's Ann.Rules on Appeal, rules 15, 59(a).

2. Attorney and Client 🔑57

In reviewing a disciplinary proceeding, Supreme Court passes upon sufficiency and weight of evidence and is not bound by findings of fact of local board committee or Board of Governors of the State Bar.

3. Attorney and Client 🔑57

Burden of showing that decision or action of Board of Governors of State Bar in disciplinary proceeding is erroneous or unlawful is upon the attorney.

4. Attorney and Client 🔑57

On appeal by attorney to Supreme Court in a disciplinary proceeding, oral argument presented by attorney before the court is to be regarded as argument and not as testimony.

5. Attorney and Client 🔑46

Fact that ill health of attorney might possibly have contributed to various incidents of misconduct could be accepted as explanatory of cause of such incidents but it could not constitute an excuse for either indulging or continuing in the course of conduct.

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Leo Aubrey Sullivan, Oakland, in pro. per., and Joseph Morozumi, Emeryville, for petitioner.

Garrett H. Elmore, San Francisco, for respondent.

PER CURIAM.

[1] In three proceedings before local administrative committees of The State Bar (for Alameda County) petitioner was

found guilty of nine counts of professional misconduct. The complaints, all similar in nature, in general involve charges that petitioner accepted fees and payments on account of fees for the rendition of future professional services, that he failed to devote the necessary attention to the matters involved and neglected to give satisfactory reports to or make adjustments to the clients, in most instances retaining the sums paid to him. We have concluded that petitioner has failed to sustain his burden of showing lack of support for or injustice in the subsequent recommendation, made by the Board of Governors of The State Bar, that he be suspended from practice for a period of three years.

In the first proceeding the local committee found culpability on four counts. They note that although petitioner received full notice of all hearings he at no time made any appearance before the committee and offered no evidence to show any extenuating circumstances for his conduct. Their recommendation was that petitioner be publicly reprimanded and also required to make restitution of fees collected by him, for which he failed to render services required by his employment as counsel in each of the four counts.

In the second proceeding, heard before the same local committee, petitioner likewise offered no evidence. The committee found culpability on three counts, including a finding as to one matter that petitioner had himself retained the sum of $150 entrusted to him for forwarding to opposing counsel in a divorce matter. The committee considered the fact that petitioner "has for some time been suffering from an illness which periodically confines" him, and made its recommendation "with the knowledge that other proceedings" were currently pending against petitioner in which further discipline might be imposed. The recommendation was that petitioner be suspended from practice for 60 days and ordered to make restitution of the $150.

In the third proceeding, heard by a different committee, culpability was found on each of the two counts involved. The committee took into consideration[1] the record in the proceeding then pending before the same committee in which petitioner was eventually suspended from practice for three months by order of this court (Sullivan v. State Bar, 1955, 45 Cal.2d 112, 287 P.2d 778), and found that the facts shown in that proceeding, together with those found in the instant one, "show a continuing course of conduct on the part of" petitioner, that the matters complained of in one count of the present proceeding "were done at the time" that petitioner was appearing in his own behalf before the same committee in the prior proceeding. The committee also found that it "has no evidence before it of extenuating circumstances, in connection with the acts complained of," that petitioner offered no evidence other than his own testimony "in answer to and relevant to the charges," and "failed to produce witnesses and evidence within his power to produce when requested so to do" to corroborate his own testimony. The committee recommended a three-year suspension from practice.

With petitioner's consent the three proceedings were consolidated for hearing by the Board of Governors of The State Bar, which by a vote of 13 board members made its own findings of culpability by petitioner on each of the nine counts. By a vote of 12 to 1, with two members not voting, the board has recommended that petitioner be suspended from the practice of law for a period of three years. In so recommending, the board also took into consideration the three-months' suspension ordered in 1955. Sullivan v. State Bar, 1955, supra, 45 Cal.2d 112, 287 P.2d 778. The matter is now before this court for review.

1. LeBoulanger matter. The board found: In November, 1953, one Crowell employed petitioner to represent Al LeBoulanger, then in jail in Los Angeles

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[1] Under Rule 29.1, Rules of Procedure of The State Bar.

awaiting trial on criminal charges; petitioner was paid $500 as a retainer on account of such representation; aside from one short conference with LeBoulanger petitioner "wilfully and negligently failed to render any services to his client and wilfully and negligently failed to appear on three occasions when his client's case was called for trial."

The record shows that early in November, 1953, Crowell, a former client of petitioner, asked petitioner if he knew an attorney in Los Angeles or if he would like to take LeBoulanger's case, and petitioner said he would like to handle it, that he had other cases in Los Angeles and thought he could help LeBoulanger. Petitioner later told Crowell he would need $1,000 to go to Los Angeles, that he needed "something for expenses." Crowell gave petitioner $500 and received from petitioner a receipt reading, "Recd. of Mr. Crowell $500, for case of LeBoulanger in L.A. Leo A. Sullivan." Crowell testified that petitioner told him not to worry about "the rest" until "we get this straightened out," that petitioner thought LeBoulanger had a very good case but he wanted to get down there before LeBoulanger got mixed up with other defendants involved in the same criminal charges. Crowell stated further that the money was paid for petitioner to handle the case, not just to talk to LeBoulanger; that part of the money was for travel; that Crowell intended to pay the remaining $500 at the end of the trial. LeBoulanger by deposition testified that petitioner visited him once in the jail and stated he, petitioner, had been retained by Crowell to defend LeBoulanger, for the latter not to talk, that petitioner was his lawyer and would "take care of everything from there on," that he would see LeBoulanger "before I went up for my plea" and would see about arranging a bond; that was the last LeBoulanger saw of petitioner. Thereafter LeBoulanger was in court on four occasions, but petitioner was not present. The court ultimately appointed the public defender to represent him until petitioner could come to Los Angeles. Subsequently, almost 11 months after the original employment of petitioner, LeBoulanger entered a plea of guilty to one count. He was represented by the public defender, who was formally appointed the same day. Petitioner was not present, although LeBoulanger was informed by his (LeBoulanger's) wife that petitioner was supposed to be there. LeBoulanger was sentenced to 10 years to life, and was in prison at the time of his deposition.

Crowell later asked petitioner "what he was going to do about the money" (the $500), and complained he did not think "it was right, what he had done," and petitioner told him "it wasn't over yet." Crowell could not thereafter reach petitioner either personally or by telephone, although he attempted to do so. There is no evidence in the record that petitioner ever prepared any papers or did anything further in the LeBoulanger matter than shown by the above-recited evidence.

Although he failed to testify before the committee, petitioner in his brief now asserts the evidence shows that his agreement with Crowell was to go to Los Angeles and discuss the nature of the charges and the strength of the case pending against LeBoulanger, that he did go to Los Angeles "and went through all of the proceedings against LeBoulanger"; that he made three trips to Los Angeles, on the last of which he was "informed that all of the defendants, including LeBoulanger, had made a complete statement admitting their guilt of the charge"; that petitioner so informed Crowell, who "At all times" knew that petitioner had received information from LeBoulanger "completely changing the complexion of his case because of his confession." Further, asserts petitioner, "At no time did petitioner ever agree to participate in any trial of LeBoulanger. * * * Petitioner informed * * * Crowell that * * * LeBoulanger had pled guilty and to expend further money on his behalf would be useless * * * At no time was petitioner ever the attorney of record for LeBoulanger, nor did he ever fail to appear on any occasion when the case was called in court, by reason of the fact that he was not the attorney for * * * LeBoulanger at any time." References to the record in this proceeding, made by petitioner in his brief, utterly fail to support his assertions.

2. Sitko matter. The board found: Petitioner was employed by one Mike Sitko to bring an action in his behalf to recover money allegedly stolen from him; petitioner "wilfully and negligently failed to render any services or take any steps to commence or prosecute such action, and wilfully and negligently ignored and refused to answer repeated 'phone calls from his client relating to said representation."

The record shows that in June, 1954, Sitko, a hotel owner, discussed with petitioner a criminal complaint against a tenant, which had been dismissed. Sitko testified that petitioner said that for $50 he could get the case "re-opened" and the accused would have to go back to jail. At petitioner's request Sitko paid him $50 and received a receipt therefor which reads: "June 23rd, Received of Mike Sitko, $50 to investigate case in S.F. Leo Sullivan." Petitioner promised to call Sitko the next day but failed to do so. Sitko telephoned petitioner twice but failed to reach him. On another day Sitko went to petitioner's office and was told by petitioner to meet him at the Oakland City Hall the next day; however, petitioner failed to appear at the City Hall, although Sitko waited for over an hour and then tried unsuccessfully to reach petitioner at the latter's hotel room. About a week later Sitko tried to talk to petitioner at the courthouse, but petitioner evaded him. He later went 8 or 9 times to try to catch petitioner in the lobby of the latter's hotel, telephoned his office 20 times, and went to his office, all without success. There is no evidence that petitioner ever did anything for Sitko after the employment was accepted. Sitko later filed an action for $50 against petitioner in small claims court.

Petitioner asserts in his brief that the receipt given for the $50 paid him by Sitko shows that the sole purpose of the employment was to investigate the criminal case in San Francisco, and that Sitko's testimony shows that petitioner informed Sitko that "insofar as the claim case was concerned there was nothing further that could be done." The record as referred to by petitioner does not bear out the latter assertion; Sitko's testimony was that petitioner, on the one day Sitko was able to find him in his office, stated that "he said he had not done nothing." Petitioner makes no other references to the record.

3. Williamson matter. The board found: Petitioner was employed by a Mrs. Williamson for the purpose of moving for a new trial of a criminal case in which her husband had been convicted of a violation of section 261 of the Penal Code and to prosecute an appeal from the judgment of conviction; petitioner was paid the sum of $800[2] on account of his fee and for costs of the proposed appeal; shortly thereafter he falsely represented to Mrs. Williamson that an appeal had been taken and that a petition for a writ of habeas corpus had been prepared by him, both of which representations petitioner knew to be false; petitioner made the representations for the purpose of concealing from Mrs. Williamson the fact that he had not performed services as agreed and "lulling her into the belief that the cause committed to him was progressing in usual routine."

The record shows that in October, 1953, one Williamson, following a jury trial of several days in which he was represented by petitioner, was found guilty of rape. Immediately thereafter petitioner told Mrs. Williamson that he would move for a new trial and that his fee for a new trial would be $800. Mrs. Williamson raised $200, and petitioner said, "Give me that, and that will be all right." The new trial motion was made, but denied. Petitioner then quoted a fee of $600 more for an appeal, and said that the $200 paid would be applied to a total fee of $800 for the new trial motion and an appeal. Seemingly nothing further was paid to petitioner. The record indicates that thereafter petitioner did, however, make various misrepresentations to Mrs. Williamson and to Williamson's mother, Mrs. Arwood, that he had filed a notice of appeal, that "he had written up a 25 page writ of habeas corpus," and that Williamson would "definitely be home by" a certain date.

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[2] Respondent State Bar notes that this $800 figure is in error, as the evidence shows that the total agreed fee was $800, on which $200 was paid.

As already noted, petitioner did not testify before the committee, and in his brief he refers to no portion of the record which would indicate that the board's findings concerning the misrepresentations are without support.

4. Mills matter. The board found: In March, 1954, petitioner was employed by Lena B. Mills to represent her in a criminal case pending against her, and was paid a retainer fee of $300 therefor; petitioner "wilfully and negligently failed to appear on seven occasions when said criminal case was called for hearing, with the result that his client was ultimately represented by the Public Defender"; petitioner also "wilfully and negligently failed to perform any substantial services in behalf of his client in said cause."

Without detailing the record in this matter, it is sufficient to state that petitioner in his brief admits that he "was hired to represent the woman in question," but protests that on occasions when the matter was called for hearing and he failed to appear he was in a hospital, "which was known to the Court, who so stated to the defendant." Again, however, petitioner failed to testify before the committee, and in his brief makes no reference whatsoever to the record.

5. Steward matter. The board found: In June, 1953, petitioner was employed by Mrs. Steward to bring a divorce action on her behalf and was paid $42 on account; petitioner "wilfully and negligently failed to bring said action or, aside from his first conference with her, to perform any services in his client's behalf." At the client's request, petitioner made numerous appointments with her but "wilfully and negligently failed to keep any of" them. He also promised to return the $42 to his client, but failed to do so.

Again petitioner in his brief makes no reference to the record. He admits being employed by Mrs. Steward in the divorce matter but pleads that "During all this period of time petitioner was trying cases whenever possible, with the exception of such time as petitioner was confined in bed or in a hospital because of illness. It may be true that petitioner was unable to confer with her at times. It is true that appointments might have been made by petitioner's office unknown to petitioner, but at no time did petitioner ever refuse to see her or to talk to her."

6. Merritt matter. The board found: In July, 1950, petitioner was employed by one Merritt to represent him in a divorce action then pending against him, and was paid $265 therefor; at the time the cause was called for trial petitioner did not appear but caused another lawyer, not known to Merritt, to appear for Merritt. Judgment went against Merritt, and petitioner requested from him and was paid $50 for "retrial papers." In September, 1952, petitioner caused a divorce complaint in Merritt's behalf to be filed. Merritt thereafter wrote numerous letters to petitioner concerning the matter, but petitioner wilfully and negligently failed to answer any of them. On at least two occasions petitioner told Merritt to be in court on a specified date at which time the divorce case would be called for trial, but the case was not called on any of such occasions and Merritt was informed by the court clerk that it was not on the calendar. Nothing further was done in the matter by petitioner.

Petitioner in his brief does not refer to the record, pleads that the other lawyer who appeared in the first Merritt divorce matter was petitioner's associate whose appearance was neither unusual nor injurious to Merritt's cause, and makes no reference whatsoever to the findings with respect to the second Merritt divorce case.

7. Anderson matter. The board found: In August, 1952, one Anderson employed petitioner to represent him in the defense of a divorce complaint filed against him, and paid petitioner $175 (corrected to read $75) on account of court costs; Anderson requested petitioner to file a divorce complaint in his own behalf and paid petitioner the requested sum of $375, of which petitioner stated $150 would be paid on account of the wife's attorney fees; petitioner later falsely told Anderson that he had paid the wife's attorney; Anderson made numerous unsuccessful attempts to confer with petitioner and secured many appointments all of which petitioner wilfully and negligently failed to keep; petitioner promised to repay $350 to Anderson but did not do so.

Petitioner in his brief states that he agreed to return to Anderson the money paid, but before petitioner was able to do so he was "again compelled to practically suspend all work by reason of * * * long protracted illness. * * * Petitioner has at no time ever been unwilling to repay this money, but felt that an effort to repay it while these hearings were being held might be misconstrued." Again petitioner makes no reference to the record, nor does he mention the finding as to his false statement to Anderson that the wife's attorney had been paid.

8. Krasky matter. The board found: In January, 1953, one Krasky employed petitioner to represent him in "straightening out some difficulty in connection with a demand for restitution made in connection with the terms of an order of probation entered in the United States District Court * * * in a matter in which Krasky had been convicted of a criminal offense." Petitioner was paid $150 on account. Aside from making and cancelling one appointment and making and failing to keep another appointment with the probation officer petitioner performed no services in connection with the matter. Krasky made several appointments with petitioner to confer but petitioner wilfully and negligently failed to keep any of them.

Petitioner testified before the committee in this matter. However, in his brief he merely asserts that "testimony to the contrary," he "contacted the interested parties. This matter was thoroughly discussed with Krasky and at no time was petitioner wilfully and negligently failing to keep any appointments with said Krasky." Again petitioner makes no reference to the record in support of his assertions.

9. Sullivan matter. The board found: In January, 1954, Mr. and Mrs. W. H. Sullivan (not related to petitioner) employed petitioner to bring an action in their behalf to enjoin abusive and disturbing activities on the part of one of their neighbors, and paid petitioner $700 on account. At various times, in response to inquiries from Mr. and Mrs. Sullivan, petitioner represented to them that action had been filed, and that process therein had been served, whereas petitioner knew none of such "actions was ever taken or done." Thereafter petitioner promised to repay the $700 to Mr. and Mrs. Sullivan, but failed to do so, and falsely told them he had deposited the money in their bank account. Petitioner later repaid $300 to the Sullivans but has not repaid the balance of the $700. While petitioner was representing the Sullivans they attempted on many occasions to arrange consultations with him but were unsuccessful.

In this matter petitioner also testified before the committee. His brief, however, makes no reference whatsoever to the record, but merely sets forth an alleged account of what petitioner had done for the Sullivans and asserted difficulties with the case. Petitioner does not mention the board's finding of misrepresentations to the Sullivans with respect to the filing of action, service of process, and deposit of money in their bank account.

In addition to the specific findings set forth hereinabove, the board also found generally that:

(a) For several years last past petitioner has habitually engaged in the practice of accepting professional employment and compensation therefor and thereafter wilfully and negligently failing to perform any substantial services in the matters;

(b) Such failure and neglect was not due to any ignorance, doubt, uncertainty, or mistake of judgment, on petitioner's part as to the applicable law or procedure, but was due to a callous disregard on his part of his duties and responsibilities to his clients;

(c) As part of such habitual course of conduct petitioner wilfully failed properly to inform his clients of the progress and status of their matters, resorted to half-truths, evasions, concealments and even deliberately false representations, to conceal the true state of affairs from his clients and to lull them into belief that their matters were being properly and expeditiously handled by him;

(d) Such habitual course of conduct, in the specific situations as found by the board, was grossly negligent conduct on petitioner's part amounting to and involving moral turpitude.

As related in the prior disciplinary proceeding (Sullivan v. State Bar, 1955, supra, 45 Cal.2d 112, 117, 287 P.2d 778), petitioner was admitted to practice in this state in 1921. His age is now 62 years. The matters involved in the present proceeding occurred during approximately the same period of time as did those for which the prior discipline was imposed.

[2, 3] In reviewing a disciplinary proceeding this court passes upon the sufficiency and weight of the evidence and is not bound by the findings of fact of the local committee or the board, although the burden of showing that the board's decision or action is erroneous or unlawful is upon the petitioner. Webb v. State Bar, 1957, 47 Cal.2d 866, 868, 306 P.2d 458, and cases there cited; Bus. & Prof.Code, § 6083.

[4] Petitioner has utterly failed to meet this burden. His petition to review the board's decision is not based on or supported by references to the record, and it is not verified, as required by subdivision (a) of Rule 59, Rules on Appeal. Neither is it accompanied by a brief as required by the same rule. In response to direction from this court petitioner has subsequently filed a brief, but as already shown such statements therein as purport to be based on the record are not supported by appropriate reference to the record, as required by Rule 15, Rules on Appeal. Although in petitioner's brief he states that his contention is that the findings of the board are not supported by the evidence taken at the committee hearings, he has made no effort to comply with the rules that his brief must point out the part of the record that sustains his claim of insufficiency of the evidence (see 4 Cal.Jur.2d 314, § 482, and cases there cited), and must fairly state all the material evidence relative to the point as to which such want of evidence is claimed to exist. In re Winne, 1929, 208 Cal. 35, 42, 280 P. 113. Further, the record indicates various instances of non-cooperation by petitioner in the proceedings before the local committees, including his nonappearance at scheduled hearings, following which continuances were granted for a period of over one year at petitioner's request in the one proceeding in which he finally did testify personally. As already shown, he failed to offer testimony in the other two proceedings, and makes no claim of a showing of lack of notice or that he was unable to appear and testify. The oral argument presented by petitioner before this court is, of course, to be regarded as argument, not as testimony.

[5] Although petitioner pleads that his difficulties, as in the previous disciplinary matter (Sullivan v. State Bar, 1955, supra, 45 Cal.2d 112, 120, 287 P.2d 778), were brought about largely because of poor health, it is manifest that his general course of professional conduct, as illustrated in the nine instances involved in the present proceeding, has been so far below the minimum standard acceptable from a member of the Bar of this state as to fully warrant the three-year period of suspension from practice recommended by the board. The fact that ill health possibly contributed to

various incidents of misconduct might be accepted as explanatory of the cause of such incidents but it cannot constitute an excuse for either indulging or continuing in the course of conduct.

It is ordered that Leo Aubrey Sullivan be suspended from the practice of law for a period of three years commencing 30 days after the filing of this order.

On Petition for Rehearing

Application of petitioner for rehearing denied.

The time for commencement of the period of his suspension from the practice of law is hereby extended to begin September 5, 1958.

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50 Cal.2d 469

Lester FERGUSON, Petitioner,
v.
INDUSTRIAL ACCIDENT COMMISSION of the State of California; Subsequent Injuries Fund; Birdo Burks, dba Thrifty Super Market; Casualty Insurance Company of California, Respondents.

L. A. 24914.

Supreme Court of California,
In Bank.

June 6, 1958.

As Modified on Denial of Rehearing
July 2, 1958.

Workmen's compensation case. Claimant sought annulment of a decision and award of industrial accident commission denying his application for compensation payments from subsequent injuries fund. The Supreme Court, Schauer, J., held that in order to qualify for resort to the subsequent injuries fund, an employee must show that prior to the occurrence of the subsequent industrial injury he had obtained factual status of the "permanently partially disabled" and that such previously incepted disability was labor disabling, but previous knowledge thereof by the employer is not required as a condition to an award to the employee of payments from such fund.

Award annulled and matter remanded for determination on the merits in accordance with opinion.

1. Workmen's Compensation 🔑 1030

Statute setting up conditions for payment of injuries from Subsequent Injuries Fund is a constituent part of the subsequent injury legislation of the state, and is designed, and appropriate, to encourage employment of handicapped persons, but neither such statute, nor any other provision of subsequent injuries legislation requires that an employer have knowledge of the employee's pre-existing handicap as a basis for a subsequent injuries fund claim for an employee who while permanently partially disabled receives a subsequent compensable injury. West's Ann.Labor Code, §§ 4750, 4751, 4750–4755.

2. Workmen's Compensation 🔑1030

Statute pertaining to conditions for compensation payments from Subsequent Injuries Fund contemplates that previous condition of disability of employee must be actually "labor disabling" and that such disablement, rather than employer knowledge, is the pertinent fact to be considered in determining whether the employee is entitled to subsequent injury payments under terms of such statute. West's Ann.Labor Code, § 4751.

3. Workmen's Compensation 🔑872

Where a disability is due entirely to an industrial injury and the lighting up or aggravation of a pre-existing condition by such industrial injury, employer is required to compensate for the entire disability so caused, and there is no apportionment of disability as between the industrial accident on the one hand and that due to the industrially caused aggravation of employee's pre-existing physical condition, but if entire disability is partly due to industrial disability growing out of the immediate injury, and in part to a nonindustrial disability, then there is an apportionment of the percentage. West's Ann.Labor Code, § 4663.

4. Workmen's Compensation 🔑872

Where an employee already suffering from a previously incurred permanent disability or physical impairment sustains a permanent industrial injury, employer, in such case, is not liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury, as though no prior disability or impairment had existed. West's Ann. Labor Code, § 4750.

5. Workmen's Compensation ⟹1030

In order to qualify for resort to the Subsequent Injuries Fund, an employee must show that prior to the occurrence of the subsequent industrial injury he had obtained factual status of the "permanently partially disabled" and that such previously incepted disability was labor disabling, but previous knowledge by the employer is not required as a condition to an award to the employee of payments from such fund. West's Ann.Labor Code, § 4751.

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William M. Sarnoff and Donald Franz, Los Angeles, for petitioner.

Everett A. Corten, San Francisco, Edward A. Sarkisian, Los Angeles, Edmund G. Brown, Atty. Gen., Miles J. Rubin and Gerald F. Carreras, Deputy Attys. Gen., for respondents.

SCHAUER, Justice.

Petitioner seeks annulment of a decision and award of respondent Industrial Accident Commission denying his application for compensation payments from respondent Subsequent Injuries Fund (hereinafter sometimes termed the fund). We have concluded that "labor disablement" rather than "employer knowledge" is the essential factor by which to gauge the previously sustained disablement in determining whether that disability qualifies petitioner for resort to the fund, and that the matter should be remanded to the commission for redetermination in the light of the views hereinafter set forth.

On February 2, 1956, petitioner, then 43 years of age, sustained a fractured right hip arising out of and occurring in the course of his employment as a meat cutter. His claim against his employer and the latter's insurance carrier, based on the industrial injury, has been settled by an approved compromise and release, and the present case concerns only petitioner's asserted right to payments from respondent fund under the provisions of section 4751 of the Labor Code[1] as amended effective September 7, 1955.

During convalescence from the hip fracture (i e., from the industrial injury), it was discovered that petitioner was suffering from progressive muscular dystrophy. His application for compensation payments from the fund followed. For the purpose of determining the application the trial referee found that petitioner's industrial injury resulted in a permanent disability rated at 14½ per cent; that petitioner "had a previous permanent partial disability consisting of primary progressive muscular dystrophy affecting * * * lower extremities"; and that the combination of the disabilities resulted in a permanent disability of 100 per cent, entitling petitioner to certain subsequent injuries payments from respondent fund.

On petition of the fund respondent commission granted reconsideration and, on the sole and specific ground that petitioner had failed to prove that his employer knew of the pre-existing disability, concluded that petitioner was not entitled to payments from the fund.[2] In so doing the commission relied on four opinions by the District Court of Appeal which state or hold that proof of knowledge by the employer of the previous disability is a prerequisite to payments under section 4751. (State of California, Subsequent Injuries Fund v. Industrial Acc. Comm. (Baldes) (1957), 150 Cal.App.2d 716, 311 P.2d 26; State of California v. Industrial Acc. Comm. (Bachrach) (1957), 147 Cal.App.2d 818, 306 P.2d 64; Urquiza v. Industrial Acc. Comm. (1956), 144 Cal.App.2d 322, 300 P.2d 871; State of California, Subsequent Injuries Fund v. Industrial Acc. Comm. (Strauss) (1955), 135 Cal.App.2d 544, 288 P.2d 31.)

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[1] Section 4751: "If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article; provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to the age of the employee, is equal to 40 percent or more of total."

In the earliest of these four cases (Strauss) the applicant had suffered a heart attack while lifting some objects in the course of his employment. His resultant 90 per cent disability was determined to be partially due to the lifting and partially due to pre-existing heart disease. Uncontradicted evidence indicated that prior to the lifting incident the heart condition was unknown, did not interfere with the applicant's work ability and could not have been diagnosed had the applicant submitted to a heart examination. The commission nevertheless found that at the time of his injury the applicant "suffered from a previous physical disability" within the meaning of section 4751. The court annulled that part of the award which provided for subsequent injuries payments and, in the course of its opinion, referred to Zyla v. A. D. Juilliard & Co. (1951), 277 App.Div. 604, 102 N.Y.S.2d 255 (holding that "employer knowledge" is essential to payments from the New York counterpart of our Subsequent Injuries Fund), and concluded "that section 4751 * * * was not intended to apply to *asymptomatic disease processes* which were unknown to both employee and employer and *which in nowise interfered with the employee's ability to work.*" (At page 553 of 135 Cal.App.2d, 288 P.2d at page 36; italics added.)

The above stated conclusion is fully consistent with the fundamental requirement of the statute *as to status for eligibility to resort to the fund;* i. e., that the employe be one who already "is permanently partially disabled." (Lab.Code, § 4751.) But the language of the Strauss case goes farther. It articulates the inception in California of the "employer knowledge" requirement, and it is against that concept that Ferguson directs his attack. He argues that the court erred in relying upon New York decisions to support the proposition that "employer knowledge" is requisite to payments under section 4751, and points to the fact that the New York statute is significantly different from ours. There the employer is made liable not only for the disability resulting from the industrial injury but also for the disability flowing from the employe's pre-existing condition. Such is not the case in California. (See Lab.Code, § 4750.[3]) It is the New York employer, rather than the employe, who must seek the benefits of the New York counterpart of our Subsequent Injuries Fund, and the New York courts have held that the employer must prove that he had knowledge of the employe's pre-existing impairment before he qualifies for reimbursement. New York reasons that the purpose of the statute is to encourage employment of handicapped persons and that the legislative intent is not furthered by reimbursing an employer who did not know of the employe's pre-existing handicap. (See Zyla v. A. D. Juilliard & Co. (1951), supra, 277 App.Div. 604, 102 N.Y.S.2d 255.)

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[2] Other contentions advanced by the fund were discussed by the commission, but no decision was made as to their merit.

[3] Section 4750: "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.

"The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed."

[1] Be that as it may, and despite the difference between the New York and California statutes, section 4751 is a constituent part of the subsequent injuries legislation of this state (Lab.Code, §§ 4750–4755) which this court, so treating it, has sustained against constitutional attack, on the ground, *inter alia,* that such legislation is designed, and is appropriate, to encourage employment of handicapped persons and that such purpose is encompassed in the constitutional authorization. (Subsequent Injuries Fund v. Industrial Acc. Comm. (1952), 39 Cal.2d 83, 86, 244 P.2d 889.)

Nevertheless, neither section 4751 nor any other provision of the subsequent injuries legislation nor any decision of this court requires that *the employer have knowledge* of the employe's pre-existing condition as a basis for a Subsequent Injuries Fund claim by an employe who already "is permanently partially disabled [and who] receives a subsequent compensable injury." The purpose of the legislation—to encourage employment of persons who are "permanently partially disabled"—is subserved if the further protection provided by the fund encourages either employers to offer, or the described handicapped persons to seek or accept, such employment. A person who already "is permanently partially disabled" to the substantial extent contemplated by the statute—as by the loss of "a hand, an arm, a foot, a leg, or an eye" to meet the requirement of subdivision (a), or that will combine with the subsequent injury of 40 per cent or more to make a minimum combined effect of 70 per cent of total permanent disability as required by subdivision (b)—may well need the encouragement afforded by the fund as an inducement to seek further gainful employment. By such employment he may risk the aggravated effect of loss of "the opposite and corresponding member" as defined in subdivision (a) or the grave percentage of totality described in subdivision (b). Whether full employer knowledge of pre-existing employe disabilities is or is not desirable, or should or should not be encouraged by the statute, is beside the point here. Certainly employers are entitled to know all relevant and material facts concerning the physical condition of prospective employes just as such employes are entitled to be informed as to hours of labor, working conditions, etc. But all such matters should be the subject of discussion before the contract of employment is made. If prospective employers wish to be informed of pre-existing disabilities before entering into an employment contract, they are in a position to acquire the pertinent data by means, for example, of requiring the filling out of an application blank including a statement of physical condition, or by requiring a physical examination by a doctor as does the State of California before accepting applicants into permanent employment in civil service positions. (See Gov.Code, §§ 18931, 18935.)

The fund, in support of its argument favoring an employer-knowledge rule, refers to the fact that as pointed out in the Strauss case (135 Cal.App.2d 544, 553, 288 P.2d 31), in the "Subsequent Injuries Fund Report of the Sub-committee of Assembly Interim Committee on Finance and Insurance" (vol. 15, No. 7, 1953–1955, Assembly Interim Committee Reports), attention is called to the wide variety of pathologies (most of them asymptomatic, i. e., unmanifested) which have been urged as a basis for commission awards against the Subsequent Injuries Fund: "heart disease; arthritic processes; nervous tremors; Parkinson's disease; tuberculosis; syphilis; varicosities; diabetes; hysteria, and other forms of mental derangement; harelip; speech impediments; weak abdominal walls; decreased mental capacity; epilepsy; nervousness; hemorrhoids; false teeth; general debility and undernourishment; flat feet; tonsilitis; calluses and bunions on feet; knock-knees; and schizophrenia of the paranoid type." The report further states that to apply the provision for pre-existing permanent partial disability to more than easily recognizable permanent objective disabilities would convert the Subsequent Injuries Law into a state health insurance plan, applicable only to one class, the employed. In addition, it would provide life annuity benefits when the combined effect of a previous disease and subsequent injury results in a permanent disability of 70 per cent or more of total disability. Such a legislative intent should not be inferred. It should clearly appear. This point of view was reiterated by the court in the Bachrach case (State of California v. Industrial Acc. Comm. (1957), supra, 147 Cal.App.2d 818, 822–823, 306 P.2d 64) and is one with which we are in accord.

It may, however, be noted that the four District Court of Appeal cases hereinabove cited (Strauss, Urquiza, Bachrach, Baldes) were decided under the section (Lab.Code, § 4751) as it read prior to the 1955 amendment and at a time when the two provisos added by that amendment were not included. Those provisos now expressly require "that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to the age of the employee, is equal to 40 percent or more of total." It thus appears that the 1955 amendment shows further legislative recognition of, and an intention to altogether obviate or at least to strictly limit, the opportunities of converting the Subsequent Injuries Fund into a state health plan.[4]

[2] Further, we are of the view that as indicated by the Sub-committee report mentioned in the Strauss case, as suggested by the commission in the Urquiza case (Urquiza v. Industrial Acc. Comm. (1956), supra, 144 Cal.App.2d 322, 300 P.2d 871), and as is implicit in the legislative language, the statute contemplates that the previous condition must be actually "labor disabling," and that such disablement, rather than "employer knowledge," is the pertinent factor to be considered in determining whether the employe is entitled to subsequent injuries payments under the terms of section 4751. As commented in Larson's Workmen's Compensation Law (1952), section 59.33 (Vol. 2, p. 63), "the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in Smith v. Industrial Acc. Comm. (1955), 44 Cal.2d 364, 367 [2, 3], 282 P.2d 64], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability. This must be so, because when the second-injury question later arises, the prior injury must be one capable of accounting separately for a portion of the ensuing disability, as distinguished from condition rendered disabling only as the result of 'lighting up' by the second injury." This construction is also supported by the language of Labor Code, section 4663, hereinafter quoted.

[3] The rule is, of course, that where a disability is due entirely to an industrial injury and the lighting up or aggravation of a pre-existing condition by such industrial injury, the employer is required to compensate for the entire disability *so caused* (within the limits defined in Lab.Code, § 4663) and there is no apportionment of disability as between the industrial accident on the one hand and that due to the *industrially caused aggravation* of the employe's pre-existing physical condition. But if the entire disability is partly due to industrial disability growing out of the immediate injury (including such industrially caused aggravation or lighting up of a pre-existing dormant condition) and, in part, to a nonindustrial disability resulting from normal

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[4] In the present case petitioner's claim is that his industrial injury to his right hip, together with the previous muscular dystrophy affecting "lower extremities," as found by the trial referee, brings him within proviso (a) of the 1955 amendment.

symptoms, effects or progress of a pre-existing disease or condition, then there is an apportionment of the percentage of the disability due to the *industrial cause* (the injury) and the percentage due to the disease itself and its symptoms, effects and progress apart from the injury. In the language of section 4663 of the Labor Code, "In case of aggravation of any disease *existing prior to a compensable injury* [italics added], compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury." (See Subsequent Injuries Fund, etc. v. Industrial Acc. Comm. (1955), 44 Cal.2d 604, 607–610, 283 P.2d 1039; see, also, Colonial Ins. Co. v. Industrial Acc. Comm. (1946), 29 Cal.2d 79, 83–84 [2, 3], 172 P.2d 884; Tanenbaum v. Industrial Acc. Comm. (1935), 4 Cal.2d 615, 617–618, 52 P.2d 215; Globe Indem. Co. v. Industrial Acc. Comm. (1954), 125 Cal.App.2d 763, 768–769 [2], 271 P.2d 149; Bowler v. Industrial Acc. Comm. (1955), 135 Cal.App.2d 534, 539 [4, 5, 6], 287 P.2d 562.)

[4] As already noted above, and more fully discussed in Subsequent Injuries Fund, etc. v. Industrial Acc. Comm. (1955), supra, 44 Cal.2d 604, 607–608, 283 P.2d 1039, there is also an apportionment under the terms of section 4750[3] of the Labor Code where an employe already suffering from a previously incurred permanent disability or physical impairment sustains a permanent industrial injury. The employer, in such case, "shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed." (See, also, Smith v. Industrial Acc. Comm. (1955), supra, 44 Cal.2d 364, 282 P.2d 64.) It is, of course, with the apportionment prescribed by section 4750 and the contribution award contemplated by section 4751 that the parties to this litigation are directly concerned.

From the several applicable statutory provisions which have been referred to, it appears that both employe and employer, in relationships subject to the Workmen's Compensation Act, will be well advised to be diligent in ascertaining, at the very inception of the employment relation, all available or discoverable facts relevant to the prospective employe's physical condition. This should subserve the interests of both employe and employer. In many cases it may result in alerting the employe to possibly incipient processes of disease at a time when they can be interrupted or corrected; it may disclose conditions which will indicate that, for the personal safety or financial welfare of all concerned, certain types of activity should be avoided by some employes or that they possess peculiar aptitude for other endeavors. Certainly periodic medical examinations of all those engaged in industry would not be inimical to the interests of employer, employe, insurance carrier, or the State of California acting as the Subsequent Injuries Fund. The statutes we have discussed and the conclusions we have reached are consistent with both the interests of the parties and the objectives of the legislation.

[5] To summarize, we hold that to qualify for resort to the Subsequent Injuries Fund an employe must show that prior to the occurrence of the subsequent industrial injury he had attained the factual status of the "permanently partially disabled" and that such previously incepted disability was labor disabling, but that previous knowledge thereof by the employer is not inherently as a matter of law required as a condition to an award to the employe of payments from the Subsequent Injuries Fund. All implications to the contrary which may be found in State of California, Subsequent Injuries Fund v. Industrial Acc. Comm. (Baldes) (1957), supra, 150 Cal.App.2d 716, 311 P.2d 26; State of California v. Industrial Acc. Comm. (Bachrach) (1957), supra, 147 Cal.App.2d 818, 306 P.2d 64; Urquiza v. Industrial Acc. Comm. (1956), supra, 144 Cal.App.2d 322, 300 P.2d 871; State of California, Subsequent Injuries Fund v. Industrial Acc. Comm. (Strauss)

(1955), supra, 135 Cal.App.2d 544, 288 P.2d 31, are disapproved.

Inasmuch as respondent commission placed its decision (award denying recourse to the Subsequent Injuries Fund) solely on the ground that petitioner had failed to establish previous employer knowledge of his alleged earlier incurred permanent partial disability, and as the decision cannot on that limited ground be sustained, it follows that the award should be and it is annulled and the matter is remanded for determination by the commission, on the merits, in a manner and on grounds not inconsistent with the views hereinabove expressed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

McCOMB, J., dissents.

Rehearing denied; McCOMB, J., dissenting.

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161 Cal.App.2d 145

In re KIRK'S ESTATE.

In the Matter of the ESTATE of Frederick Arthur KIRK, also known as Frederick Kirk, also known as Fred Kirk, Deceased. Adeline L. Kirk, L. P. Gebhardt, Jess Leach and Vesta Leach, Proponents and Appellants;

Oscar F. Kirk and Charles Ellsworth Kirk, Contestants and Respondents.

Civ. No. 9247.

District Court of Appeal, Third District, California.

June 6, 1958.

Proceeding for probate of will. The Superior Court of Amador County, Ralph McGee, J., denied probate and proponents appealed. The District Court of Appeal, Peek, J., held that evidence supported finding of lack of testamentary capacity.

Affirmed.

1. Wills 🔑400

Province of reviewing court in a will contest is the same as in any other civil action, and conflicts in evidence will not be reviewed.

2. Evidence 🔑571(2)

Testimony of medical experts, based on diagnosis of elderly testator as having psychosis with cerebral arteriosclerosis, a permanent, irreversible and progressive disorder, was not too remote in point of time to support verdict finding lack of testamentary capacity.

3. Wills 🔑21

Proof of sanity of testator and proof of facts upon which his state of mind depends are not necessarily confined to the exact time of execution of will, especially where permanent and progressing mental disease is indicated.

4. Wills 🔑55(1)

Evidence supported determination that testator lacked testamentary capacity.

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Pierce Deasy, Jackson, for appellants.

George Gard Chisholm, Jackson, for respondents.

PEEK, Justice.

This is an appeal by proponents Adeline Kirk, L. P. Gebhardt, Jess Leach and Vesta Leach of the will of Frederick Kirk, deceased, from a judgment entered denying probate thereof. The judgment was entered pursuant to a special verdict of the jury finding that Frederick was induced to sign the proposed will by means of the undue influence of Phil Gebhardt, and that Frederick, at the time of said execution, was not of sound and disposing mind. The proponents contend that the findings of undue influence and mental incompetency are not supported by the evidence. Necessarily, therefore, if the conclusion of the jury can be supported on either ground, the judgment must be sustained. Since it appears that the evidence upon the question of competency amply supports the judgment, we shall limit this opinion solely to that issue.

The testator executed the contested will on August 3, 1950. He died on April 15, 1956, at the age of 78 years, survived by two sons—Charles Ellsworth Kirk and Oscar Kirk, the contestants.

At the time the will was executed, as at the time of his death, the decedent was the owner of real property in Amador County consisting of the Mount Echo Ranch containing about 316 acres; the Lane Place, about 133 acres; the Glascock Place, about 45 acres; the Ruggles Ranch, about 480 acres; and a home place in Ione, about one-half block.

By the contested will of August 3, 1950, he gave the Lane Place to his sister-in-law, Adeline Kirk; the Mount Echo Ranch and the home place in Ione to Adeline Kirk and his brother, Charles H. Kirk, who died in 1952; the Glascock place to the children of his son Ellsworth—Dulcy and Rodney—and their mother, Betty; $500 to Phil Gebhardt; $100 each to Jess Leach and his wife, Vesta; and the residue to those specifically remembered in the will. Adeline Kirk was named the executrix.

Paragraph IX of the will provided in part as follows: "I have two sons now living, Ellsworth Kirk and Oscar Kirk. I specifically and with premeditation leave each of them nothing. My son, Ellsworth, for a long number of years has failed to give to me any filial or other respect, attention, love or affection and it has been necessary for me, through my friends, to have had my son Ellsworth removed as my Guardian because of his lack of attention to me either as Guardian or son. My son, Oscar, treats me as a stranger and has never at any time displayed toward me any affection or respect."

Pursuant to a petition filed on November 5, 1942, by Frederick's brother, Charles, Frederick was adjudged a mentally ill person and ordered committed for placement in the Stockton State Hospital. Frederick was a patient in the hospital until September, 1944, when he was granted a leave of absence. He was issued a certificate of recovery in 1945. Frederick was examined again on September 29, 1948, and would have been issued a certificate of recovery on that date had not one already been issued to him. The conclusion of the medical examiners at the time of his admission to the hospital was that decedent was "mentally confused." Both of the doctors who signed the report died prior to the trial. The later official diagnosis of the hospital staff was "psychosis with cerebral arteriosclerosis and alcoholism."

Upon his petition, Ellsworth was appointed guardian of the person and estate of his father on December 4, 1942, and remained guardian until May, 1950. The petition of Frederick's brother, Charles, that Ellsworth be removed as Frederick's guardian and that Phil Gebhardt be appointed the guardian of the person and estate of Frederick was granted on May 15, 1950. Gebhardt assisted Frederick's brother, Charles, in the preparation of the petition for the removal of Ellsworth as guardian. In that proceeding Gebhardt filed an affidavit wherein he alleged it was necessary for someone to "care for the person and manage the property of said incompetent," and in a subsequent procceeding alleged that "the person and estate of the said Frederick Kirk was and is endangered and subject to damage and loss unless a special guardian were not therein appointed." Thereafter, during the course of the present trial and in answer to questioning by contestants' counsel, Gebhardt admitted that he thought Frederick "wasn't right" and that "he couldn't look after his property." Gebhardt was Frederick's guardian until July 28, 1951. From that time until his death the Bank of America was the guardian of the estate of Frederick but there was no guardian of his person until Ellsworth was appointed in 1955.

Decedent resided at what is referred to as the home place in Ione all his life. He married in 1902; Oscar was born in 1904 and Ellsworth in 1908. In 1913 Frederick and his wife separated and were subsequently divorced. After the separation Ellsworth and his mother moved to Oakland

and Oscar lived with his father in Ione. Ellsworth spent school vacations with his father. He lived in the East from 1927 or 1929 until 1939 and saw his father every two or three years during that time. He returned to the West in 1940. From 1933 on Oscar was employed as a warehouseman in a cannery in Oakland and lived in that city. He saw his father about twice a month during the winter months except when he was in the Army in 1942–1943, and spent a week or ten days with him during the holidays. During the years 1944 through 1950 Oscar visited his father twice a month in the winter season but was not able to go to Ione during the busy season at the cannery. Oscar took food stuffs from the cannery to his father and remembered him with Christmas gifts. He gave his father an overcoat for Christmas in 1952 or 1953.

Gebhardt testified under section 2055 of the Code of Civil Procedure that Frederick cared for his family and told him on numerous occasions and up to the time of his death that he (Frederick) "thought the world of Oscar."

Ellsworth testified that from 1944 until his father's death, there had been a normal father-son relationship between them and he knew of no ill feeling that his father had toward him. He said further that when his father testified during the guardianship proceedings in April, 1950, in answer to the court's question whether or not he had any ill feeling toward Oscar or Ellsworth, he said, "No, none whatever. We are getting along fine."

Oscar testified that one time, the exact date he did not recall, he asked his father if he had made a will. His father replied that "* * * he wasn't interested in a will at all. All he wanted to do was to leave it in the family."

Frederick's former wife testified that in July, 1955, she asked him, "Have you draw a will?" He answered, "You know I never would draw a will. I ain't got no faith in them." She also testified that in her opinion he was not competent to make a will on August 3, 1950; that he could not carry on a conversation and could not talk rationally.

Ellsworth testified further that from the time his father returned from the hospital until he died his mental and physical condition gradually deteriorated; that he did not bathe, change his extremely dirty garments, shave or get his hair cut and resented anyone trying to persuade him to do these things; that he was somewhat rambling in conversation and dwelt upon events 30 or 40 years in the past; that he had a disorganized garden which was in spots over the lot and over established paths; that he stuck a pole in the ground and cultivated any weed or "sucker" from a tree; that he planted thistles; that he used green limbs and leaves to start a fire in a wood stove in his cabin when he had firewood available; and that he dipped drainage from the septic tank and poured it on his vegetables. He further testified that at least twice a year until his death his father said that Oscar had a spot on his lung and was going to be discharged from the service; that during that time Oscar had visited him on a number of occasions; that from 1944 through 1946 he sprinkled water on the premises when it was raining; that he ascertained the day of the week from the newspaper and then asked for the newspaper again to find out what day of the week it was; the during the winter he wore bedroom slippers outside when it was raining and muddy, and during the summer wore high laced boots inside; that he wore shoes that were not mates; that he refused to have facilities for water installed inside the cabin; that at times he eliminated in the storeroom in the barn in preference to toilet facilities in the five-room house or an outside privy; that in August or September, 1955, he took a check and a letter from the glove compartment of Ellsworth's car.

A neighbor, Rose Bell, testified that after Frederick returned from the hospital he set fires indiscriminately—adjacent to fences, houses and other buildings; that he took effluent from a septic tank and spread this upon his garden; that he dug thistles and horehound from her yard and planted them in his; and that he sprinkled water when it was raining. She also testified that from the time he returned from the hospital until his death he would proceed up and down the street in the vicinity of his house and look into vehicles parked there; that in 1951 he took a cattle pen sign from a sales yard at an auction in Galt; that from the time he returned from the hospital until his death he got gradually worse; and that in 1950 "* * * his mind and everything was worse. He just simply didn't know what he was doing part of the time."

Sam Hawkins who, with his family, was a tenant of Frederick during 1946–48 testified that during that period of time Frederick poured sewer water which he called "fire water" over the witness's vegetable garden; that Hawkins found human excrement stored in the barn in tobacco cans which had contained the brand Frederick used.

Doctor Freeman H. Adams, who was superintendent of the Stockton State Hospital and acting superintendent of Modesto State Hospital at the time of the trial, stated that psychosis with cerebral arteriosclerosis means there was a loss of the higher centers because of poor blood supply or insufficient nutrition to the brain; that the disorder is generally considered permanent, irreversible and progressive. It interferes with a person's ability to see things clearly. The patient's personal appearance very often suffers as do his memory and his ability to know exactly his surroundings. He becomes careless and does not take care of his personal needs. Doctor Rudolf B. Toller, who had been superintendent of Stockton State Hospital during a portion of decedent's commitment, stated that this illness causes a dying-out or destruction of certain brain cells and is progressive in nature. A person suffering from this illness may have lucid moments. Periods of lucidity vary as to the amount of progress the disease has made. In their opinions Frederick Kirk, on August 3, 1950, was not able to satisfy the well-established elements of testamentary capacity. See In re Estate of Smith, 200 Cal. 152, 158, 252 P. 325. Their opinions were based upon hypothetical questions which took into consideration the decedent's medical records and the previously summarized facts.

[1] The province of a reviewing court in a will contest is the same as in any other civil action. In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. Necessarily, therefore, appellants' contentions which are essentially a reargument of the weight and sufficiency of the evidence are without merit. While it is true that much of the evidence was in conflict, to review those conflicts is not the province of this court.

[2–4] Equally without merit is appellants' further contention that the evidence, particularly in regard to the testimony of the two medical experts, is too remote in point of time. "Proof of the sanity of the testator and of the facts upon which his state of mind depends are not necessarily confined to the exact time of the execution of the will. Evidence of the testator's mental status, together with his appearance, conduct, acts, habits, and conversation, both before and after the execution of the will are admissible so long as they have a reasonable tendency to indicate his mental condition at the time of the execution of the will. Its weight was for the jury to determine. [Citations.] This is particularly true when the characteristics of the malady indicate a permanent and progressing mental disease." In re Estate of Hartley, 137 Cal.App. 630, 633, 31 P.2d 240, 242. The evidence produced by the contestants comes squarely within the rule enunciated in the case above quoted.

Since it cannot be said that such evidence was insufficient, as a matter of law, the judgment must be affirmed.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

161 Cal.App.2d 151

Auderlene STROMAN, Plaintiff and Respondent,

v.

The ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, a corporation, Defendant and Appellant.

Civ. 17677.

District Court of Appeal, First District, Division 1, California.

June 9, 1958.

Rehearing Denied July 9, 1958.

Hearing Denied Aug. 6, 1958.

Action by railroad employee for conspiracy to cause discharge and for wrongful discharge. The Superior Court of the City and County of San Francisco, A. K. Wylie, J., rendered summary judgment for plaintiff as against the employer, and the employer appealed. The District Court of Appeal, Peters, P. J., held that evidence of whether employee was discharged in violation of collective bargaining agreement was sufficiently in conflict to make a case for jury.

Reversed.

1. Appeal and Error 🔑927(7)

On appeal from a directed verdict, on all factual issues the evidence produced by appellant, and all reasonable inferences therefrom, must be accepted as true.

2. Appeal and Error 🔑882(3)

Where complaint alleged conspiracy to cause discharge of plaintiff from employment, with implication that discharge was unlawful and in violation of collective bargaining agreement, and employer's answer denied breach of employment contract and wrongful termination of employment, and issue of whether plaintiff had been discharged was fully developed by both litigants at trial, employer could not complain on appeal that cause of action for wrongful discharge, as distinguished from conspiracy, was not before trial court.

3. Master and Servant 🔑43

In action against railroad for wrongful discharge of employee, evidence of whether employee was discharged in violation of collective bargaining agreement was sufficiently in conflict to make a case for jury.

4. Master and Servant 🔑36

Under California law, employee must exhaust his administrative remedies under employment contract before he may bring action for damages for violation of such contract.

5. Judgment 🔑181(21)

Fact that discharged railroad employee failed to exhaust her administrative remedies provided in collective bargaining agreement, in that she protested only to general manager and not to vice president designated by employer as highest official to hear such protests, did not entitle employer to summary judgment in action for wrongful discharge, in view of affidavit indicating that employer's officials informed her that general manager was the highest designated official to whom appeal might be taken.

6. Corporations 🔑425(5)

If railroad officials informed employee that general manager was the highest designated official to whom her appeals might be taken under collective bargaining agreement, railroad was estopped from urging, as defense to action for wrongful discharge, that employee protested only to general manager and failed to take protest to vice president designated by company as the highest official to hear such protests.

7. Labor Relations 🔑433

Employer was under no duty to speak to inform the employee of proper official to whom appeal might be taken under collective bargaining agreement, but when it did speak through responsible agents, it was under duty to speak the truth, and not mislead employee to her damage.

8. Estoppel 🔑119

Whether employer made representations as to proper official to whom employee must protest grievances, and hence was estopped from urging as defense in action for wrongful discharge that employee failed to protest to highest possible official, presented fact question for jury.

Robert W. Walker, Richard K. Knowlton, Los Angeles, Peart, Baraty & Hassard, San Francisco, for appellant.

Jarvis, Miller & Decker, Hugh B. Miller, Charles W. Decker, San Francisco, for respondent.

PETERS, Presiding Justice.

Auderiene Stroman, on July 22, 1952, filed this action naming as defendants the Atchison, Topeka and Santa Fe Railway Company and several of its employees, and the Bay Cities Lodge No. 1039 of the Brotherhood of Railway and Steamship Clerks, an unincorporated labor union, and several of its officers. This complaint is entitled: "Complaint for Damages for Conspiracy to Force Plaintiff out of Service of Defendant Atchison, Topeka & Santa Fe Railway * * * in Violation of Contractual Provisions." It contains detailed allegations in reference to the claimed conspiracy and asks for damages for the conspiracy alleged, claiming that such conduct violated the provisions of the Collective Bargaining Agreement existing between the Santa Fe and the union. The Santa Fe's answer admitted the employment of the plaintiff, denied the conspiracy, denied any breach of the employment contract by it, denied any termination of such contract by it, denied that plaintiff had performed certain conditions precedent required by the employment contract, and alleged a breach of the employment contract by her.

During the trial the Santa Fe moved for a summary judgment on the ground that before filing suit plaintiff had not exhausted her administrative and contractual remedies. This motion was denied. Plaintiff then dismissed as to defendant A. B. Enderle, a Santa Fe employee who had died, and as to the union and its officers.

At the close of the presentation of the evidence, all of the individual defendants remaining in the case moved for a nonsuit on the ground that no conspiracy had been proved. These motions were granted, and all of the remaining individual defendants were dismissed from the proceeding. This left as the sole defendant the Santa Fe. The court denied its motion for a nonsuit. The court then granted plaintiff's motion for a directed verdict against the Santa Fe. This motion was granted, on the theory that the complaint not only alleged a conspiracy but also alleged a cause of action for damages for breach of the employment contract, and a wrongful discharge of plaintiff by the Santa Fe, and that the evidence showed, as a matter of law, that the Santa Fe had breached the contract of employment and wrongfully discharged the plaintiff without affording her a hearing and investigation as required by the Collective Bargaining Agreement governing the terms of her employment. The court then submitted the question of the amount of damages to the jury and the jury assessed the damages against the Santa Fe at $40,000. The Santa Fe appeals from the judgment entered on that verdict. Its main contentions are that it was entitled to a summary judgment in that it appears as a matter of law that plaintiff did not, prior to filing suit, exhaust her contractual and administrative remedies as required by law, and that, in any event, the issue of liability should have been submitted to the jury for the reason that the evidence in reference thereto is conflicting.

[1] This being an appeal from a directed verdict, on all factual issues the evidence produced by appellant, and all reasonable inferences therefrom, must be accepted as true. This court must view all of the evidence submitted in the light most favorable to appellant and must accept every inference in favor of appellant that can reasonably be drawn from the evidence. These rules are elementary.

[2] Inasmuch as the complaint alleges a conspiracy, and the court ruled in granting the motions for nonsuit of the individual defendants that, as a matter of law, no conspiracy had been proved, the only theory that will support a judgment against the Santa Fe is that there was also involved a cause of action against that company for wrongful breach of the employment contract, that is, that respondent was wrongfully discharged in violation of that

contract. Appellant contends that the complaint alleges no such cause of action. It is true that it is difficult to spell out such a cause of action from the complaint in precise language. The complaint but hints at and does not directly allege such a cause of action. But necessarily underlying the conspiracy allegations is the theory that the discharge was unlawful and in violation of the Collective Bargaining Agreement. Moreover, the complaint is not the only document before us. There is also the Santa Fe's answer which discloses that the defendant was not misled by the complaint. It must have construed the complaint as including a cause of action for wrongful discharge in violation of the contract, because it denied any breach of the employment contract by it and denied that it had wrongfully terminated the admitted employment. Whatever doubt may have existed on this issue was set at rest at the time of trial. At that time the issue of whether plaintiff had or had not been discharged was fully developed by both litigants. It is too late now, under these circumstances, to complain that the issue was not before the trial court. It was.

It is undisputed that the employment relationship of plaintiff with the Santa Fe, at all times here relevant, was covered by an agreement between the Santa Fe and the Brotherhood of Railway and Steamship Clerks. This Collective Bargaining Agreement purports to cover the working conditions and hours of service of the various persons, including plaintiff, covered by it. The trial court, in granting the directed verdict against the Santa Fe, was of the opinion that the evidence showed, as a matter of law, that plaintiff had been discharged by the Santa Fe, and that under Article IV of the Collective Bargaining Agreement, the Santa Fe was required, before dismissing the employee, to afford her a formal investigation, and hearing.

Article IV of the Collective Bargaining Agreement provides that an employee who has been in the employ of the company for 90 days or more "shall not be dismissed or otherwise disciplined without a formal investigation, which shall be promptly held, unless such employee shall accept such dismissal or other discipline in writing and waive formal investigation." The same section requires that prior to such formal investigation the employee shall be notified of the precise nature of the charge, and then provides for a hearing and for a transcript of such hearing, if desired. The Article then provides for an appeal up to the highest official designated by the company to hear such appeals. The same Article also provides that an employee who considers himself unjustly treated may have his complaint handled as a grievance up through the regular channels of appeal, but to avail himself of this procedure the employee must file his complaint with his superior officer within seven days of the occurrence of which complaint is made. As already pointed out, it was the theory of the trial court that the Santa Fe dismissed plaintiff without the formal investigation and hearing required by this Article, and that this amounted, as a matter of law, to a wrongful discharge. Thus a verdict was directed on that issue. The Santa Fe contends that the evidence on the issue of wrongful discharge was in conflict and for that reason the issue should have been submitted to the jury. In this same connection Santa Fe also contends that the evidence is capable of being interpreted as showing that plaintiff, in fact, breached and repudiated the employment contract. These contentions require a reference to the evidence.

The record shows without conflict that plaintiff was employed by the Santa Fe from 1943 through March 7, 1949. As already pointed out, her working conditions with the company were governed by the Collective Bargaining Agreement. That agreement provides for the seniority rights of employees and provides for the "bumping," or displacing of an employee by a qualified senior employee. An employee whose position is lost to him because of a reduction in force, abolishment of the position, or displacement by a senior employee in turn has the right to "bump" or displace a junior employee holding a position within the senior employee's fitness, ability and qualifications.

So far as the present case is concerned, between 1943 and February of 1948 nothing occurred of any importance except that plaintiff gained the seniority of these years of service. In February of 1948 plaintiff was "bumped" off a job in the cashier's department, Job 124. Plaintiff then "bumped" a junior employee in the expense and billing department—Job 134. Plaintiff testified that this displeased Mr. Nesbitt, chief clerk of the freight agency. Nesbitt was named as a defendant but has been dismissed from the case. In May of 1948, Job 134 was abolished. A job such as this one is abolished by Nesbitt making such a recommendation to Linsley, the terminal freight agent, who in turn recommends it to Hobdy, chief clerk to the Superintendent. Linsley and Hobdy were also named as defendants but also were dismissed from the case.

Plaintiff testified that when her job was abolished she wanted to "bump" a comptometer job but was discouraged by Nesbitt. She "bumped" Job 100, a billing job, and this made Nesbitt angry. Nesbitt accused her of making 201 mistakes on this job, whereas, in fact, she had only made one, and offered her a resignation to sign, but she refused to sign it. Nesbitt recommended to the Superintendent of the department that plaintiff be penalized 10 demerits for each error, but no demerits were ever assessed. Plaintiff asked for a hearing on the charges but it was not given. In December of 1948 plaintiff decided to bid for Job 67–A, a car record clerk in the car desk department. She did not file this bid herself, but testified that she left it with another employee named Thelma Smith, and then went on her vacation. On January 15, 1949, she was informed by Nesbitt that she was assigned to the job and should report for work on January 17th, which she did. On January 24, 1949, she was told that Erma Crawford, another employee with seniority, would displace her as of January 31, 1949. Then plaintiff wanted to go back to her old job, numbered 100, but Nesbitt refused to let her do so. She submitted a written request for a temporary placement on Job 100 but her request was denied, and she submitted a bid for Job 100 on January 29, 1949, but her bid was not honored. The position was given to a junior employee. But on February 4, 1949, she successfully "bumped" another employee on Job 100, only to receive a notice from Nesbitt that the job was to be abolished on February 9, 1949.

On February 9, 1949, plaintiff asked to work on Job 91, secretary to Nesbitt and Linsley, but the request was denied. Plaintiff then told Hobdy that she had seniority over four employees on his staff, and had the right to "bump" them. Hobdy told her he would not let her "bump" into his office, and that she should shut up or be discharged for insubordination. On February 12, 1949, she "bumped" Job 10–A, a stenographer's job in Hobdy's office. When she started work on this job there were 228 pieces of back work on her desk, for which she was unjustly accused of being responsible. Moreover, she was unable to spend full time on the job because Hobdy would call her into his office and force her to just sit while he had long conversations on the telephone. He also had her try to find old files. Thus she only worked about half time at this job.

She also testified that on February 26, 1949, a Saturday, Hobdy told her not to work during the afternoon and then Hobdy and another employee ransacked her desk and compiled a list of back work for which he unjustly accused her of being responsible. Plaintiff complained to Enderle, the superintendent, who was originally named as a defendant but who died pending trial and was dismissed from the action, about Hobdy's activities and Enderle heard both sides in his office and after a heated discussion said there would be no formal hearing on the problem, and that if she wanted to go higher she should take the matter up with the general manager in

Los Angeles. Her relationship with Hobdy worsened. On Saturday, March 5, 1949, he again gave her Saturday afternoon off and, with the employee plaintiff had "bumped" to get into Hobdy's office, again ransacked her desk and again prepared a backlog list. On that afternoon she came back to the office, not to work, but to see what Hobdy was doing. On March 7, 1949, she was given another backlog communication and was told that as of that date she was disqualified from that job. She demanded a formal investigation and hearing, but they were not granted.

She went home and did not return to the office until March 28, 1949. During this period she received no communication from the company about any new assignment. On March 28th she came to the office to get her pay check, and saw Hobdy. He asked her if she had received a registered letter he had sent her, and when she said she had not, asked her if she wanted a copy. She replied that she did, but none was furnished. She introduced into evidence this letter dated March 15, 1949, which was from Enderle to her assigning her to the job of relief car clerk in Oakland, and informing her that if she did not report for work in 14 days her seniority rights would be forfeited. She did not know about this letter until April 4, 1949, and no one telephoned her about this Oakland assignment. The hours on the Oakland job were eight hours each day, but the shifts changed so that on some days more than eight hours in a particular 24 hours were worked. Thus, the hours were: Saturday—7 a. m. to 3 p. m.; Sunday—3 p. m. to 11 p. m.; Monday—8 a. m. to 5 p. m.; Tuesday—8 a. m. to 5 p. m.; Wednesday—8 a. m. to 5 p. m.; Thursday—11 p. m. to 7 a. m.; Friday—day off. It is obvious that in some periods of 24 hours this job would have required plaintiff to work more than eight hours. This violates section 1350 of the Labor Code which prohibits women from working more than eight hours in any 24-hour period.

Plaintiff also introduced into evidence, and places much reliance on, a form of the Santa Fe, numbered 1615–A which relates to her. It is dated April 2, 1949, and states that plaintiff had voluntarily left the service of the company and that it would not be in the best interests of the company to re-employ her. Plaintiff claims that this form was false because she had never voluntarily left the employ of the company. She was never given a hearing on the facts contained in that form, and did not know about it until she learned that her name was not on the seniority list that came out in January, 1950. Shortly thereafter she discovered that she had been dishonorably discharged. She had talked with Enderle and Nesbitt a number of times asking if there was any work for her, but they did not tell her about the 1615–A form.

Plaintiff testified that she wrote a letter to Enderle on February 6, 1950, protesting the omission of her name from the seniority roster, and that she also wrote to the general manager in Los Angeles. She also asked the Brotherhood, of which she was not a member, for aid but none was forthcoming. Admittedly, she made no attempt to place her case before the National Railway Adjustment Board.

Plaintiff testified that at no time were any demerits assessed against her. She admitted that in the document delivered to her on March 7, 1949, concerning the backlog in connection with her work, there was a notice that she had been disqualified from Job 10–A, and that she read this on March 8, 1949. She also admits that, when she came back to the office on March 28, 1949, she did not ask Hobdy to reinstate her or to give her another position. She claims that she was unable to get a job until 1954.

This is a fair summary of the evidence of the plaintiff, and it would support a finding that plaintiff had been wrongfully discharged and not afforded the investigation and hearing called for by Article IV of the Collective Bargaining Agreement. If this evidence were the only evidence on the issue it would warrant a directed verdict for the plaintiff. But it is not the only evidence on the issue. In practically every important respect defendant produced evidence that directly or indirectly contradicted that of plaintiff.

Hobdy testified that plaintiff was a fair typist and a good transcriber, but that she constantly loafed on the job, frequently sitting at her desk and doing nothing. He denied telling plaintiff that he would disqualify her if she "bumped" into his office, or that she should not try to get into his office. When the employee in Job 10–A left that job there was no backlog, but during plaintiff's first week very little work was done by her. He did not put her to looking for old files, nor did he keep her in his office while he telephoned. On Saturday, February 26, 1949, he and the former occupant of the position made a check of plaintiff's work and discovered a big backlog. Incidentally, starting in November, 1948, the office was closed Saturday afternoons at 1 p. m., so that plaintiff was in error in stating that she was given Saturday afternoon off so Hobdy could check up on her work. When Hobdy tried to discuss the back work with plaintiff, she simply argued. On the next Saturday afternoon another checkup demonstrated that plaintiff was still far behind in her work. On March 7, 1949, he told the plaintiff that she was being disqualified for that job because of her backlog of work. Plaintiff made no oral or written request for a hearing.

On March 28, 1949, when plaintiff came into the office to get her pay check, she refused to read a copy of the official notification sent to her by registered mail assigning her to the Oakland job, as of March 15, 1949, but he orally told her about the contents of that notice. Another employee of the Santa Fe overheard this conversation and agreed that Hobdy told plaintiff about the Oakland assignment. After she failed to protect the Oakland assignment, form 1615–A was prepared indicating that she had voluntarily left the employment. This form was not circularized among other railway companies, but was simply an office form for office use. Hobdy also testified that he did not ever abolish a job simply because plaintiff held it.

Linsley, the terminal freight agent, who first hired plaintiff in 1943, contradicted plaintiff as to what he then told her about advancements, denied having assessed any demerits against her, and denied cooperating with other employees to have plaintiff lose her job. In his opinion, plaintiff was an efficient worker, and he had no prejudice against her. No job was canceled because plaintiff held it. Between March of 1947, and September of 1949, in fact, some 106 jobs were abolished because of lack of work caused by a drop in business. Twenty-four jobs were abolished in the first six months of 1949 for this reason. He never threatened to have plaintiff removed or disqualified, he did not have anything to do with the Oakland assignment, and he never told plaintiff that if she worked on a job it would be abolished. He did correspond with the Superintendent about assessing demerits against her, and he did present to plaintiff a form waiving a hearing on these demerits, but when she refused to sign, no further action was taken. Plaintiff was not permitted to return to her job after her vacation because under then company rules she was not eligible for that job, which also precluded her from being assigned as his secretary.

Nesbitt, the chief clerk of the freight agency, denied that he planned with Erma Crawford to "bump" plaintiff from Job 67–A, and denied telling plaintiff she could not work in his office.

It will be remembered that plaintiff testified that she left a bid for Job 67–A with Thelma Smith, asking her to file it for her while plaintiff was on her vacation. Thelma Smith testified that plaintiff had never asked her to file a bid on her behalf.

The employee who was displaced by plaintiff on Job 10–A testified that when she left that job her work was up to date and there was no backlog.

Other evidence could be referred to, but that, in substance, is a summary of defendant's defense.

On this evidence, the trial court ruled, as a matter of law, that no conspiracy had been proved, and dismissed all of the individual defendants. The propriety of that ruling is not before us, plaintiff not having appealed. The trial court then granted a directed verdict against Santa Fe, holding that plaintiff was entitled, under Article IV of the Collective Bargaining Agreement to a formal investigation, and that, as a matter of law, plaintiff was wrongfully and illegally dismissed from her job because no such investigation was afforded her.

[3] There can be no doubt that, under Article IV of the Agreement, before the employer can dismiss or otherwise discipline an employee, there must be a formal investigation and hearing, and that without such investigation and hearing, a dismissal violates the terms of the Collective Bargaining Agreement. There can also be no doubt that an employee may voluntarily leave the employment, or a job may be abolished, or an employee may be "bumped" by a senior employee, and that, in such event, no investigation or hearing is held. The question in the present case is whether or not there is a conflict in the evidence that should have been submitted to the jury on the issue of whether or not plaintiff was discharged in violation of the provisions of Article IV. We think that there was such a conflict.

The trial court placed reliance on form 1615–A. That was an office form, for office use alone, and its contents were never communicated to plaintiff. While that form stated that plaintiff was no longer in the employ of the Santa Fe, it also stated that plaintiff had voluntarily left the service of the company. Other than this form no one told plaintiff that she was dismissed, and plaintiff admits that she did not learn about the form until sometime in 1950. There was evidence by defendant that would permit the jury to infer that after plaintiff was disqualified from Job 67–A, she simply stayed at home and made no effort to bid for another post or to displace another employee. Under these circumstances it was a jury question whether the 1615–A form and the removal of plaintiff's name from the seniority roster on January 10, 1950, constituted a discharge. Normally there cannot be a wrongful discharge unless by words or acts the employee is informed of his discharge. In Percival v. National Drama Corporation, 181 Cal. 631, at page 637, 185 P. 972, at page 974, which involved an action for a claimed wrongful discharge, the court stated:

"A discharge cannot be effected by a secret, undisclosed intention on the part of the master. It must be done by some word or act communicated to the servant. 'No set form of words is necessary; but any words or acts which show a clear intention on the part of the master to dispense with the servant's services, and which are equivalent to a declaration to the servant that his services will be no longer accepted, are sufficient.' 26 Cyc. 987."

In the instant case there is no conclusive evidence that plaintiff was ever told that she was dismissed. So far as acts are concerned indicating a dismissal, the evidence is susceptible of conflicting inferences. Plaintiff testified that she called a number of times to ask if there was any work for her, and that she found out about the 1615–A form and the removal of her name from the seniority roster in January of 1950. But she also admitted that when she saw Hobdy on March 28, 1949, she did not ask him to reinstate her and to give her another position. Nor did she protest to the general manager of the company in Los Angeles, or seek the aid of the union, until 1950.

Unless plaintiff was discharged she was not entitled to suspend performance of her work. Section 1–h of Article IV of the Collective Bargaining Agreement provides: "Prior to the assertion of grievances as herein provided, and while questions of grievances are pending, there will neither be a shutdown by the employer nor a suspension of work by the employees."

Disqualification of plaintiff from a particular job did not permit her to suspend performance on her part. Article III, section 6 of the Agreement provides, in part: "An employee disqualified under this Section may be removed from the position without following the procedure provided for discipline cases in Article IV of this Agreement, will retain all seniority rights under conditions stated in Section 13–b of this Article, will be permitted to bid on bulletined positions to which his seniority is applicable, but cannot displace any other employee because of such disqualification. An employee who considers he has been wrongfully disqualified under this Section may have his complaint handled as a grievance through the recognized channels of appeal. In the handling of that grievance, the affected employee shall have the right, if requested, of conference with his employing officer, either alone or with representatives of his choice, *as* which conference it will be the effort to dispose of the case based upon the facts and arguments there presented, but this will not prohibit full consideration of any facts and arguments thereafter presented by either party during the course of appeal."

It cannot be held as a matter of law that plaintiff's disqualification, as distinguished from dismissal, from her job was unjustified. There was a direct conflict on this issue. Hobdy testified as to plaintiff loafing on her job and of her failure to do her work. The employee who was displaced by plaintiff testified that she left no backlog of work. There is evidence to the effect that in the first three weeks on this job the plaintiff accumulated a massive backlog of work.

There is much dispute over the assignment of plaintiff to the Oakland job. There is no doubt that on March 15, 1949, the Santa Fe sent plaintiff a properly addressed prepaid registered letter notifying her she had been assigned to Oakland. This letter was returned, unopened, to the Santa Fe on March 29, 1949. Why plaintiff did not, or would not, accept delivery, or why delivery was not made, does not appear. There is a direct conflict on whether plaintiff knew of this assignment. Plaintiff testified that she was not informed of it. Hobdy testified that he offered plaintiff a copy of the letter but that she refused to read it, and that then he orally told her about it. If Hobdy's testimony were believed by the jury it could have found that plaintiff, without voicing any objection, simply voluntarily refused to accept the Oakland job, and failed to report to the Oakland office.

Plaintiff attempts to meet this point by asserting that the Oakland assignment was a nullity because it violated the then provisions of section 1350 of the Labor Code prohibiting employment by transportation companies of female employees "more than eight hours during any one day of twenty-four hours." It is true that the Oakland assignment, because of the different starting times on various days of the week, required the employee on several occasions each work week to work more than eight hours in a single 24-hour period. Plaintiff also calls attention to a note to section 4 of Article III of the Agreement which provides: "It is understood that where Federal and State laws limit the number of hours or days per week for women employees, such employee may be considered as having her position abolished and may exercise her seniority rights as provided for in these rules to other positions when on the position occupied by her the requirements necessitate hours of service in excess of what is permitted under such laws."

Under this provision plaintiff argues that because the hours on the Oakland job violated the statutory laws of this state she had the legal right to consider that job "abolished," and so was under no duty to report. That is undoubtedly true. But it is also true that plaintiff did not assert this illegality at the time, nor did she make any effort to call it to the attention of the employer. Moreover, assuming that she could consider the Oakland job as having been abolished because of the illegal hours of employment, then she would have been entitled to assert her seniority rights to displace another employee for whose job she was qualified. The evidence is conflicting as to whether she attempted to do so. The case should have gone to the jury for its determination whether her failure to take another post with the company was her own fault or that of the company. There was a clear conflict in the evidence and in the reasonable inferences therefrom, as to whether plaintiff was discharged by the Santa Fe, or whether she just voluntarily left the employ. This conflict should have been resolved by the jury.

Santa Fe not only contends that it is entitled to a reversal, but also contends that it is entitled to a judgment in its favor as a matter of law because, so it is asserted, the evidence shows without conflict that plaintiff failed to exhaust her contractual and administrative remedies conferred upon her by the Collective Bargaining Agreement before filing this action. This, so it is claimed, is fatal to plaintiff's cause of action for breach of the employment contract.

Article IV, section 1–e of the Agreement provides: "The right of appeal by employees or their representatives in regular order of succession and in the manner prescribed, up to and including the highest official designated by the Company to whom appeals may be made, is recognized. * *" During the trial, the Santa Fe moved for a summary judgment on the ground that plaintiff had failed to ask for relief from the "highest official designated by the Company to whom appeals may be made," and that such failure was fatal to her cause of action. In the affidavit of De Witt F. Todd, an officer of the company, filed in support of this motion, it is averred that the company has designated the Vice-President of the Operating Department as the highest official to whom appeals can be made. This affidavit also avers that plaintiff did appeal to the General Manager of the Company, O. L. Gray, who denied the appeal, but that plaintiff failed to apply to the Vice-President. In her counter-affidavit plaintiff admits that she did not appeal to the Vice-President, but avers that she did not do so because Enderle and Hobdy told her that Gray was the highest designated official to whom her appeal might be taken, and that she relied thereon. She also averred that no one told her that a Vice-President had been designated as the highest official to whom appeals could be taken.

In addition to the provisions of the Collective Bargaining Agreement, the Railway Labor Act (45 U.S.C.A. § 153) creates the Railway Adjustment Board with certain powers over disputes between employers and employees in the transportation industry, and particularly for a further appeal by the employee if he desires to go beyond the highest officer designated by the company. The section provides, in part:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

The United States Supreme Court has ruled that under this statute an appeal to the Adjustment Board is not a condition precedent to filing a court action. Moore v. Illinois Central R. Co., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089. In Transcontinental & Western Air v. Koppal, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed. 1325, an employee of an airline brought an action against his company for a wrongful discharge under Missouri law. The court, in discussing the precise point here involved, stated that while the Adjustment Board had exclusive jurisdiction over certain disputes "that Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged. Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law.

"On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so. Here respondent was employed by a carrier, subject to Title II of the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed." 345 U.S. at page 661, 73 S.Ct. at page 910.

[4] The California law requires an employee to exhaust his administrative remedies under his employment contract before he may bring an action for damages for violation of such contract. Cone v. Union Oil Co., 129 Cal.App.2d 558, 277 P.2d 464; Hagin v. Pacific Gas & Elec. Co., 152 Cal. App.2d 93, 312 P.2d 356; Williams v. Pacific Elec. Ry. Co., 147 Cal.App.2d 1, 304 P.2d 715.

[5–7] In the instant case it is undisputed that plaintiff failed to exhaust her administrative remedies provided in the Collective Bargaining Agreement. She conceded that she had carried her protest only to the General Manager in Los Angeles. She failed to take her protest to the Vice-President designated by the company as the highest official to hear such protests. But this does not entitle defendant to a summary judgment as a matter of law. In plaintiff's affidavit in opposition to the motion for summary judgment she alleged circumstances which, if true, might excuse her failure to exhaust her contract remedies. She averred that Ederle and Hobdy informed her that the General Manager in Los Angeles was the highest designated official to whom her appeal might be taken. If this is true, then the defendant is estopped from urging this defense. Underlying the proper interpretation of the Collective Bargaining Agreement are certain fundamental principles of morality and fair play. While the company was under no duty to speak, when it did speak through its responsible agents, it was under a duty to speak the truth, and not to mislead the plaintiff to her damage. For this reason the trial court correctly denied the motion for a summary judgment.

[8] In view of the fact that this case must be retried there are certain comments that should be made on this issue. Whether the company did make these representations and whether the company is estopped, presents a question of fact which should be submitted to the jury. If the jury should find that these representations were not made and that the company is not estopped, then defendant would be entitled to a summary judgment. This is another factual issue that should have been submitted to the jury.

For these reasons the judgment appealed from must be and is reversed.

BRAY and FRED B. WOOD, JJ., concur.

Bruce MACFARLANE and Fay M. Wine, dba Bruce's, Petitioners,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL and Russell S. Munro, Director, Defendants and Respondents,

Bruce Macfarlane, Appellant.*

Civ. No. 22942.

District Court of Appeal, Second District, Division 2, California.

June 4, 1958.

Hearing Granted July 30, 1958.

Proceedings on petition for a writ of mandate. From a judgment of the Superior Court of Los Angeles County, Bayard Rhone, J., denying the relief sought, the petitioners appealed. The District Court of Appeal, Ashburn, J., held that even though penalty of revocation of general on-sale liquor license seemed severe punishment for taking of two bets of $2 each on licensed premises, it was not its province to interfere.

Affirmed.

1. Criminal Law ⚷27

Where crime is punishable as a felony or as a misdemeanor, offense is a felony until trial judge has converted crime into a misdemeanor by sentencing defendant on that basis. West's Ann.Pen.Code, §§ 17, 337a, subd. 3.

2. Constitutional Law ⚷208(1)

Distinction between betting at race track and betting elsewhere is a valid one. West's Ann.Pen.Code, § 337a, subd. 3.

3. Intoxicating Liquors ⚷106(2)

The "good cause" mentioned in constitutional provision, giving department power to revoke license if it determines for "good cause" that continuance of license would be contrary to public welfare or morals, may consist of any violation of Alcoholic Beverage Control Act; and gambling in connection with sale of liquor falls within constitutional provision. West's Ann.Const. art. 20, § 22.

4. Mandamus ⚷87

Even though penalty of revocation of general on-sale liquor license seemed severe punishment for taking of two bets of $2 each on licensed premises, it was not province of court, in mandamus proceeding brought to procure vacation of revocation order, to interfere. West's Ann.Pen. Code, § 337a, subd. 3; West's Ann.Code Civ.Proc. § 1094.5.

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John J. Bradley, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondents.

ASHBURN, Justice.

Appeal from judgment denying petition for writ of mandate requiring respondents to vacate an order revoking a general on-sale liquor license held by appellant Macfarlane and his co-licensee, Fay M. Wine.

The evidence shows that appellant and said Wine were conducting a bar and restaurant known as Bruce's Cafe at 10508 South Prairie Avenue in the town of Lennox, six or seven blocks from the Hollywood Park race track. Many of their customers were connected with the track. On April 12 and 13, 1955, Hollywood Park had no races but the Golden Gate Park track in the San Francisco area was operating. On April 12th Bruce Kiesling, deputy sheriff, visited Bruce's Cafe, the licensed premises, asked appellant Macfarlane to take a bet for him, was told it was too late but that Jim probably would take it; appellant introduced the officer to Jim Platt who, in the presence of appellant, took a two dollar bet on a horse running in the seventh race at Golden Gate Park. On the next day, April 13th, Kiesling placed with Platt on the same premises a bet on a horse in the sixth race at Golden Gate Park. This was before appellant arrived. When he came the officer placed a bet with him on the same horse in the same race. As they left the premises Macfarlane was placed under arrest.

All of appellant's arguments upon this appeal come to rest upon the proposition that one who is convicted of a crime which is subject to punishment as a felony or a misdemeanor and who is sentenced to the county jail is convicted of a misdemeanor and not a felony. That this is an erroneous concept will appear from the ensuing discussion.

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* Opinion vacated 330 P.2d 769.

Appellant was prosecuted in the superior court upon an information charging "Violation of Section 337a, Subdivision 3, Penal Code of California, a felony," on April 13, 1955. That statute forbids taking bets on horse races and the like, and declares that any person who does so "[i]s punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year." After a jury trial verdict was rendered that defendant was "guilty of violation of Section 337a, a felony, as charged in the information." In due course judgment was rendered reciting that defendant had "been duly found guilty in this court of the crime of Violation of Section 337a, Subdivision 3, Penal Code of California, a felony, as charged in the information." It adjudged that defendant be punished by imprisonment in the county jail for the term of six months and that he be fined $250; sentence was suspended and probation granted for one year.

The Area Administrator of the Department of Alcoholic Beverage Control filed an accusation against Macfarlane and Wine charging that Macfarlane was convicted on September 26, 1955, in the superior court, of violation of § 337a, subdivision 3, Penal Code, through "taking, holding, and forwarding bets upon horse races" upon licensed premises. Notice of Defense having been filed, hearing was duly had before a hearing officer of the department who filed a proposed decision stating that it was true that on September 26, 1955, Macfarlane was convicted in the superior court "of violation of Section 337(a) subsection 3 of the California Penal Code, a felony, as charged in an information filed with said court"; that the judge did sentence him to the county jail for a term of six months, sentence was suspended and said Macfarlane placed on probation for a period of one year and ordered to pay a fine in the amount of $250. Also that Macfarlane was arrested on the licensed premises; that said arrest "was on the above charge and the events immediately preceding said arrest constituted the cause for said conviction," namely, (a) Macfarlane's referring Kiesling to Platt for the purpose of placing a bet and Platt's taking same upon said licensed premises, (b) Macfarlane's personally taking a bet upon said premises on April 13th. The hearing officer recommended revocation of license. The department adopted the proposed decision and revoked the license. On appeal to the Alcoholic Beverage Control Appeals Board the ruling of the department was affirmed. This was followed by petition for administrative mandamus filed in the superior court under § 1094.5, Code of Civil Procedure. The trial court held that the findings of fact of the hearing officer are supported by substantial evidence and the decision fully supported by the findings. Mandamus was denied and hence this appeal taken by Macfarlane.

Because of the statement in the proposed opinion that appellant was convicted "of violation of Section 337(a) subsection 3 of the California Penal Code, a felony, as charged in an information," counsel for appellant argues that this is a finding contrary to the record, that this "misconception" prevented the department from exercising a sound discretion and led it into imposing an excessive penalty.

The contention that appellant was convicted of a misdemeanor and not a felony is not technically correct, nor is there factual support for the claim that the hearing officer and the department and the appeals board had a mistaken notion with respect to the conviction.

[1] We again quote § 337a, subdivision 3, Penal Code, to the effect that any person who violates any of its provisions "[i]s punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year." Section 17, Penal Code, says: "A felony is a crime which is punishable with

death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison, unless the court commits the defendant to the California Youth Authority. * * *" Its language is carefully chosen and specific,—"it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison." Until the trial judge has converted the crime into a misdemeanor by sentencing defendant on that basis the offense is a felony. That is the reason the information, jury verdict and judgment in this instance described the crime as a felony.

Fricke on California Criminal Law, Fifth Edition, pages 5 and 6: "Where an offense is punishable either as a felony by imprisonment in the state prison or as a misdemeanor by fine or by imprisonment in a jail the offense is a felony up to the time the sentence is imposed. * * * If, upon conviction of such an offense, the defendant is placed on probation without any sentence having been pronounced he still stands convicted of a felony. * * * Where in such a case the defendant is sentenced to imprisonment in the state prison the offense is at all times a felony but if he be sentenced to a term in jail or to pay a fine the offense is deemed a misdemeanor for all purposes after such judgment has been pronounced." Doble v. Superior Court, 197 Cal. 556, 576, 241 P. 852, 860: "A fair construction of section 17, in order to give effect to every part thereof, requires us to hold, and we do so hold, that in prosecutions within the contemplation of that section the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter—the judgment not to have a retroactive effect so far as the statute of limitations is concerned." People v. Williams, 27 Cal.2d 220, 228, 163 P.2d 692, 696: "Burglary in the second degree is punishable by imprisonment in the state prison (Pen.Code, § 461) and is therefore a felony. (Pen.Code, § 17.) While it is also punishable, in the alternative, by a county jail sentence (Pen. Code, § 461), its status can be changed only by 'a judgment imposing a punishment other than imprisonment in the state prison.' (Pen.Code, § 17; In re Miller, 218 Cal. 698, 700–701, 24 P.2d 766; In re Rogers, 20 Cal.App.2d 397, 400, 66 P.2d 1237. This principle is stated in no uncertain terms in the Rogers case as follows, 20 Cal.App.2d at page 400, 66 P.2d at page 1238: 'The necessary inference to be drawn from the language of section 17 of the Penal Code that "when a crime, punishable * * * by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes *after a judgment imposing a punishment other than imprisonment in the state prison*," is that *the offense remains a felony* except when the discretion is acually exercised and the prisoner is punished only by a fine or imprisonment in a county jail.'" See, also, People v. Sullivan, 113 Cal.App. 2d 510, 527, 248 P.2d 520; 14 Cal.Jur.2d § 19, p. 204. The case of People v. Hamilton, 33 Cal.2d 45, 50, 198 P.2d 873, cited by appellant, is not contrary to the foregoing authorities.

Counsel who then represented appellant recognized this rule in the hearing before the department. Cross-examination of officer Kiesling contains the following: "Q. And the arrest that you were attempting to perfect or consumate was what we call a violation of Section 337(a) of the Penal Code, a felony in this state? A. Yes, sir. Q. As a matter of fact, it is a felony in this state, too, not only by one who takes a wager, but also by one who makes a wager, isn't that also your understanding? A. Yes, sir, it is."

The hearing officer does not appear to have been confused in any manner with respect to this crime or the conviction or the sentence. The paragraph of the proposed decision which refers to conviction of a felony immediately adds the fact of sentence "for a term of six months * * * then suspended and said Bruce Macfarlane placed on probation for a period of one year and ordered to pay a fine in the amount of $250.00." There is no merit in any of the arguments based upon the assumption that appellant was not convicted of a felony or that the hearing officer, the department or the board of appeals was laboring under any misapprehension with respect to the Macfarlane prosecution or the judgment of the superior court.

[2] It is contended that the law does not sanction arbitrary revocation of a liquor license and the familiar argument is made that an act which is lawful at the race track should not be a crime of any degree when committed elsewhere. The authorities do not recognize any such doctrine; they hold that the distinction thus made in the law is a valid one. See, People v. Maddox, 65 Cal.App.2d 45, 51, 149 P.2d 739; People v. Haughey, 48 Cal.App.2d 506, 511, 120 P.2d 121; In re Goddard, 24 Cal.App.2d 132, 141, 74 P.2d 818; Ex parte Tuttle, 91 Cal. 589, 27 P. 933; People v. Sullivan, 60 Cal.App.2d 539, 141 P.2d 230. The Tuttle case says, 91 Cal. at page 590, 27 P. at page 934: "Any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, is a legitimate subject for regulation or prohibition by the state; and that gambling, in the various modes in which it is practiced, is thus demoralizing in its tendencies, and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure, is no longer an open question."

[3] That gambling in connection with the sale of liquor falls within the constitutional provision (Art. XX, § 22) seems obvious. The pertinent language of that provision is: "The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." Appellant's brief is redolent of recognition that good cause was shown at bar. It says: "To conclude that conviction of a felony is 'good cause' to suspend or revoke appellant's license is a logical determination regardless of what other evidence is in the record to establish that appellant had never been arrested in his life. * * * That the Department was given broad discretion under the Constitution to determine what constitutes good cause for the suspension or revocation of a license is recognized by appellant. * * * Ultimately, it is appellant's position that it, no doubt, is in the power of respondent Department to determine that the conduct of appellant in forwarding a $2 bet for an officer of the Sheriff's department was an act that was of such nature as to make his holding of an on-sale liquor license contrary to public welfare or morals. Accordingly, such conduct may be a basis for a conclusion that 'good cause' existed for the Department to exercise its discretion in regard to whether appellant's license should be suspended or revoked." Appellant testified at the board hearing: "Q. You forget—had you been on the jury you say you would have acquitted yourself? A. No. Q. You would have found yourself guilty? A. I would have found myself guilty. Q. Why do you say that? A. Well, there were three stalwart nice big police officers all set to make statements that were not true. Q. In other words, you say the officers lied? A. Yes, definitely." The "good cause" mentioned in the constitutional provision may consist of any violation of the Alcoholic Beverage Control Act. Revenue and Taxation Code, § 32001 et seq. "The owner of a liquor license has the responsibility to see to it the license is not used in violation of law." Maxwell Cafe v. Dept. Alcoholic Control, 142 Cal.App.2d 73, 76, 298 P.2d 64, 67.

[4] Finally, appellant argues that the penalty of revocation of license is excessive punishment for the taking of two bets of two dollars each on the licensed premises. It does seem severe. But it is not our province to interfere. The rule here applicable is thus stated in Thayer v. Board of Osteopathic Examiners, 157 Cal.App.2d 4, 320 P.2d 28, 32: "Appellant complains that revocation of his license is a penalty so harsh that it should not stand and the cause should be remanded to the board for reconsideration of the punishment. But the established rule is 'that the determination of the penalty to be imposed by an administrative agency lies with the agency and not with the court. King v. Board of Medical Examiners, 65 Cal.App.2d 644, 652, 151 P.2d 282; Fuller v. Board of Medical Examiners, 14 Cal.App.2d 734, 737, 59 P.2d 171.' Black v. State Personnel Board, 136 Cal.App.2d 904, 912, 289 P.2d 863, 867. In Mast v. State Board of Optometry, 139 Cal.App.2d 78, 91, 293 P.2d 148, 156, it is said: 'It is now fully established that where an agency exercising statewide jurisdiction has imposed a single penalty based on multiple charges of misconduct, and the court holds some of them to be unsupported, the practice normally to be employed is to return the case to the administrative agency with a direction to reconsider the penalty to be imposed.' But this can be done only when some of the charges are unsupported by the evidence and the court cannot ascertain from the record whether the same penalty would have been imposed had the administrative agency recognized the absence of evidence sufficient to support only a part of the charges upon which the licentiate had been found guilty. See Mast v. State Board of Optometry, supra, 139 Cal.App.2d at page 92, 293 P.2d [148] at page 156. There is no absence of supporting evidence here and hence no occasion to remand." To the same effect, see, Munro v. Alcoholic etc. Appeals Board, 154 Cal.App.2d 326, 332, 316 P.2d 401; Black v. State Personnel Board, 136 Cal.App.2d 904, 912, 289 P.2d 863; Furnish v. Board of Medical Examiners, 149 Cal.App.2d 326, 332, 308 P.2d 924, 309 P.2d 493; Hansen v. Civil Service Board, 147 Cal.App.2d 732, 739, 305 P.2d 1012.

We find no error in this case.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

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161 Cal.App.2d 129

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Grady C. HAYES, Defendant and Appellant.

Cr. 2739.

District Court of Appeal, Third District, California.

June 5, 1958.

Hearing Denied July 30, 1958.

Defendant was convicted in the Superior Court, Sonoma County, Charles J. McGoldrick, J., for assaulting his wife with intent to commit murder, and he appealed. The District Court of Appeal, Van Dyke, P. J., held that the trial judge had not directed verdict of guilty when, in course of discussing verdict forms, he stated, after reading one form, "the foreman will place his signature upon that".

Affirmed.

1. Criminal Law 🔑404(3)

Where it was shown that rifle had been purchased by defendant shortly before his wife was shot and that it had been used to fire cartridges found in vicinity of shooting, and there was evidence that a similar weapon had been taken from defendant shortly after the shooting, rifle was properly admitted in evidence in prosecution for assault with intent to commit murder.

2. Criminal Law 🔑680(1)

Error cannot be predicated on mere order of proof.

3. Criminal Law 🔑753(3)

In prosecution for assault with intent to commit murder, trial judge did not direct verdict of guilty when, in course of discussing verdict forms, he stated, after reading one form, "the foreman will place his signature upon that".

4. Criminal Law 🔑800(4)

In instructing on crime of assault with intent to commit murder, it is proper to define murder.

5. Criminal Law 🔑829(3)

In prosecution for assault with intent to commit murder, instructions given adequately covered subject, and it was not error not to give instructions specifically defining crime of murder.

6. Criminal Law 🔑808½

It is never necessary to instruct in exact language of statute.

7. Criminal Law 🔑781(1), 1173(2)

On record presented, in prosecution for assault with intent to commit murder, it was error to refuse to instruct that oral admissions of party ought to be viewed with caution; but in view of improbability of any other result even if cautionary instruction had been given, reversal would not be required. West's Ann.Code Civ. Proc. § 2061, subd. 4; West's Ann.Pen. Code, §§ 187, 188.

James B. Thompson, Carmichael, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment following the verdict of a jury finding appellant guilty of the crime of assaulting his wife with intent to commit murder and from the order denying defendant's motion for a new trial. The information also contained counts charging the same offense with respect to her two children by a prior marriage. Appellant was acquitted on the counts concerning the children.

For two years prior to the marriage, appellant had been employed by his present wife as a salesman in her real estate business. One Roby Brown had been a customer of appellant and a friend of the family for a number of years. A difference arose between Brown and appellant over a real estate transaction. Shortly thereafter, appellant and his wife separated and she started proceedings for a divorce. After the separation, appellant made various threats against her, indicating that he intended to kill her. On May 30, 1955, Mrs. Hayes, her three children and Roby Brown drove to a small ranch that she owned in Sonoma County, arriving at about 8:30 A.M. About 11:30 she and two of the children walked to a small orchard near the house and while standing there Mrs. Hayes heard shots, felt a bullet pass in front of her eyes, and then, on receiving two shots in the abdomen, fell to the ground. She then noticed that her two children were also down. Brown came out and placed the woman and the children in an automobile in order to drive them to a hospital. As they rounded a bend in the road a short distance from the house, Mrs. Hayes and Brown saw appellant standing near an automobile with a rifle in his hands which he was aiming at the automobile driven by Brown. The rifle was described as having a telescopic sight. Brown fired two shots toward the appellant with a 45 automatic and at the same time appellant fired several shots toward the automobile being driven by Brown. Brown proceeded to the hospital where the victims were examined by a physician who testified that in his opinion the wounds were gunshot wounds. It was shown that prior to the commission of the offense appellant had purchased a rifle with a telescopic sight and that at the time appellant was taken into custody, shortly after the foregoing events had transpired, this same rifle was found in his possession, although the testimony as to the identity of the gun purchased and the gun taken from appellant was supplied by one Wilan who could go no further than to say that the rifle which he took from appellant was similar to the rifle shown to have been purchased by appellant. The gun purchased had a telescopic sight and it was established that the gun taken from appellant was similarly equipped. Two empty cartridges were found lying at the base of a tree in the vicinity where the victims had received their wounds and one empty cartridge was found near the automobile from beside which appellant had fired at the car carrying Mrs. Hayes and the children. It was shown that the cartridges had been fired by the rifle which had been purchased by appellant.

Appellant does not attack the sufficiency of the evidence to support the verdict, but he assigns as errors the receiving into evidence of the rifle purchased by appellant prior to the shooting of Mrs. Hayes, the asserted invasion by the court of the province of the jury by in effect directing them to find appellant guilty of the crime against Mrs. Hayes, the failure of the court to properly instruct the jury on the offense charged, and the failure of the court to instruct the jury that oral admissions of appellant ought to be viewed with caution.

[1, 2] The rifle purchased by appellant, a 30–06 caliber gun, was received in evidence as People's Exhibit No. 5. At the trial Mrs. Hayes testified that this gun "looked like" the rifle she saw appellant firing at her while she was in the car going to the hospital. Appellant argues that the record is devoid of evidence to show what type or caliber of weapon was used to fire the shots which formed the basis of the crime charged. Although it appears that the physician who treated the victims at the hospital extracted the bullets which they had received, these bullets were not produced at the trial and, of course, there was no evidence by a ballistic expert that they had been fired from Exhibit No. 5. But Exhibit No. 5 was properly received in evidence. It was shown that it had been purchased by appellant shortly before Mrs. Hayes was shot, and that it had been used to fire the three spent cartridges. There was testimony that the rifle he fired when shooting at the car was similar to Exhibit No. 5, even to having a telescopic sight; and the witness Wilan testified that the weapon he took from appellant shortly after the shooting was similar to Exhibit No. 5. Based on the foregoing testimony the court properly admitted Exhibit No. 5. It was a question for the jury as to whether or not the shooting had been done by the use of that rifle. Some of this testimony was received after the rifle had been introduced in evidence as an exhibit, but error cannot be predicated on mere order of proof. It would not have advantaged appellant if the rifle had been received for identification when shown to have been purchased by appellant and held in that status until the rest of the testimony was in and then admitted as an exhibit in the case for all purposes.

When the court had concluded its instructions to the jury it explained to the jury various forms of verdict which had been prepared for their use. There were eleven forms: Three of guilty on each of the three counts, three of not guilty on each count, one of guilty on all three counts, one of not guilty on all three counts and three forms of guilty on an included offense under each of the three counts. The court discussed first a form which it read to the jury. The following appears in the record:

> By The Court: "Now, there has been prepared for your convenience and to use in your deliberations several forms of verdict. They read—'* * * We, the Jury, find the defendant guilty of the crime of assault with a deadly weapon with intent to commit murder as charged in Count I of the Amended Information.' The foreman will place his signature upon that, and the date will be upon it, there is no date on it at the present time.

"Then, the next form of verdict is the same, only it relates to Count II of the Information.

"The next form of verdict is the same throughout, and relates to Count III of the Information.

"The next form of verdict has the same title of court and cause and reads as follows— 'We, the Jury, find the defendant not guilty of the crime of assault with a deadly weapon with intent to commit murder as charged in Count I of the Amended Information.'

"The next form of verdict reads * * *"

[3] Appellant argues that because, with respect to the first verdict form called to the attention of the jury, the court stated "The foreman will place his signature upon that" and fill in the blank left for the date, the jury were thereby ordered to bring in a verdict of guilty on that count. From the record we cannot agree that the jury could possibly have obtained an impression they were being directed as to what verdict to bring in. If such a thought had been suggested in the jury room, we think the reply would have been that if that were so the other forms concerning the count as to Mrs. Hayes would not have been given to the jury. We find no merit in the contention that the court directed the jury to find appellant guilty of assaulting Mrs. Hayes.

[4–6] Appellant contends that the court failed to properly instruct the jury concerning the elements of the crime charged. Appellant was charged with the crime of assault with a deadly weapon with intent to commit murder. He concedes that the jury was properly instructed on the definition of assault, of assault with a deadly weapon and on the element of specific intent to commit murder. He argues, however, that because the court did not specifically define the crime of murder it erred to appellant's prejudice. Appellant does not contend that the court ought to have defined the different degrees of murder (People v. Bernard, 28 Cal.2d 207, 214, 169 P.2d 636), but says that the definition of murder found in Section 187 of the Penal Code and the definition of malice found in Section 188 ought to have been given. The code sections referred to define murder as the unlawful killing of a human being with malice aforethought and malice as express, when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature, and as implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. In instructing on the crime here charged it is proper to define murder since the element of intent to commit murder is definitely involved. People v. Whitlow, 24 Cal.App. 1, 6, 139 P. 826. However, we think that essentially the court did this. The court told the jury that an assault was an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another. The court defined a deadly weapon as any object, instrument or weapon which, used in the manner in which it appears to have been used, is capable of producing and is likely to produce death or great bodily injury. Coming now to the specific intent which the statute requires, that is, the intent to commit murder, the court told the jury that this intent must be proved and was an element of the offense charged. Then the court told the jury: "In the crime of assault with intent to commit murder, there must exist in the mind of the perpetrator the specific, preconceived intent to kill a human being."

We have in the instructions given an adequate explanation of what is meant by charging an intent to commit murder, for the jury has been told that appellant must have acted with a specific, preconceived intent to unlawfully kill a human being, which is to say that he must have acted with the intent unlawfully to kill with malice aforethought. Of course, it is never necessary to instruct in the exact language of a statute. People v. Guasti 110 Cal.App.2d 456, 243 P.2d 59.

[7] Finally, appellant contends that the trial court prejudicially erred in refusing

to instruct the jury on admissions. It appears that the prosecution requested an instruction on the subject of admissions, but the request was refused by the court upon the ground that there was no evidence of an admission. We think the trial court erred in refusing to instruct as requested and as required by statute that the evidence of the oral admissions of a party ought to be viewed with caution. Code Civ.Proc. Sec. 2061, subd. 4. It has been held that a trial court commits prejudicial error, where evidence of admissions of a defendant have been received, if the court fails to give, even on its own motion, the cautionary instruction required by the code section. People v. Bemis, 33 Cal.2d 395, 202 P.2d 82. There, the court said, 33 Cal. 2d at page 399, 202 P.2d at page 84:

> "* * * Section 2061 of the Code of Civil Procedure provides that the jury are 'to be instructed by the court on all proper occasions: * * * 4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution', and it is now settled that it is error for the trial court not to give such instructions in proper cases."

In this case the following admissions, in substance, appear to have been shown against the appellant. The witness Amos Watkins testified that on more than a dozen occasions the appellant had stated to him that he was going to kill Mrs. Hayes. The witness Wilan testified that appellant stated to him when he apprehended him that he, appellant, "had been shooting at squirrels and had heard some people screaming and was excited and thought that somebody had been hurt and wanted to go to San Francisco and turn himself in to the police." This witness also testified that appellant told him he had hid in a culvert the evening of the day of the shooting because the officers were looking for him, that he had seen them pass. The witness Waite, a deputy sheriff, testified that the appellant stated to him also that he had been shooting squirrels which had been bothering him; that "I know I hit her, because I heard her scream." The witness Cole, another deputy sheriff, testified to the same statements by appellant as testified to by the witness Waite. These were oral admissions as to which the cautionary instruction ought to have been given. The statements were admissible as showing that appellant had acted with the intent to kill, without proof of which intent no case could be made by the prosecution, as showing that it was appellant who had done the shooting and that he had fled to avoid arrest. The question remains as to whether or not the failure to give the cautionary instruction required by the statute constituted prejudicial error. In spite of the gravity of the error, it is our view that no other result would have been probable had the cautionary instruction been given. The evidence against appellant, without the admissions, was very strong. There was other evidence to prove the presence of appellant on the scene at the time of the felonious assault and immediately thereafter. We refer to the evidence of Mrs. Hayes and of Mr. Brown that immediately after the shots had been fired, while Mrs. Hayes and her children were in the orchard, Mr. Brown had carried them to their automobile, placed them therein and was driving away to take them to the hospital when the appellant appeared and fired additional shots into the automobile in which they were being carried. We refer also to the evidence of the detention of appellant by the witness Wilan, who held appellant until the officers could come and take him into custody, and who took from him what the jury could clearly have held to have been the very weapon with which the assault was committed. So far as the intent to kill is concerned, the jury could hardly have held other than that the appellant acted with such intent in view of the wanton nature of his conduct and the follow-up attempt to kill while his victims were being taken away. The same jury found him to have been sane at the time of the commission of the offense, and it is incredible that, all of the circumstances considered, they would have arrived at a different verdict had the cautionary instructions been given.

The judgment and the order appealed from are affirmed.

PEEK and SCHOTTKY, JJ., concur.

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161 Cal.App.2d 109

Charlotte BOHNSTEDT, Plaintiff and Appellant,
v.
James C. BALLAGH, Defendant and Respondent.
Civ. 22592.

District Court of Appeal, Second District, Division 3, California.
June 4, 1958.

Action for breach of alleged oral trust. From adverse judgment of the Superior Court of Los Angeles County, Emil Gumpert, J., plaintiff appealed. The District Court of Appeal, Nourse, J. pro tem., held that where trial court had found that no trust or confidential relationship existed and that defendant did not enter into any agreement with plaintiff except to hold for plaintiff money received from trustee under deeds of trust which was in excess of amount owing by plaintiff to defendant, issue raised by plaintiff's complaint that defendant orally agreed that if plaintiff would consent to defendant's acquiring second deed of trust defendant would reinstate it, made all payments thereon, and sell property at market price was immaterial, but judgment would be modified to award excess sum owed by defendant to plaintiff.

Judgment modified and as modified affirmed, and case remanded with directions.

1. Trial 🔑397(5)

In action for alleged breach of oral trust where trial court found that no trust or fiduciary relationship existed between plaintiff and defendant and that defendant did not enter into any agreement except that he agreed to hold for plaintiff's benefit money received by him from trustee under deed of trust which was in excess of amount owing by plaintiff to defendant, issue that defendant had allegedly orally agreed that if defendant acquired second deed of trust he would reinstate it, make all payments thereon, pay delinquent taxes to protect property and sell same at its market price, was immaterial.

2. Tender 🔑19(1)

Where defendant held money for benefit of plaintiff and tendered such sum to plaintiff who refused and brought action for alleged breach of oral trust, tender while sufficient to stop running of interest, was not sufficient to extinguish defendant's obligation to pay plaintiff and since there was no deposit of fund to plaintiff's credit judgment in favor of defendant would be modified to provide for award to plaintiff of excess sums held by defendant for plaintiff's benefit. West's Ann.Civ.Code, §§ 1500, 1504.

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Robert H. Green, Los Angeles, for appellant.

Hill, Farrer & Burrill, Los Angeles, by William S. Scully and Anson B. Jackson, Jr., Los Angeles, for respondent.

NOURSE, Justice pro tem.

The plaintiff appeals from an adverse judgment in an action brought by her to recover damages for breach of an alleged oral trust. The only assignments of error made are that the court failed to find upon the material issues and that the judgment is not supported by the findings of fact. No attack is made upon the sufficiency of the evidence to support the findings made.

The facts in this matter, briefly stated are: Upon the death of her husband in 1945, plaintiff became the owner of certain real property. This property was encumbered by a deed of trust securing a loan which was at the time of the death of her husband, $6,000, and later increased by her to $11,000. In August of 1951 plaintiff borrowed from one McCann the sum of $5,000 and secured this loan by a second deed of trust. In March of 1952, both loans being in default, plaintiff called upon the defendant who is the brother of her deceased husband, for financial aid. The defendant agreed to make monthly advances to her with the understanding that he would be repaid out of the proceeds of the sale of the real property owned by plaintiff, and pursuant to this agreement defendant did advance $1,425. To prevent foreclosure of the deeds of trust, defendant purchased the second deed of trust from McCann and reinstated the first trust deed by paying all of the delinquent installments of both principal and interest. The real property had a reasonable market value of about $25,000 subject to the two deeds of trust and an attachment lien of $4,700 plus interest. In September of 1952, defendant commenced foreclosure of the second deed of trust and on January 30, 1953, the property was sold at the trustee's sale to a third person for the sum of $19,526.55 and there was remitted to the defendant a sum equal to the difference between the balance due on the first deed of trust plus the expenses of the sale, the advances made by defendant, and the selling price.

Prior to the trustee's sale, the plaintiff and defendant entered into an agreement under the terms of which defendant was to receive the net proceeds of the sale and from those proceeds repay himself the balance due on the second deed of trust, the amounts advanced by him on account of the delinquent payments of the first deed of trust and the monies advanced to the plaintiff, and pay to the plaintiff any remaining balance.

After the sale the defendant tendered to the plaintiff the balance of the proceeds of the sale, to-wit: the sum of $446.38; plaintiff refused to accept this tender. The court found that no relationship of trust or confidence existed between plaintiff and defendant; that plaintiff at all times had relied upon the advice of legal counsel of her own choosing and that the defendant did not at any time promise or agree to act as trustee for the plaintiff except that he would hold for the plaintiff the excess monies realized from said sale over and above the amount necessary to repay the defendant the amounts due him. That the plaintiff was at all times the owner of the real property in question and had the right to sell the same and that the defendant did not, in any wise, prevent such a sale; and that the defendant did not agree to acquire the subject real property at the foreclosure sale or enter into any agreement with plaintiff other than the agreement to hold said excess funds for the benefit of plaintiff.[1]

[1] By her amended complaint filed at the conclusion of the trial, plaintiff alleged in substance, that the defendant orally agreed with the plaintiff that if the plaintiff would consent to his acquiring the second deed of trust, that he would reinstate it, make all payments thereon, pay the delinquent taxes to protect the property from loss and would sell the property at its market price, and alleged that contrary to this agreement and in breach of his trust, defendant caused the property to be sold at trustee's sale on foreclosure of the second deed of trust for $19,000, while its fair market value was $25,000.

Appellant asserts that the court made no finding of fact on this allegation, which she says is the basic allegation of her amended complaint. There is no merit in this contention. The court expressly found that no trust or confidential relationship existed and that the defendant did not enter into any agreement with the plaintiff or breach any agreement with the plaintiff except that he did agree to hold for her benefit the monies received by him from the trustee under the deed of trust which were in excess of the amount owing by the plaintiff to the defendant, and expressly found that defendant tendered performance of this promise. No further findings were necessary to meet the issue of ultimate facts tendered by the pleadings.

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[1] We glean the foregoing facts from the findings and admissions in the pleadings.

[2] From a careful study of the findings and judgment, we are unable to find, except in a single particular, any support for appellant's contentions that the findings do not support the judgment. The court found that the respondent held the sum of $446.38 for the benefit of the appellant but also found that the tender of this sum extinguished the trust upon which respondent held this sum. By its judgment, the court did not make any award to the appellant. In this it erred, for the tender, while sufficient to stop the running of interest (Civ.Code, § 1504) was not sufficient to extinguish respondent's obligation to appellant, there having been no deposit of the fund to her credit. Civ.Code, § 1500. Under the findings, appellant was entitled to judgment in the sum of $446.38 without interest.

The matter is remanded to the trial court with directions to enter judgment for plaintiff and against the defendant in the sum of $446.38 without interest or costs; each party to bear his own costs on this appeal.

SHINN, P. J., and VALLÉE, J., concur.

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159 Cal.App.2d 807

Albert E. KILLEEN and Jack R. Killeen, etc., Petitioners,

v.

The SUPERIOR COURT, LOS ANGELES COUNTY, State of California, etc., Respondent,

Henry Sachs, Real Party in Interest.

Civ. 23106.

District Court of Appeal, Second District, Division 3, California.

April 29, 1958.

Richard A. Perkins and Arnerich, Del Valle & Sinatra, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, Los Angeles, for respondent.

S. L. Kurland, Los Angeles, for real party in interest.

PER CURIAM.

Upon the hearing pursuant to the alternative writ of prohibition heretofore issued herein the matter was argued and submitted. The alternative writ is discharged and a peremptory writ is denied for the reason that it has not been made to appear to the satisfaction of this court that the order confirming the ex parte appointment of a receiver of the property described in the petition herein was in excess of the discretionary powers of the court and the additional fact that the petitioner has an adequate remedy through his pending appeal from said order.

161 Cal.App.2d 215

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John Donald KELLEY, Defendant and Appellant.

Cr. 6083.

District Court of Appeal, Second District, Division 3, California.

June 9, 1958.

Defendant was convicted of indecent exposure with a prior conviction. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment on the verdict and an order denying defendant's motion for new trial, and the defendant appealed. The District Court of Appeal, Parker Wood, J., held that fact that court in prior prosecution imposed improper sentence of only six months in county jail on defendant, who was convicted of indecent exposure with a prior conviction, when statute, under which he was convicted, provides that punishment shall be by imprisonment in state prison for not less than one year, did not change character of crime from a felony to a misdemeanor, and that therefore in subsequent prosecution it was proper for deputy district attorney, on cross-examination of defendant, to refer to the prior conviction as a felony.

Judgment and order affirmed.

1. Witnesses 🔑337(6)

Fact that court imposed improper sentence of only six months in county jail on defendant, who was convicted of indecent exposure with a prior conviction, when statute, under which he was convicted, provides that punishment shall be by imprisonment in state prison for not less than one year, did not change character of crime from a felony to a misdemeanor, and therefore in subsequent prosecution it was proper for deputy district attorney, on cross-examination of defendant, to refer to the prior conviction as a felony. West's Ann. Pen.Code, §§ 17, 311.

2. Criminal Law 🔑706

Trial court erred in overruling objection of defendant to question of deputy district attorney inquiring why defendant did not contact the police when he heard that they wanted to talk to him, since defendant was not required to go to the police or to talk to them.

3. Criminal Law 🔑1171(1)

Error of trial court in overruling objection of defendant to question of deputy district attorney inquiring why defendant did not contact the police when he heard that they wanted to talk to him, was not prejudicial error, where evidence showed that defendant, pursuant to advice of his attorney, later went to the police and surrendered when he learned that there was a warrant for his arrest.

4. Criminal Law 🔑419(1)

Trial court erred in overruling objection of defendant to question of deputy district attorney inquiring of police officer if he knew whether or not police report, which had been made by prosecuting witness, contained any reference to sideburns of suspect, since the question called for hearsay.

5. Criminal Law 🔑1170½(2)

Error of trial court in overruling objection of defendant to question of deputy district attorney inquiring whether police officer knew whether or not police report, which had been made by prosecuting witness, contained a reference to sideburns of suspect, was not prejudicial error, where police officer merely answered in the affirmative and did not state whether the report did or did not contain reference to sideburns.

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Warner, Peracca & Cowan and James O. Warner, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Jack E. Goertzen, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

By information defendant was accused, in two counts, of the crime of indecent exposure in violation of section 311, subdivision 1, of the Penal Code, with a prior conviction of said section and subdivision, a felony. It was also alleged in the information that on September 6, 1955, before the commission of the offense set forth herein, the defendant was convicted of the crime of indecent exposure in violation of section 311, subdivision 1, of the Penal Code, with a prior conviction of violation of section 311, subdivison 1, of the Penal Code, a felony. Further reference to this allegation of prior conviction will be made later herein. In a trial by jury he was found not guilty as to the first count, and was found guilty as to the second count. Probation was granted. He appeals from the judgment on the second count, and from the order denying his motion for a new trial.

Appellant asserts that the deputy district attorney was guilty of prejudicial misconduct, and that the court erred in overruling appellant's objection to certain testimony.

Stephanie, a girl about 8 years of age, testified that she and Rosa (a girl about 9 years of age) were neighbors in Burbank; in August, 1956, about 5 p. m., she and Rosa went from the back yard of Rosa's home into an alley at the back of the yard, where they intended to ride their bicycles; after they were in the alley, an automobile came down the alley and they turned into a driveway (apparently a driveway to a garage) to let the automobile pass them; the automobile stopped and "blocked" them in between a wall and a fence—a garage was behind them; a man was alone in the automobile; when they tried to get out of that place (where they were blocked), by going behind the automobile, the man would back the automobile, and when they tried to get out by going forward he would move the automobile forward; the man said to them, "When I get too hot I take off my pants"; she could see in the automobile window; she could see the man holding his private parts in his hand; the girls tried again to get away; they turned the bicycle wheels as if they were going forward then they went to the back of the automobile and got away; they went around (to the street in front of Rosa's house), entered the house, and told Rosa's mother; when Stephanie went to her own home she told her father and mother what had happened; the automobile in which the man was riding was a Cadillac, and it was cream colored on the bottom and green on top; the man had sideburns; about half an hour after she saw the man in the automobile, two officers came to Stephanie's home; in October, a number of weeks after she saw the man in the automobile, an officer brought about five pictures to Stephanie's school and she selected a picture of the man whom she had seen in the automobile; the man she saw in the automobile is the man at the end of the table in the courtroom (indicating the defendant).

Rosa's testimony was in substance the same as the testimony of Stephanie with respect to the occurrences in the alley and at Rosa's home. Rosa testified further that she did not remember when the incident happened other than it happened in the afternoon; the automobile was dark green on top and very light green on the bottom; after the occurrence in the alley, officers came to her house and showed about four pictures to her, and she selected one of the pictures; the picture she selected was a picture of the defendant; she did not remember when it was that the pictures were shown to her, but she did remember it was after school had started; the defendant is the man who was driving the automobile in the alley.

Stephanie's mother testified that in the latter part of August, 1956, Stephanie made a complaint to her about something that happened in the alley.

Rosa's mother testified that in August, 1956, in the afternoon, Rosa and Stephanie were going to ride their bicycles in the alley; they returned to the house and made a complaint about something that happened in the alley; officers came to her house that afternoon; sometime later an officer brought pictures to her house.

Officer King testified that on August 24, 1956, he took a report, concerning an indecent exposure case, from the Garnicas (parents of Rosa); on October 3, 1956, he saw a 1950 Cadillac automobile, with license number KDM 529, that was parked in Burbank and was green with light gray on the bottom, and was registered to 10838 Hartsook Street, North Hollywood.

Officer Lane testified that on October 4 or 5, 1956, he saw an automobile with green top and white or beige bottom, bearing license number KDM 529; about October 8 he showed five or six pictures to Stephanie and Rosa, and they picked out the picture of defendant; on October 16, after defendant had been arrested, defendant said that he lived at 10838 Hartsook Avenue, North Hollywood, he had owned a 1950 Cadillac automobile which was green and gray, and he had sold it on October 10 to a lady.

Mr. Leve, proprietor of a motel in Los Angeles, who was called as a witness by defendant, testified that Mr. and Mrs Scudier had been registered at his motel from August 15, 1956, to August 24, 1956, and they checked out of the motel on said August 24.

Mr. Scudier, called as a witness by defendant, testified that he resides in Chicago; he was staying at Mr. Leve's motel from August 15 to August 24, 1956; he and his wife checked out of the motel about 9 a. m. on August 24; he saw defendant on August 24, about 10 a. m., at the home of defendant's mother on Hartsook Avenue; he (witness) and his wife went with defendant and defendant's wife and Pat (Mr. Flood) to the Del Mar race track on August 24, 1956; they arrived at the track about 1:15 p. m. and left there about 6 p. m.; they returned to Los Angeles about 8:30 p. m.; they stopped to visit Donnie and Ronnie (friends of defendant); they took defendant and his wife to their home; then, about 10 p. m., the witness and his wife started on their return trip to Chicago.

Mr. Flood (Pat) testified that on August 24, 1956, he went with defendant, defendant's wife, and Mr. and Mrs. Scudier to the Del Mar race track; they left his home about 10 a. m.; they left the track about 6 p. m.

Defendant testified that on August 24, 1956, he owned a 1950 Cadillac automobile which had a green top and gray bottom, and had license number KDM 529 and was registered to 10838 Hartsook Avenue; on said August 24 he went to the Del Mar race track with his wife, Mr. and Mrs. Scudier, and Pat; they arrived at the track about 1:30 p. m. and remained there until approximately 6 p. m.; then they took Pat to his home; then they stopped at Donnie's home and visited there about half an hour; he had never seen Stephanie or Rosa prior to the preliminary hearing; he never hemmed them in with an automobile; he sold the Cadillac automobile to Mary Turbeyville in the first part of October, 1955.

On cross-examination, defendant was asked if he had been convicted of a felony. His attorney objected to the question and stated, in effect, that he had objected to that question (in chambers) and it is deemed that he made the same objection again. The objection was overruled. (Previously the attorneys and the judge had discussed the matter in chambers, and defendant's attorney had said that he objected to such question on the ground that the prior conviction referred to was not a felony but was a misdemeanor.) The objection was overruled. Defendant replied that he had not been convicted of a felony. Then the deputy district attorney asked him if he had been convicted in the superior court in Los Angeles County on September 6, 1955, of the crime of indecent exposure in violation of section 311, subdivision 1, of the Penal Code, with a prior conviction of that section and subdivision. Defendant's objection to the question was overruled. Defendant replied that it was not a felony. He testified further, on cross-examination, that he was living at 10838 Hartsook Avenue from October 3 to October 16, 1955; during that time the Cadillac automobile was in the possession of Mary Turbeyville, who was known to many of their friends as his wife; about October 3, he was informed by his mother and Mary Turbeyville that the police desired to talk to him about certain charges; he obtained legal aid and was told that if the police wanted him they could come after him, and that he should wait to see what happened; when defendant's attorney ascertained that there was a warrant for the arrest of defendant, the attorney suggested that defendant go to the police and surrender; defendant followed that advice; upon the advice of his attorney, he refused to talk to the officers; defendant was a studio extra by occupation; sometimes he wore sideburns.

As hereinabove stated, the information filed by the district attorney included an allegation that on September 6, 1955, before the commission of the offense set forth therein, the defendant had been convicted of the crime of indecent exposure in violation of section 311, subdivision 1, of the Penal Code, with a prior conviction of violation of section 311, subdivision 1, of the Penal Code, a felony. When the present case was called for trial, the deputy district attorney made a motion that the allegation of the information, with reference to the prior conviction, be amended to read that the prior conviction was a misdemeanor (instead of a felony). The motion was granted and the amendment was made by interlineation. Thereupon, the defendant admitted the allegation of prior conviction as amended.

Immediately preceding the time the prosecution rested its case in chief, the deputy district attorney made a motion that the amendment theretofore made by interlineation be stricken out and that the information be amended to read that the prior conviction was a felony (instead of a misdemeanor). The motion was granted. The minutes of the following day recite that the defendant "is rearraigned and admits the prior conviction as amended." The reporter's transcript does not show that defendant was rearraigned or that he admitted the allegation of prior conviction as re-amended. The prosecution offered in evidence a judgment of the superior court in and for Los Angeles County, dated September 6, 1955, in file No. 173290, which judgment recited that John Donald Kelley was convicted of violation of section 311, subdivision 1, of the Penal Code, with a prior conviction of violation of said section and subdivision, a felony. It was stipulated, in the present case, that the Kelley referred to in that judgment is the defendant Kelley in the present case. The judgment also recited that Kelley was sentenced to imprisonment in the county jail for six months. Defendant's attorney objected to said offer of the judgment and stated that there was a sufficient showing in the record of his "objections as to that being a misdemeanor only." The judge said that there was a sufficient showing of his objections. The judgment was received in evidence.

Appellant contends that the deputy district attorney was guilty of prejudicial misconduct in asking appellant, on cross-examination, if he had been convicted on September 6, 1955, of the crime of indecent exposure, with a prior conviction of that crime, a felony. Appellant argues to the effect that it was improper to attempt to impeach him by reference to that conviction, for the reason that the sentence pronounced upon the prior conviction was imprisonment in the county jail for six months and therefore the crime was not a felony but was a misdemeanor and that since there was no appeal from the judgment therein and the judgment became final, the judgment could not be attacked collaterally and is "the law of the case."

Section 311 of the Penal Code provides: "Every person who wilfully and lewdly, either: 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or, 2. * * * or, 3. * * * or, 4. * * * or, 5. * * * or, 6. * * * is guilty of a misdemeanor. Upon the second and each subsequent conviction under subdivision 1 of this section * * * every person so convicted is guilty of a felony, and is punishable by imprisonment in the state prison for not less than one year."

Section 17 of the Penal Code provides: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison * * *."

[1] In the present case, the punishment imposed in the matter of the prior conviction was imprisonment in the county jail for six months. The statutory provision, however, regarding the character of such prior offense and the punishment therefor, designates the offense as a felony and provides that the punishment is imprisonment in the state prison. It is to be noted that the statute does not provide that such offense "is also punishable by fine or imprisonment in a county jail, in the discretion of the court." Appellant concedes that the statute does not provide for a misdemeanor sentence upon such a prior conviction, but he argues to the effect that since a misdemeanor sentence was imposed and the judgment became final, the prior offense which was designated by statute as a felony (without an alternative provision for a jail sentence, in the discretion of the court) was reduced to a misdemeanor. He cites People v. Williams, 27 Cal.2d 220, at page 231, 163 P.2d 692, at page 698, wherein it is said: "'The characterization given a penalized act by the Legislature is immaterial in determining whether or not it is a misdemeanor or a felony, the sole test being the nature and extent of the punishment imposed. [Citation.] If the punishment imposed is other than death or imprisonment in the state prison, the penalized act is for all purposes thereafter deemed a misdemeanor.'" In that case the district attorney attempted to impeach the defendant by reference to a prior record of conviction of second degree burglary, wherein the defendant, who was nineteen years of age, was committed to the Preston School of Industry. It was held therein that the punishment imposed was not a misdemeanor punishment, and it was not error to allow reference to the prior conviction, as a felony, for the purpose of impeachment. It therefore appears that the cited case is not authority in support of a contention that if a court imposes misdemeanor punishment, under a statute which provides only for a felony punishment (without an alternative discretionary provision for a misdemeanor punishment) the offense is reduced to a misdemeanor. It was also said in the cited case (27 Cal.2d at page 229, 163 P.2d at page 696), in quoting from another case: "The necessary inference to be drawn from the language of section 17 of the Penal Code that 'when a crime, punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes *after a judgment imposing a punishment other than imprisonment in the state prison,*' is that the *offense remains a felony* except when the discretion is actually exercised and the prisoner is punished only by a fine or imprisonment in a county jail." Also, in People v. Trimble, 18 Cal.App.2d 350, at page 351, 63 P.2d 1173, at page 1174, it was stated that the sole test in determining whether a crime is a felony or a misdemeanor is the nature and extent of the punishment imposed. In People v. Rowland, 19 Cal.App.2d 540, 65 P.2d 1333, the Trimble case was cited with approval. In People v. Hamilton, 33 Cal.2d 45, at page 50, 198 P.2d 873, at page 876, it was said: "As to a crime *which may be either a misdemeanor or a felony,* depending upon the punishment imposed therefor, sec. 17, Penal Code, it is the punishment specified by the sentence which determines the character of the crime 'for all purposes' (sec. 17) including that of impeachment." (Italics added.) In those cases the misdemeanor punishment was imposed under statutes which designated the prior crimes as felonies and also provided that,

in the discretion of the court, misdemeanor punishment might be imposed. In the present case the statute designated the prior crime as a felony and there was no alternative provision in the statute that the court was empowered to impose a jail sentence or any misdemeanor punishment. In "California Criminal Law," 6th Edition, by Fricke, it is stated at page 6: "Where the offense is punishable only by imprisonment in the state prison it is always a felony and its character is not changed if the illegal sentence imposed provided for imprisonment in the county jail." The county jail sentence imposed, in the matter of the prior conviction herein, was an inadequate and improper sentence under the definite provision of the statute (Pen. Code, § 311) that the punishment should be imprisonment in the state prison for not less than one year. Such unauthorized act of grace or clemency did not have the effect of changing the character of the prior crime from its statutory designation of felony to a misdemeanor. It was not improper for the deputy district attorney to refer to the prior conviction of September 6, 1955, while cross-examining the defendant. The court did not err in permitting the deputy to refer to that conviction.

[2, 3] Appellant also contends that the deputy district attorney was guilty of prejudicial misconduct in attempting "to impeach the appellant by evidence that the appellant did not contact the police when he heard that they wanted to talk to him." The deputy asked defendant, on cross-examination, where he was between the 3rd and 16th of October, 1956. Defendant replied that he was at home. The deputy said: "You knew the police were seeking to talk to you about these matters?" Defendant's attorney objected to the question on the ground that it was immaterial. The objection was overruled. Defendant replied: "No, I did not, not looking for me. I knew they had been to the house and I contacted legal aid, and they said if they had a warrant and they wanted me they could come after me, and wait and see what happened." Appellant argues that a person has no duty to seek the police merely because he has heard that the police want to talk to him, and that the purpose of the deputy in asking the question was to cause the jury to infer that defendant must have been guilty because he did not contact the officers. The question was immaterial. The defendant was not required to go to the police or to talk to them. The court erred in overruling the objection, but the ruling was not prejudicial under the circumstances here. The evidence shows that defendant, pursuant to advice of his attorney, did go to the police and surrender when he learned there was a warrant for his arrest.

[4, 5] Appellant contends further that the court erred in permitting an officer to testify, over appellant's objection, that he was familiar with a police report and he was familiar with whether or not it contained a reference to sideburns. The deputy district attorney asked Officer Lane if, at the time he showed the pictures to Stephanie, he was familiar with the report she had previously made concerning the charge here. Defendant's attorney objected to the question on the ground that it was incompetent and immaterial. The objection was overruled. The officer replied, "Yes, sir." The deputy asked: "And were you familiar with whether or not that report contained any reference to the alleged suspect having sideburns?" Defendant's attorney objected to the question on the grounds that it called for a conclusion of the witness and for hearsay. The objection was overruled. The officer replied, "Yes, sir." The court erred in overruling the objection. It was immaterial whether the officer was familiar with the report. Whether or not the report contained a reference to sideburns was hearsay. The rulings were not prejudicial, however. The witness merely answered in the affirmative, thereby testifying, in effect, that he was familiar with the report, and he was familiar with *whether or not* it contained any reference to

the suspect having sideburns. He did not state whether the report did or did not contain such a reference.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

161 Cal.App.2d 1

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles W. BLUE and Richard J. Du Bey, Defendants,

Charles W. Blue, Defendant and Appellant.

Cr. 6105.

District Court of Appeal, Second District, Division 3, California.

May 28, 1958.

Rehearing Denied June 23, 1958.

Hearing Denied July 23, 1958.

Prosecution under amended information containing counts charging robbery and assault with intent to commit robbery. The Superior Court of Los Angeles County, McIntyre Faries, J., entered a judgment convicting defendant on all four counts of the amended information and an order denying motion for new trial, and the defendant appealed. The District Court of Appeal, Vallée, J., held that where state accepted defendant's pleas of guilty to counts of amended information charging assault with intent to commit robbery before proceeding on counts charging robbery, and it was evident that acts relied on to support the counts charging robbery were the same as those forming basis of counts charging assault with intent to commit robbery, prosecution on counts charging robbery was barred by conviction of lesser offenses of assault with intent to commit robbery.

Judgment and order affirmed in part and reversed in part.

1. Criminal Law 🔑199

A person shall not be convicted of both an included and a greater offense. West's Ann.Pen.Code, § 1023; West's Ann.Const. art. 1, § 13.

2. Criminal Law 🔑193½

A conviction of a lesser offense included in a greater will bar a prosecution for the greater if on an information for the greater the accused can be convicted of the lesser. West's Ann.Pen.Code, § 1023; West's Ann.Const. art. 1, § 13.

3. Criminal Law 🔑273

Defendant's pleas of guilty to counts of amended information charging assault with intent to commit robbery constituted convictions of the offenses charged in those counts. West's Ann.Pen.Code, §§ 220, 1023; West's Ann.Const. art. 1, § 13.

4. Robbery 🔑1

"Robbery" is the combination of assault and larceny. West's Ann.Pen.Code, § 211.

See publication Words and Phrases, for other judicial constructions and definitions of "Robbery".

5. Indictment and Information 🔑189(11)

The offense of assault with intent to commit robbery is necessarily included in the offense of robbery. West's Ann.Pen. Code, §§ 211, 220.

6. Criminal Law 🔑739(4)

Where there was no dispute as to the facts, whether accused has been formerly convicted or formerly was once in jeopardy is a question of law and not of fact. West's Ann.Pen.Code, § 1023; West's Ann.Const. art. 1, § 13.

7. Criminal Law 🔑193½

Where state accepted defendant's pleas of guilty to counts of amended information charging assault with intent to commit robbery before proceeding on counts charging robbery, and it was evident that acts relied on to support the counts charging robbery were the same acts as those forming basis of counts charging assault with intent to commit robbery, prosecution on counts charging robbery was barred by conviction of lesser offenses of assault with intent to commit robbery. West's Ann.Pen. Code, §§ 211, 220, 1023; West's Ann.Const. art. 1, § 13.

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Ellery E. Cuff, Public Defender of Los Angeles County, James P. Nunnelley, Deputy Public Defender, and Richard F. Bird, Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

By amended information defendant Blue, called defendant, and Richard J. Du Bey were charged in count I with robbery in that on May 10, 1957, they feloniously by means of force and fear took $7,875 from Harry L. Cline, and that at the time they were armed with a .45 caliber automatic pistol; in count II with robbery in that on May 10, 1957, they feloniously by means of force and fear took $53.99 from Elbert Fraijo, and that at the time they were armed with a .45 caliber automatic pistol; in count III, with assault with intent to commit robbery in that on May 10, 1957, they feloniously committed an assault on Harry L. Cline with the intent to steal from his person and immediate presence personal property in his possession without his consent and to accomplish the taking by means of force and fear, and that at the time they were armed with a .45 caliber automatic pistol; in count IV, with assault with intent to commit robbery in that on May 10, 1957, they feloniously committed an assault on Elbert Fraijo with intent to steal from his person and immediate presence personal property in his possession without his consent and to accomplish the taking by means of force and fear, and that at the time they were armed with a .45 caliber automatic pistol.

On June 26, 1957, defendant pleaded "guilty" to counts III and IV, and admitted being armed at the time of the commission of the offenses charged in counts III and IV, and "not guilty" to counts I and II. At that time trial as to counts I and II was set for July 22, 1957, and further proceedings as to counts III and IV continued to July 24, 1957.

On July 22, 1957, when the cause was called for trial as to counts I and II defendant entered the further plea that he had already been convicted of the offenses charged in those counts by his pleas of "guilty" on June 26, 1957, to counts III and IV. With respect to counts I and II defendant waived a jury trial and it was stipulated that the People's case be submitted on the transcript of the preliminary hearing subject to the right to produce additional evidence. Witnesses were heard on behalf of the People, following which all parties rested. The court found defendant guilty as charged in counts I and II, found against him on his pleas of former conviction, and that he had not been in "double jeopardy." Defendant was sentenced to state prison on all counts, the sentences as to counts I and III to run concurrently with each other, the sentences as to counts II and IV to run concurrently with each other, and the sentences as to counts II and IV to run consecutively with counts I and III. Defendant appeals from the judgment and the order denying his motion for a new trial.

It is defendant's only contention that the court erred in finding for the People on the pleas of former conviction to counts I and II which followed his pleas of "guilty" to counts III and IV. He argues that his pleas of "guilty" to counts III and IV constituted a conviction thereof; that count I was identical in fact with count III, and count II was identical in fact with count IV; that the crime of robbery necessarily included that of assault with intent to commit robbery.

Harry L. Cline owned an apartment house in Arcadia. He lived in apartment 1. On May 10, 1957, he and a guest, Elbert Fraijo, were in that apartment watching television. About 8:15 p. m. defendant and Du Bey entered the apartment. Cline testified: Immediately after entering Du Bey said, "Los Angeles Police, County Police

Department." He asked Du Bey for his credentials, whereupon Du Bey hit him on the neck with his fist. Defendant hit him with a ".45 automatic" across the neck, made him lie on the floor face down, and told him not to look around or he would have his brains blown out. He was "tied" with buckskin string and tape. He cannot say who tied him. Defendant stood over him with the gun, telling him to lie still. Du Bey went into the bedroom and went through his suitcase, clothes, and socks. Fraijo fell on his knees with his hands tied back of him. He was crying. He did not see who tied Fraijo. Du Bey came back into the room, caught Fraijo by the hair, raised him, hit him in the face with his fist, and told him to "Shut up."

Fraijo testified: Immediately after entering, Du Bey said "We are from the Los Angeles County Sheriff's Police Department." Cline said, "Show us your badge," whereupon Du Bey hit Cline, knocked him down, and tied his legs and hands; told him (Fraijo) to kneel on the floor. Du Bey, with the .45 automatic in his hand, told Cline not to say a word or he would shoot him. Du Bey tied him (Fraijo), taped his mouth, and hit him on his neck with his wrist and the edge of his hand. All the rooms of the apartment were searched by defendant and Du Bey.

After they had completed searching the apartment defendant and Du Bey left. One hundred forty dollars cash, a $7,730 cashier's check, and a .22 caliber long rifle pistol were taken from Cline. Fraijo's wallet, containing $40 cash, a check for $13.99, and personal papers, was taken from Fraijo.

[1, 2] "No person shall be twice put in jeopardy for the same offense." Const. art. I, § 13. When the defendant is convicted or has been once placed in jeopardy upon an accusatory pleading, the conviction or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading or for an offense necessarily included therein of which he might have been convicted under that accusatory pleading. Pen.Code, § 1023. It is settled "that no person shall be convicted of both an included and a greater offense." People v. Greer, 30 Cal.2d 589, 601, 184 P.2d 512, 519; People v. Mims, 136 Cal.App.2d 828, 830, 289 P.2d 539; People v. Armstrong, 100 Cal.App.2d Supp. 852, 224 P.2d 490. Stated another way, a conviction of a lesser offense included in a greater will bar a prosecution for the greater if on an information for the greater the accused can be convicted of the lesser. Giles v. United States, 9 Cir., 157 F.2d 588, 590. "Although section 1023 refers to a situation where the prosecution for the greater offense is first in time, there is no such limitation in the cases. If the defendant is tried first for assault and later for battery, the prosecution for the included offense bars the subsequent prosecution for the greater offense. [Citations.] 'A conviction of the lesser is held to be a bar to [the] prosecution for the greater on the theory that to convict of the greater would be to convict twice of the lesser.' [Citation.] If this were not the rule, section 1023 could be vitiated by the simple device of beginning with a prosecution of the lesser offense and proceeding up the scale. * * * The prosecution cannot avoid the consequences of a conviction of a necessarily included offense by charging the included offense in a separate count, on the theory that a conviction under such circumstances constitutes a conviction of a separate offense. * * * The form of pleading cannot assume such importance that it will permit defendant to be convicted of both the included and the greater offense." People v. Greer, 30 Cal.2d 589, 597–599, 184 P.2d 512, 517.

In People v. Logan, 41 Cal.2d 279, 260 P.2d 20, the defendant was charged with robbery and assault with a deadly weapon. The defendant slipped up behind the victim, hit her with a baseball bat, and snatched her purse. Holding "the striking of the victim with the baseball bat and the taking of the purse constituted a single, indivisible transaction," the court stated (41 Cal. 2d at page 290, 260 P.2d at page 26):

> "The one act of inflicting force with the bat cannot both be punished as assault with a deadly weapon and

> availed of by the People as the force necessary to constitute the crime of robbery, for 'co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted.' (People v. Clemett (1929), 208 Cal. 142, 144, 280 P. 681; People v. Greer (1947), 30 Cal.2d 589, 604, 184 P.2d 512; People v. Knowles (1950), 35 Cal.2d 175, 187, 217 P.2d 1.)"

[3] Defendant's pleas of guilty to counts III and IV constituted convictions of the offenses charged in those counts. The court in People v. Goldstein, 32 Cal. 432, at page 433, stated:

> "Where a defendant pleads guilty, and his plea is entered of record as provided in the Criminal Practice Act, (sec. 300,) he stands convicted in the eye of the law as fully as he would have been by a verdict of guilty. He is convicted by his plea, and there is, therefore, no occasion for a trial, and nothing remains to be done except to pronounce judgment. On the question of former conviction there can be no distinction between a plea and a verdict of guilty, for both are followed by the same consequences.
>
> "Nor is it necessary that a judgment should have been pronounced upon the conviction to make the plea of former conviction good."

Referring to this quotation from People v. Goldstein, supra, 32 Cal. 432, Mr. Justice Dooling in People v. Mims, 136 Cal.App.2d 828, at page 831, 289 P.2d 539, at page 541, wrote:

> "The reasoning of this case appears to us to be unanswerable, but even if it were open to question, under a well settled principle of constitutional construction, we are foreclosed from reexamining it now. The right not to be placed twice in jeopardy for the same offense was contained in the California Constitution of 1849, Const.1849, Art. I, sec. 8. It was that constitutional provision which the Supreme Court construed in People v. Goldstein, supra. The same provision against being placed twice in jeopardy was readopted in the present Constitution. It is settled by a long line of authorities that where a provision of the earlier Constitution had been construed by the Supreme Court it must be presumed that the framers of the present Constitution in readopting it intended it to have the same effect. [Citations.] We conclude that the regular entry of the plea of guilty placed respondent in jeopardy within the meaning of article I, section 13, of our Constitution."

[4, 5] "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Pen.Code, § 211. Every person who assaults another with intent to commit robbery is guilty of a public offense. Pen.Code, § 220. Robbery is a combination of assault and larceny. People v. Wallace, 36 Cal.App.2d 1, 4, 97 P.2d 256. The offense of assault with the intent to commit robbery is necessarily included in the offense of robbery. In People v. Allen, 32 Cal.App. 110, 162 P. 401, the defendant was charged with robbery. He was found guilty of assault with intent to commit robbery. On review he contended he could not be convicted of that offense because he was charged with robbery. The court stated (32 Cal.App. at page 114, 162 P. at page 403):

> "There is evidence which clearly tends to prove that defendant was guilty as charged in the information, namely, that while Horgan, at the point of a loaded pistol, commanded those in the gambling room to hold up their hands, and, by means of such force and fear resulting therefrom, he (the defendant) proceeded, against the will of Widener, to take money from his pockets. That it was done with a guilty intent admits of no doubt. In

order, however, to constitute robbery, the defendant must have obtained money from Widener. Upon this point the evidence is in conflict, and apparently the jury were not convinced beyond a reasonable doubt that he obtained any money in the search of Widener's pockets. Such act, assuming no property was obtained from him, while incomplete as a robbery, possessed all the elements of robbery other than the taking of money. The assault was made and made with the intent to rob. That it was not accomplished may be due to the fact that Widener possessed no money, or to other causes. While an assault with intent to commit a crime may constitute an attempt, the converse of the proposition is not true, since there may be an attempt to commit a crime, such as larceny, for instance, unaccompanied by an assault. In robbery, however, there must be an assault, accompanied by an intent to rob, and the actual taking of the property by force and against the will of the one robbed; and since this is true, the lesser crime, namely, an assault with intent to commit robbery, lacking in the one element of the crime charged, is included in the offense for which defendant was prosecuted."

Also see People v. Foss, 85 Cal.App. 269, 259 P. 123.

In Colson v. Johnston, D.C., 35 F.Supp. 317, it was held that proof of robbery of a mail pouch, in the course of which lives of postal employees were placed in jeopardy by the use of dangerous weapons, necessarily included proof of every element of the offense of assaulting postal employees with intent to rob.

In re Chapman, 43 Cal.2d 385, 273 P.2d 817, 819, relied on by respondent, is not in point. In that case the defendant was charged with robbery and assault with force likely to produce great bodily injury. The assault was committed after the robbery had been accomplished and the court held that in view of that fact the acts were separate and distinct. The court said, however, that "if there is but a single act of force proved as an essential element of the crime of robbery then such act of force cannot also be availed of as constituting a separate crime and only one punishment may be had." Referring to People v. Logan, supra, 41 Cal.2d 279, 260 P.2d 20, the court in People v. Galvin, 148 Cal.App.2d 285, at page 293, 306 P.2d 575, at page 580, stated:

> "In said case, the decisive factors were that the defendant struck his victim a vicious blow upon the head with a baseball bat, then snatched her purse, containing money, and fled. The instant case is like that and must be distinguished from cases like In re Chapman, 43 Cal.2d 385, 273 P. 817, where the victim was first robbed by being menaced by one of the robbers with a deadly weapon and placed in fear, then fled and was pursued, tackled by one defendant and beaten with the weapon by the other, the decision being that the assault was a separate, divisible act, independent of the robbery and not an element thereof."

[6, 7] Where, as here, there is no dispute as to the facts, whether the accused has been formerly convicted or formerly was once in jeopardy is a question of law and not of fact. People v. Brain, 75 Cal.App. 109, 110, 241 P. 913; People v. Conson, 72 Cal.App. 509, 511, 237 P. 799; People v. Wilkison, 30 Cal.App. 473, 158 P. 1067; People v. Newell, 192 Cal. 659, 668, 221 P. 622; People v. Warren, 16 Cal.2d 103, 113–114, 104 P.2d 1024. It is evident the acts relied on to support the prosecution for robbery charged in count I are the same acts as those forming the basis of the prosecution for assault with intent to commit robbery under count III. The same is true with respect to counts II and IV. The charge of robbery in count I arose out of the same transaction which gave rise to and formed the gravamen of count III. The same comment applies to counts II and IV. The evidence introduced to prove the robbery of Cline was

the assault made on him by defendant and Du Bey. The force used to accomplish the robbery was the same force used to accomplish the assault. The assault on Cline was a necessary and integral requirement to prove the corpus delicti of count I. Likewise, the evidence introduced to prove the robbery of Fraijo was the assault made on him by defendant and Du Bey. The assault on Fraijo was a necessary and integral requirement to prove the corpus delicti of count II. It is apparent from the description of the criminal transaction in the testimony of Cline and Fraijo, who were the only persons present other than defendant and Du Bey, that from the time defendant and Du Bey entered the apartment until they left, the tying and striking of Cline and Fraijo, the menacing with the gun, and the taking of their personal property constituted a single, indivisible transaction. Defendant now stands convicted of both the included and the greater offenses.

The comment in People v. Krupa, 64 Cal.App.2d 592, at page 603, 149 P.2d 416, at page 423, is pertinent:

> "It is true that the effect of this holding is that defendant escapes punishment for the more serious offense, violation of section 11714, Health and Safety Code, a felony, and suffers only the lighter punishment prescribed for an offense under section 702, Welfare and Institutions Code, a misdemeanor. This result does not, necessarily, show a weakness in the law. The doctrine that no man shall be put in jeopardy twice for the same offense is based upon sound and fundamental principles, which are recognized by both the federal and state constitutions. The fault in the present case, if any there be, lies in the procedure adopted. It was within the discretion of the law enforcement authorities to prosecute defendant for either the felony or the misdemeanor. They elected to frame an information charging the two identical offenses. This made it possible for the defendant to adopt the procedure he did."

The judgment and the order denying a new trial as to counts I and II are reversed. The judgment and the order denying a new trial as to counts III and IV are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Nicholas GORSHEN, Defendant and Appellant.*

Cr. 3423.

District Court of Appeal, First District, Division 2, California.

June 12, 1958.

Hearing Granted Aug. 6, 1958.

Defendant was convicted of murder in the second degree. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., rendered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that fact that homicide was committed under irresistible impulse, arising from a diseased or abnormal condition of the mind, constituted no defense to charge of murder, where defendant had mental capacity to realize that what he was doing was morally and legally wrong.

Judgment affirmed.

1. Homicide 🔑27

That homicide was committed under irresistible impulse arising from a diseased or abnormal condition of the mind was no defense to charge of murder where defendant had mental capacity to realize that

* Opinion vacated 336 P.2d 492.

what he was doing was morally and legally wrong.

2. Courts ⚷91(1)

Intermediate appellate court must follow clear precedents laid down by state Supreme Court and should not attempt to evaluate or re-examine the basis of a rule of law settled by unbroken line of decisions of Supreme Court.

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Garry, Dreyfus, McTernan & Keller, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by the trial judge sitting without a jury of murder in the second degree.

Appellant was working as a longshoreman under the decedent O'Leary. O'Leary was dissatisfied with appellant's conduct on the job and ordered him to quit working. After an argument during which appellant spit in O'Leary's face a fight followed in which O'Leary inflicted on appellant a deep cut below his left eye. Appellant was taken to the emergency hospital for treatment. Thereafter appellant stated that he was going home to get a gun and kill O'Leary. He did go home, secured a pistol and returned. Three officers who had been warned of his threat searched appellant but failed to discover the gun. Appellant thereafter in the presence of one of the officers shot and killed O'Leary, also wounding with the same bullet one Nelson.

A psychiatrist called as an expert by appellant testified that he was an ambulatory schizophrenic who had for many years been subject to waking trances in which he had visions of persons and animals engaged in bizarre conduct with sexual connotations. Appellant was a religious man and attributed these visions to temptations by devils. Characteristic of such schizophrenic state, as a man reaches middle age, is worry over loss of sexual potency and appellant compensated in his case for such worry by trying to be good at his work. When O'Leary criticized his work and put him off the job, using a Russian epithet which indicated that he was a sexual pervert, the border line of complete insanity was reached. Unless appellant proved his manliness to himself in some effective fashion he would become entirely insane. This took in appellant the form of an uncontrollable urge to kill O'Leary. The crucial testimony of the psychiatrist was: "They're—it is, in my opinion, no element of free will involved in the events; it's like shooting a kind of psychological gun. Once events have pulled the trigger, nothing on God's earth will stop it, the course of events; and just as you saw in this man, even the fact that policemen were right at his elbow and there was no possibility of getting away with this, still it couldn't stop the train of obsessive thoughts which resulted in the killing, so that I think such individual under no stretch of the imagination could be considered as acting with any sort of free will.

"I feel that Mr. Gorshen here did not commit this act intentionally, that he did not have the mental state which is required for malice aforethought or premeditation or anything which implies intention, deliberation or premeditation."

The expert further testified that appellant was sane under the legal test of knowing right from wrong.

The trial judge, largely under the influence of this testimony, found appellant guilty of second degree murder. Appellant argues that under this evidence, if believed, appellant did not have the necessary malice aforethought for murder, and the judgment should be reduced to manslaughter.

The trial judge with commendable fairness stated that he did not believe the law in this state would permit him to find from the expert's testimony that appellant acted without malice aforethought. He concluded: "Now, whether you have free will or not free will, that's so advanced, we're not prepared for that * * * whether he was compelled to do this because of some mental condition, that is so advanced and so far from us that we don't understand it."

We feel that it is fairly deducible from the trial judge's remarks that he felt himself powerless under the law to find, giving the expert's testimony its full weight, that the homicide was committed without malice aforethought.

[1] This squarely presents the question whether the killing of a human being under a so-called "irresistible impulse" arising from a diseased or abnormal condition of the mind is a defense in this state to the charge of murder, where the slayer has the mental capacity to realize that what he is doing is morally and legally wrong.

While a majority of the courts of this country apply the so-called "knowledge of right and wrong" test and refuse to admit "irresistible impulse" as a defense (1 Warren on Homicide, Perm.Ed., § 61, pp. 189–193; 26 Am.Jur., Homicide, § 79, p. 212; notes in 70 A.L.R. at pages 675–684; 173 A.L.R. at pages 395–397) a considerable minority have accepted the defense of "irresistible impulse" (1 Warren on Homicide, Perm.Ed., § 61, pp. 195–196; 26 Am.Jur., Homicide, § 80, pp. 213–214; notes in 70 A.L.R. at pages 663–675; 173 A.L.R. at pages 392–395).

The Supreme Court of this state in the past has consistently aligned itself with the majority in holding that "irresistible impulse" is not a defense to a charge of crime. 25 Cal.Jur.2d, Homicide, § 254, p. 786; 14 Cal.Jur.2d, Criminal Law, § 218, p. 465. In the latest expression of the Supreme Court which we have found on the subject, People v. French, 12 Cal.2d 720, at page 730, 87 P.2d 1014, at page 1019, that court said: "Moreover, it has long been the settled law of this state that neither emotional, moral nor partial insanity nor insane delusion nor hallucination, *nor the irresistible impulse theory* (the accused being conscious as to the nature and quality of his act and that it was wrongful and punishable by law), affords grounds in this state as the basis of a defense or as an excuse for the commission of a homicide." (Emphasis ours.)

Similarly in People v. Walter, 7 Cal.2d 438, 440, 60 P.2d 990, 991, the Supreme Court said: "It is the well-settled rule of law in this state, which has existed since the early organization of our state government, that moral insanity, as an independent state—that form of insanity in which the patient knows the nature of his act fully but is unable to prevent it, and which is sometimes known as uncontrollable or irresistible impulse—has no standing in this state."

This unbroken line of authority has not been expressly overruled. It is true that in People v. Wells, 33 Cal.2d 330, 202 P.2d 53, 58, the Supreme Court held that in a prosecution for assaulting a prison guard "with malice aforethought" under Penal Code, section 4500, it was error to exclude expert testimony which would have a tendency to prove that the defendant acted solely under the honest, though mistaken, belief, induced by an abnormal physical and mental condition, that his conduct was necessary to defend himself from attack. The court said, 33 Cal.2d at page 345, 202 P.2d at page 62: "If he acted only under the influence of fear of bodily harm, in the belief, honest though unreasonable, that he was defending himself from such harm by the use of a necessary amount of force, then defendant, although he would not be guiltless of crime, would not have committed that particular aggravated offense with which he is charged, for the essential element of 'malice aforethought' would be lacking."

It is to be observed of the Wells case that the court was not dealing with "irresistible impulse" in which the defendant realizes the wrongfulness of his act, but with a delusion of necessity to resist a fancied attack in which the defendant would regard his conduct as rightful self-defense and would not consider it legally or morally wrong. We can therefore find no clear indication in that case that the Supreme Court intended, or is prepared, to change the long-established rule that "irresistible impulse" is not a legal defense in California.

[2] An intermediate appellate court is bound to follow the clear precedents laid down for it by the Supreme Court of the State. The refusal to admit the defense of irresistible impulse where such irresistible impulse is the result of diseased mentality has been widely criticized, but it is not for us to attempt to evaluate, or reexamine the basis of, a rule of law settled by an unbroken line of decisions of our highest court. If the Supreme Court is in a frame of mind to do so this case will afford it a clear opportunity.

Judgment affirmed.

DRAPER, J., concurs.

KAUFMAN, P. J., concurs in the judgment.

Peter O. MATTEI, Plaintiff and Appellant,
v.
Amelia F. HOPPER, Defendant and Respondent.*
Civ. No. 17880.

District Court of Appeal, First District, Division 2, California.
June 5, 1958.

Hearing Granted July 30, 1958.

Action by buyer of real estate for damages for seller's refusal to perform. The Superior Court of Contra Costa County, Wakefield Taylor, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Draper, J., held that a contract for sale of real estate was not illusory and lacking in mutuality because of provision that it was subject to the obtaining of leases satisfactory to purchaser, but buyer's obligation to exercise honest judgment was adequate consideration, and buyer who asserted satisfaction with leases obtained could recover damages for seller's refusal to perform.

Reversed and remanded.

1. Vendor and Purchaser 🔑79

An agreement to sell real estate for a fixed price payable at specified time was not, as result of provision that performance was subject to the obtaining of leases satisfactory to purchaser, a mere continuing offer which could be withdrawn at will.

2. Contracts 🔑10(1), 58

One who agrees to perform only if it pleases him to do so is not bound to perform at all, and hence such agreement will not supply consideration for another's promise, and there is no mutuality and thus no contract.

3. Contracts 🔑282

Agreements to perform to satisfaction of another fall into two classes: those involving matters of fancy, taste or judgment, and those concerning operative fitness or mechanical utility; and in first class, obligor's good faith determination that he is not satisfied is a defense to action upon his promise but in the second class the satisfaction cannot be claimed arbitrarily, unreasonably or capriciously and standard of the reasonable man is resorted to in determining whether satisfaction has been given.

4. Contracts 🔑10(5)

Vendor and Purchaser 🔑13

A contract for sale of real estate was not illusory and lacking in mutuality because of provision that it was subject to the obtaining of leases satisfactory to purchaser, but buyer's obligation to exercise honest judgment was adequate consideration, and buyer who asserted satisfaction with leases obtained could recover damages for seller's refusal to perform.

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Jay R. Martin, William F. Sharon, Oakland, for appellant.

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* Opinion vacated 330 P.2d 625.

Carlson, Collins, Gordon & Bold, John L. Garaventa, Martinez, for respondent.

DRAPER, Justice.

This appeal presents the question whether a contract for sale of real estate is illusory and lacking in mutuality because it contains the clause "Subject to Coldwell, Banker and Company obtaining leases satisfactory to the purchaser." The agreement is in the form of a deposit receipt. Plaintiff buyer deposited $1,000 of the total price of $57,500. Before the time for payment of the balance, defendant seller notified buyer that she would not sell. Plaintiff brought this action for damages, and appeals from judgment entered for defendant after trial without jury.

The deposit receipt provides that 120 days "are allowed the purchaser to examine the title and consummate the purchase" and that at the expiration of that period the balance of the purchase price "is due and payable." The clause relating to obtaining of leases is contained in a separate and concluding paragraph, and does not specify whether it is the existence or the performance of the agreement which is "subject to" the obtaining of such satisfactory leases. The evidence shows that appellant buyer planned to construct a shopping center upon this and adjoining land, and that he desired 120 days to arrange for leasing to store operators of space in the buildings to be constructed.

[1] Seller suggests that the agreement requires notice from seller to buyer of the securing of leases, and that until such notice there is no binding agreement, but merely a continuing offer which can be withdrawn at will. We do not agree. Nowhere does the agreement mention any such notice, nor can the document fairly be construed as making the existence of an agreement dependent upon the securing of leases. Rather, the parties bound themselves, one to pay and one to accept, a fixed price 120 days from date of the agreement, performance being subject to "obtaining leases satisfactory to the purchaser."

[2] The real question is whether the requirement that the leases be "satisfactory to the purchaser" renders appellant's obligation illusory. One who agrees to perform only if it pleases him to do so is not bound to perform at all. Central Oil Co. of Los Angeles v. Southern Refining Co., 154 Cal. 165, 97 P. 177. Such an agreement will not supply consideration for another's promise. If appellant's promise amounts to no more than this, there is no mutuality and thus no contract. Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 266 P.2d 856; Pruitt v. Fontana, 143 Cal.App.2d 675, 300 P.2d 371.

[3] But the courts have long recognized that agreements to perform to the satisfaction of another are not of this type. Such promises fall into two classes, those involving matters of fancy, taste or judgment, and those concerning operative fitness or mechanical utility. In the first class of cases, our courts have held that the obligor's determination that he is not satisfied, if made in good faith, is a defense to an action upon his promise. Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 182 P. 428, 6 A.L.R. 1493; Hall v. Webb, 66 Cal.App. 416, 226 P. 403; Schuyler v. Pantages, 54 Cal.App. 83, 201 P. 137. These decisions do not expressly discuss the issue of mutuality, but implicit in them is the holding that the promisor's obligation to exercise his judgment in good faith is an adequate consideration to support the promise of the other party. See Van Demark v. California Home Extension Ass'n, 43 Cal.App. 685, 185 P. 866, holding the purchaser of land could rescind his purchase, long after it was made, under a provision that the seller would buy back the land if buyer were dissatisfied. Where the condition calls for satisfaction as to commercial value, operative fitness or mechanical utility, dissatisfaction cannot be claimed arbitrarily, unreasonably or capriciously (Collins v. Vickter Manor, Inc., 47 Cal.2d 875, 306 P.2d 783), and the standard of the reasonable man is resorted to in determining whether satisfaction has been given (Melton v. Story, 113 Cal.App. 609, 298 P. 1032;

Thomas Haverty Co. v. Jones, 185 Cal. 285, 295, 197 P. 105).

[4] It may be that the factors involved in determining what are satisfactory leases are too many and varied to permit application of the standard of the reasonable man, although expert testimony might establish a measure for determining reasonable satisfaction. If such a standard can be applied, there is no question that the promise of the buyer has substance, and affords adequate consideration. If such a standard is not applicable, the buyer is obligated to exercise an honest judgment, and this, too, is an adequate consideration for the counter-promise to convey. See 3 Williston on Contracts (Rev. ed.) 1943. "It is only where the option reserved to the promisor is unlimited that his promise becomes illusory and incapable of forming part of a legal obligation." 1 Williston on Contracts (3rd ed.) 143. We are not concerned with the measure of damages in an action by seller against buyer. Here the buyer asserts his satisfaction with the leases obtained, and seeks damages for the seller's refusal to perform.

Respondent seller relies upon Lawrence Block Co. v. Palston, supra, 123 Cal.App.2d 300, 266 P.2d 856, and Pruitt v. Fontana, supra, 143 Cal.App.2d 675, 300 P.2d 371, 377. But in each the language dealing with illusory contracts was unnecessary to the decision. In Lawrence Block, plaintiff was a real estate broker seeking a commission, his right to which depended upon the existence of a binding agreement between buyer and defendant seller. The seller had not accepted buyer's offer as written, but had added other conditions. Lacking acceptance of the offer, there was no contract of sale, and thus no support for plaintiff broker's claim of commission. This ground alone supports the result there reached. In Pruitt, the written agreement provided that the land was taken subject to easements "to be approved by the buyers." In fact, buyers refused to accept some of the easements of record, and the parties entered into a new and different oral agreement. The decision held that defendant seller was estopped to assert the statute of frauds as a defense, and reversed a judgment of dismissal entered after sustaining of demurrers. Also, neither of these agreements required that performance be "satisfactory" to the buyer, and there is authority that the absence of such language takes an agreement out of the class of "satisfaction" contracts. Sloan v. Stearns, 137 Cal.App.2d 289, 296, 290 P.2d 382.

A more basic distinction is found in the fact that in both Lawrence Block and Pruitt the agreement could be construed as vesting an untrammelled option in one party. In the case at bar, as already stated, the agreement must be construed as requiring the buyer to exercise his judgment in good faith. Also, since buyer cannot prevent performance of the condition by his own conduct (Sloan v. Stearns, supra, 137 Cal.App.2d 289, 295, 290 P.2d 382), it follows that he impliedly obligated himself to see that leases were in fact sought by the broker. In view of these obligations, reasonably to be implied from the language of this deposit receipt, there clearly is no unlimited option in buyer to refuse performance on his part, and thus his agreement is not merely illusory. It follows that there is mutuality of obligation and that the contract is enforceable.

However, the action cannot be disposed of on this appeal. Because of the trial court's conclusion that the contract was unenforceable, there are no findings upon performance by plaintiff or excuse for nonperformance. Also, the issue of damages is undetermined.

Judgment reversed, and case remanded for further trial.

KAUFMAN, P. J., and DOOLING, J., concur.

161 Cal.App.2d 167

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Freddie DIGGS, Defendant and Appellant.

Cr. 3485.

District Court of Appeal, First District, Division 1, California.

June 9, 1958.

Rehearing Denied July 9, 1958.

Defendant was convicted in the Superior Court of Alameda County, Marvin Sherwin, J., of unlawful sale and possession of marijuana, and he appealed. The District Court of Appeal, Peters, P. J., held that where police officer had information from previously known reliable informer that narcotics were being sold at particular apartment and that several men were involved, and subsequently was informed by an addict who had not previously been used by police but appeared to possess reliable information about narcotics dealers and sellers in the area, that such addict had purchased marijuana cigarettes in such apartment from a man called "Freddie" who was dressed in distinctive fashion, police were justified in entering the apartment to look for such man and in arresting the only man in the room who fitted description given by addict, and hence evidence thus procured was admissible.

Affirmed.

1. Arrest 🔑63(4)

An arrest and search is not based on "reasonable and probable cause" when the only information in possession of police is secured from an informant not known by police to be reliable, but if there are also substantial corroborating facts known or discovered, the arrest and search are proper.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable and Probable Cause".

2. Arrest 🔑63(4)

In determining propriety of arrest and search, each case must be determined on its own facts and test is, considering all information in hands of police, whether a reasonable police officer would act on that information or would he seek further information before making the arrest and conducting the search.

3. Arrest 🔑63(4)

Criminal Law 🔑394

Where police officer had information from previously known reliable informer that narcotics were being sold at particular apartment and that several men were involved, and subsequently was informed by an addict who had not previously been used by police but appeared to possess reliable information about narcotics dealers and sellers in the area, that such addict had purchased marijuana cigarettes in such apartment from a man dressed in distinctive fashion, police were justified in entering the apartment to look for such man and in arresting the only man in the room who fitted description given by addict, and hence evidence thus procured was admissible.

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Wilmont Sweeney (Aptd), Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Freddie Diggs was charged with the unlawful sale and with the unlawful possession of marijuana, and with several priors. He was found guilty on both counts charged, and admitted priors of burglary and forgery. He appeals from the judgment entered on the verdict and from the order denying his motion for a new trial.

His sole contention on this appeal is that all of the evidence introduced against him was secured as the result of an unlawful search and seizure after an unlawful arrest. There is no merit to the contention.

The two offenses are alleged to have occurred on July 27, 1957. Sergeant Hilliard, attached to the Special Service Bureau of the Oakland Police Department, testified that about a month before July 27, 1957, he received information from a confidential informant that one Raymond Bardwell was selling narcotics in apartment 9 of 1026 Brush Street, Oakland, and that Bardwell had several other men staying with him. The informant had previously given Hilliard reliable information on such matters. The name of this informant was not requested by the defense, nor was there an objection to or a motion to strike this testimony.

On the evening of July 27, 1957, another informant by the name of Leroy Young came to Hilliard's office and told him that Bardwell was selling narcotics at 1026 Brush Street in Oakland, and that another person, whose name he did not know, was also dealing in narcotics at that address. Outside the presence of the jury on the issue of reasonable and probable cause, Hilliard then stated that Young was searched, found to have no narcotics and only some small change, and was given five one dollar bills, the serial numbers of which were recorded. Hilliard then drove Young to within several blocks of 1026 Brush Street, and Young then left the car in company with another officer. In a short time Young returned to the automobile and handed Hilliard three marijuana cigarettes, stating that he had purchased them for $2 from a man in apartment 9 at 1026 Brush Street. He told Hilliard that Bardwell was not then in the apartment, but that there were several men there; that he had purchased the cigarettes from a man the others had called "Freddie"; that Freddie had taken the cigarettes from a brown paper bag that he carried in his pocket; that there were more cigarettes in that bag; that Freddie wore a straw hat, a white shirt, a vest and checkered pants. Hilliard ordered several other officers to proceed to the apartment and to arrest the man described by Young.

Hilliard also testified that, although this was the first time he had used Young directly as an informant, shortly before July 27, 1957, he had talked with Young about the narcotic problem in Oakland and found Young well and correctly informed about dealers and sellers in that area. Hilliard knew that Young was an addict.

Four officers proceeded to 1026 Brush Street. They knocked on the door of apartment 9 and, when the door was opened, arrested the man who opened the door. They then walked into the apartment, which consisted of a living room-bedroom, kitchen and bathroom. There were five men in the apartment. Bardwell was not present. Diggs was sitting on a chair in the living room. A man by the name of McNeeley was sitting on another chair nearby. The officers searched the room and found a brown paper bag containing cigarettes, which later proved to be marijuana cigarettes, on the floor between the chair on which Diggs was sitting and the wall. Diggs denied that the bag belonged to him, stating that he did not live in the apartment; that he lived on Webster Street; that he was merely visiting, and that the tenant was named Bardwell.

The arresting officers had been told by Hilliard about Young's purchase with marked money in the apartment, and had also been given the description of the seller that Young had given Hilliard. The description was an accurate description of Diggs. Diggs was the only person in the room who fitted the description. When Diggs was searched, no narcotics were found on him, but the two marked bills previously given to Young, were found in his pocket. Diggs denied that he had received these bills from anyone that night, stating he had received the money for working.

As already stated, one of the occupants of the room when the police entered, was Reuben McNeeley. He testified that he and Diggs and another occupant of the room, who apparently lived in the apartment, had dropped into the apartment so that the tenant member of the group could change his shirt; that altogether there were then about five men in the apartment; that while waiting for the tenant to change his shirt, Diggs took some marijuana cigarettes from a brown paper bag he had in his pocket and Diggs and one of the other occupants of the room smoked them. While McNeeley was sitting there in the living room he saw Diggs make two sales of marijuana cigarettes to two unidentified men. When the police arrived the witness saw Diggs take the brown paper bag from his pocket and throw it on the floor. The witness admitted to three prior felony convictions.

The defendant testified that, while he was visiting in the apartment, one of the occupants asked if anyone had a five-dollar bill to exchange for five ones, and that he, Diggs, gave the unidentified man a five-dollar bill and received in exchange five ones. Two of these were the marked bills. He denied ever being in possession of the brown paper bag, or of throwing it on the floor, stated that he did not see who threw it on the floor, denied that he or anyone else in the room smoked marijuana that night, and denied giving or selling marijuana to anyone. He admitted seeing Leroy Young in the apartment, but denied selling any cigarettes to him.

The appellant does not challenge the sufficiency of the evidence to prove both possession and sale of marijuana. The evidence, if admissible, clearly, substantially and convincingly supports the implied findings on these issues. It is the contention of appellant that his arrest was illegal and that the evidence should not, therefore, have been introduced over his objections. It is contended that the only information that the police had prior to entering the apartment about appellant was given to them by Young. It is contended that Young, an admitted addict, cannot be considered as a reliable informant because he had never before been used by the police for this purpose. Thus, so it is asserted, the police did not have reasonable and probable cause to arrest appellant.

[1] It is true that an arrest and search is not based on reasonable and probable cause when the only information in the possession of the police is secured from an informant not known by the police to be reliable. People v. Goodo, 147 Cal.App.2d 7, 304 P.2d 776. But if information is received from such an informant, and there are substantial corroborating facts known or discovered, the arrest and search are proper. People v. Holguin, 145 Cal.App.2d 520, 302 P.2d 635; Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6; People v. Sayles, 140 Cal.App.2d 657, 295 P.2d 579.

[2, 3] Each case must be determined on its own facts. The test is, considering all the information in the hands of the police, would a reasonable police officer act on that information or would a reasonable officer seek further information before making the arrest and conducting the search. In the instant case Hilliard had information from a previously known reliable informant that Bardwell was selling narcotics at 1026 Brush Street, apartment 9, and that several other men were involved. Then, prior to July 27, 1957, Hilliard talked with Young about the narcotic problems in Oakland, and found that Young possessed reliable information about dealers and sellers in the area. Then Young came to Hilliard on July 27th and told him that Bardwell was selling narcotics from the apartment in question, and that possibly other individuals were involved. This corroborated what Hilliard already had been told by the unidentified reliable informant. It was some indication that Young was reliable. Then Hilliard, after searching Young, supplied him with marked bills, and sent him to the apartment. Young, in a short time, returned and gave Hilliard three marijuana cigarettes, stating that he had purchased them in the apartment from a man called "Freddie" who was dressed in a distinctive fashion. Thus, everything then known to Hilliard was consistent. From all this information Hilliard was justified in believing that someone in that particular apartment was selling marijuana, and that that someone was distinctively dressed and was named "Freddie." Hilliard acted reasonably in directing the officers to arrest that man. The

police were justified in entering the apartment to look for that man. They had reasonable grounds to believe that a felony was being or had been committed in that apartment. When they entered the apartment they found a man as described by Young. He was the only man in the room who fitted the description. They then, quite properly, arrested appellant and searched him and the room, with the results already described. Under the circumstances, the arrest and search were reasonable and proper.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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161 Cal.App.2d 123

COBBLEDICK-KIBBE GLASS CO., a corporation, Plaintiff and Appellant,

v.

Emmett L. PUGH, doing business under the firm name and style of Memorial Florist, Defendant and Respondent.

Civ. 9215.

District Court of Appeal, Third District, California.

June 5, 1958.

Action to recover for materials furnished and installed in accordance with contract. Defendant asserted fraud. The Superior Court, Yolo County, C. C. McDonald, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that if, notwithstanding recital on back of contract purporting to absolve seller of responsibility for formation of condensation on glass, contract had in fact been fraudulently induced by acts, statements and conduct of seller's representative, who had told buyer that glass would be condensation free, seller would be responsible for fraud.

Affirmed.

1. Fraud 🔑27

If, notwithstanding recital on back of contract purporting to absolve seller of responsibility for formation of condensation on glass, contract had in fact fraudulently been induced by acts, statements and conduct of seller's representative, who had told buyer that glass would be condensation free, seller would be responsible for fraud.

2. Fraud 🔑64(5)

In buyer's action for fraud in connection with sale of glass for refrigerated showcase, question of fact was presented as to whether buyer had been entitled to, and had, relied upon oral misrepresentation that glass would be condensation free.

3. Fraud 🔑22(2)

Buyer's negligence, in failing to read contract provision purporting to absolve seller of responsibility for formation of condensation on glass sold for use in refrigerated showcase, would not prevent visiting upon seller of consequences of fraud if buyer's carelessness had been induced by his dealings with seller's representative, who had represented that glass would be condensation free.

4. Contracts 🔑94(5)
Fraud 🔑22(1)

A person who has been induced to enter into contract by fraudulent representations as to its contents may rescind or reform contract, or he may affirm contract and plead fraud defensively; and his negligence in failing to read contract will not be a bar to his right to relief if he was justified in relying upon representations.

5. Fraud 🔑62

In action to recover for fraud in connection with sale of glass, represented as being condensation free, for purpose of use in refrigerated showcase, evidence would sustain award of $600 as damages. West's Ann.Civ.Code, § 3343.

McGilvray, McGilvray & Cameron, Sacramento, for appellant.

E. L. Means and Oliver J. Northup, Jr., Woodland, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff-appellant brought action against defendant-respondent to recover money due for materials furnished and installed in accordance with a written proposal accepted by respondent. The proposal, a filled-in form used by appellant, provided that appellant would furnish and install certain plate glass and Thermopane glass for use in respondent's place of business for the sum of $1,546. The answer of respondent asserted breach of warranty and fraud. The trial court found no warranty but held that the contract had been induced by fraud and allowed damages in a sum exceeding the contract price. This appeal followed.

While respondent was engaged in improving his place of business, he determined to investigate the advisability of using Thermopane glass for the purpose of floral display under refrigeration. He planned to build the display case so that it would form a part of the exterior wall of his store. He had used an evaporatively-cooled display case inside his store and had had trouble from condensation of moisture on the glass, preventing visibility. This he wished to avoid. He called a representative of appellant to visit him at his place of business and discuss the use of Thermopane, which is a product dealt in by appellant consisting of two or more glass plates separated by an air space. The representative did so and when the requirements of respondent had been explained to him, and he had been asked if Thermopane would prevent condensation of moisture on the glass, he replied that he did not know. Respondent requested him to investigate the matter by taking it up with his principal. This the representative did and reported that Thermopane would be suitable for respondent's purpose and particularly that it would be condensation free so that the flowers on display could be viewed from without the store by persons passing along the sidewalk, as well as by persons entering the store and viewing the display from within. The representative told respondent that in his inquiries he had checked with four or five "big shots" in appellant's organization and they had told him there would be no condensation on Thermopane. The falsity of these representations were sufficiently shown. For instance, the only person the representative had talked with was his superior and he had not been told by him that the glass if used would be free from condensation. The evidence sufficiently supported a conclusion that the display case was often so covered with condensation as to make it useless for display purposes.

The written contract on its face recited that appellant proposed to furnish and install the wanted material for the stated price, and contained the following: "IMPORTANT: The general conditions set forth on the reverse hereof are a part of this proposal." Turning to the reverse side of the form, the following appears: "CONDENSATION: Because of its numerous and uncontrollable causes, we shall not be responsible for the formation of condensation or frost on glass." The form was given to and left with respondent by the same representative who had made the representations to him concerning condensation and respondent kept the form with him for several days before signing a written acceptance in a space on the face of the form. Respondent testified that he did not see and did not read the statement concerning condensation on the reverse side of the form; that the representative did not call his attention thereto, but repeated his representations concerning condensation at the time he left the form. When experience proved that the glass fogged up so badly as to defeat the purpose for which Thermopane had been purchased and installed, respondent called the attention of appellant to the defect and the same representative who had dealt with respondent assured him that appellant would take steps to correct the condition as to condensation. This, however, was never done.

Appellant relies upon the rule that the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its subject matter which preceded or accompanied the execution of the instrument. Civ.Code, Sec. 1625. Says appellant: To determine that the defendant is not able to recover for breach of warranty, but is able to recover damages for fraud and deceit, is to permit him to recover an alleged loss where he admittedly has been foreclosed; and if the judgment is allowed to stand the contract will be changed in respect of the very terms intended to set forth all the obligations on the part of the plaintiff concerning condensation. Appellant also relies on the rule stated in Cobbs v. Cobbs, 53 Cal.App.2d 780, at page 785, 128 P.2d 373, 375 as follows: "In our opinion * * * a distinction must be made between * * * a parol promise * * * which by its very nature is superseded by the final writing, inconsistent with it, and a promise made with no intention of performing the same, not inconsistent with the writing, but which was the inducing cause thereof." Appellant cites several cases applying the foregoing rule. We think the rule in Cobbs v. Cobbs has no application. This is not a case where a promise is made inconsistent with the writing and not contained within it and where the action is on the written promise. The cross action of respondent asserting fraud is not an action on the contract. It is an action ex delicto which affirms the contract but seeks damages for the fraud that induced its execution.

[1–3] If, notwithstanding the recital on the back of the form, this contract was in fact fraudulently induced by the acts, statements and conduct of appellant's representative, appellant is responsible for the fraud. The real question revolves around the fact of reliance. Whether or not under the circumstances attending the inducement and execution of the contract respondent was entitled to and did rely upon the oral representations was a question of fact for the trial court. If he was so entitled to rely and did rely, he has been deceived. Respondent's negligence, if such it was in view of the dealings he had with appellant's representative, in failing to read the reverse side of the form will not as a matter of law prevent the visiting upon the appellant of the consequences of fraud. For even if respondent was careless, his very carelessness might well have been induced by his dealings with appellant's representative.

The record presents the following: Respondent stated to appellant's representative his desires to obtain a refrigerated showcase which would not be affected by condensation. The representative replied he did not know if Thermopane would effect the desired result. Respondent requested that he ascertain the fact from his superiors. The representative returned with statements that he had consulted his superiors and had been told by them that Thermopane would be condensation free. He then tendered to respondent for execution a written proposal form, without warning him that it contained a provision contrary to the representation. The trial court could properly hold this constituted a representation that the instrument contained nothing contrary to the representations made. We are bound by the trial court's finding as to the conduct of the representative, although the record discloses that he denied he had made any assertions that Thermopane would be free from condensation. Accepting the court's findings, the position of appellant is this: We knew respondent's special requirements and falsely asserted that Thermopane would meet them. We tendered a contract form which on its face contained nothing contrary to those assertions, but which on its back, among numerous other statements, contained an assertion that we would not be responsible if condensation occurred because condensation on glass occurs from numerous and uncontrollable causes. We renewed the representations at the very moment we left the form with respondent and did not call his attention to the contradiction on the back of the form.

We accepted the executed contract knowing that in all probability it would not have been signed had respondent in fact read the provision on the back, and we now say that respondent's negligence prevents recovery for our fraudulent representations that induced the contract. The court could, as it did, hold to the contrary.

[4] It is established in California that a person who has been induced to enter into a contract by fraudulent representations as to its contents may rescind or reform the contract. (On like grounds he may affirm the contract and plead the fraud defensively.) His negligence in failing to read the contract does not bar his right to relief if he was justified in relying upon the representations. Security-First Nat. Bank v. Earp, 19 Cal.2d 774, 777, 122 P.2d 900. The above rules apply when there is sufficient evidence to support a finding made by the trial court that the terms of the contract were fraudulently represented to the party complaining of fraud and that he was justified in relying upon the representations. Security-First Nat. Bank v. Earp, supra. See also for a case comparable on its facts and for a good discussion of the principle involved, Kreate v. Miller, 226 Ky. 444, 11 S.W.2d 99. Although redress has often been refused to a party who claimed to have been induced by fraud to sign a contract whose contents were misrepresented to him, the reasons often given being that to grant such relief invites perjury and encourages negligence, nevertheless there is and can be no inflexible rule that relief in such cases cannot be given. As said by Cooley on Torts, 3d ed., page 934:

> "* * * The ways of fraud are infinite in their diversity, and if into any one of them all the law refuses to follow for the rescue of victims, it will be in the direction of that one that fraudulent devices will specially tend. It can never be either wise or safe to mark out specific boundaries within which deceits shall be dealt with, but beyond which they shall have impunity; but each case must be considered on its own facts, and every case will have peculiarities of its own, by which it may be judged."

We hold that the evidence presented by the record sufficiently supports the findings of the trial court that respondent was fraudulently induced to execute the contract.

[5] Appellant contends further that the damages awarded are excessive and not justified by the evidence. We do not agree. There was testimony that not only was the display box utterly useless, but that respondent, in pursuit of his business, was compelled to have the same removed and other installations made for display purposes. The court applied the rule stated in Section 3343 of the Civil Code, that:

> "One defrauded in the purchase * * * of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction."

There was evidence that, in addition to receiving no value whatever, respondent was compelled to duplicate expenditures he had made in building the original display case; in providing a display case in a different location and of different material; in making changes in the air conditioning system required by relocation of the case and in the relocation of lighting necessitated by the change, all special expense brought about as a result of the appellant's fraud. There was testimony that the total of these expenses, in addition to credit for the contract price, exceeded the $600 money judgment which the court allowed.

The record supports the judgment rendered, and the judgment is, therefore, affirmed.

PEEK and SCHOTTKY, JJ., concur.

160 Cal.App.2d 745

Sylvan Oscar TATKIN, Petitioner,

v.

SUPERIOR COURT of State of California in and for the COUNTY OF LOS ANGELES, Respondent.

Los Angeles County Medical Association, etc., et al., Real Parties in Interest.

Civ. 22953.

District Court of Appeal, Second District, Division 2, California.

May 23, 1958.

Hearing Denied July 16, 1958.

Physician brought mandamus proceeding against the Superior Court of Los Angeles County to compel the Superior Court to set aside an order sustaining refusal of secretary-treasurer of county medical association to answer certain questions in pre-trial deposition and to enter an order requiring the secretary-treasurer to answer the questions. The District Court of Appeal, Kincaid, J. pro tempore, held that in suit by physician against county medical association and national medical association to recover damages for alleged illegal conspiracy in restraint of trade, on ground that associations had conspired to prevent him from competing successfully with members of associations, records, obtained by county medical association in connection with its deliberations on physician's unsuccessful application for membership in county medical association, were not privileged against disclosure by statute dealing with privileged communications or by public policy and were relevant, as determined by the subject matter of the action and by the potential as well as the actual issues in the case, and therefore deposition of secretary-treasurer of county medical association could be taken concerning such records.

Writ of mandate issued.

Herndon, J., dissented.

1. Mandamus ⚷4(4)

Since appeal by plaintiff from final judgment would not afford plaintiff adequate remedy for correcting order of Superior Court sustaining refusal of one of the defendants to answer questions on deposition, mandamus proceeding by plaintiff against Superior Court was the proper remedy.

2. Depositions ⚷9

Ordinarily, trial court has no discretion to refuse to exercise its powers, so far as necessary, to secure to a litigant the right to a deposition in a case defined by the code. West's Ann.Code Civ.Proc. §§ 2016 and subd. (b), 2021.

3. Depositions ⚷64(2)

Evidence ⚷99

Relevancy of evidence on taking of a deposition is to be determined by subject matter of action and by the potential as well as actual issues in the case. West's Ann.Code Civ.Proc. §§ 2016 and subd. (b), 2021.

4. Discovery ⚷41

Witness in a deposition taken under discovery statute must answer all questions seeking nonprivileged information material to subject matter of pending action, and he cannot block interrogation by contending that it is a "fishing expedition" or by urging secrecy of his methods of doing business. West's Ann.Code Civ.Proc. §§ 2016 and subd. (b), 2021.

5. Discovery ⚷41

The taking of a deposition under discovery statute must not be abused, and witness need not answer questions that serve no proper purpose or are irrelevant. West's Ann.Code Civ.Proc. §§ 2016 and subd. (b), 2021.

6. Witnesses ⚷185

Since protection against privileged communications often leads to suppression of truth and to defeat of justice, tendency of courts is toward strict construction of statute dealing with confidential communications. West's Ann.Code Civ.Proc. § 1881.

7. Discovery ⚷90

Unless statute dealing with confidential communications expressly extends privilege to specific persons or classes, the law will not justify such individuals in refusing to disclose facts contained in documents which would otherwise be competent evidence in a particular proceeding. West's Ann.Code Civ.Proc. § 1881.

8. Witnesses ⚷222

Burden is on party seeking to suppress evidence, on ground of privilege under statute dealing with confidential communications, to show that evidence is within terms of the statute. West's Ann.Code Civ.Proc. § 1881.

9. Witnesses ⚷185

Statements, to be privileged under statute dealing with confidential communications, and therefore inadmissible, must come with express terms of the statute. West's Ann.Code Civ.Proc. § 1881.

10. Monopolies ⚷25

In suit by physician against county medical association and national medical association to recover damages for alleged illegal conspiracy in restraint of trade, on ground that associations had conspired to prevent him from competing successfully with members of associations, records obtained by county medical association in connection with its deliberations on physician's unsuccessful application for membership in county medical association, were not privileged against disclosure by statute dealing with privileged communications or by public policy and are relevant, as determined by the subject matter of the action and by the potential as well as the actual issues in the case, and therefore deposition of secretary-treasurer of county medical association could be taken concerning such records. West's Ann.Code Civ.Proc. §§ 1881, 2016 and subd. (b), 2021; West's Ann.Bus. & Prof.Code, §§ 16700–16758; Sherman Anti-Trust Act, §§ 1 et seq., 3 as amended 15 U.S.C.A. §§ 1 et seq., 3.

◆

Wyman & Finell, Beverly Hills, for petitioner.

Gibson, Dunn & Crutcher, Frederick O. Field, O'Melveny & Myers, Leslie G. Turner, Warren M. Christopher, Carl J. Schuck, Los Angeles, for real parties in interest.

KINCAID, Justice pro tempore.

Petitioner, plaintiff in an action pending in the Superior Court of Los Angeles County, seeks a writ of mandate directing the respondent court to set aside an order sustaining defendants' refusal to answer certain questions in a pre-trial deposition and to enter an order compelling defendants to answer these questions.

Demurrers having been overruled, a third amended complaint was filed and the defendants, American Medical Association, Los Angeles County Medical Association, and certain named individuals, have filed their answers thereto.

The third amended complaint of plaintiff contains three causes of action and alleges generally that since August 1, 1953, plaintiff has been and is a duly licensed doctor of medicine authorized to practice medicine in the State of California; that on September 21, 1954, plaintiff was notified that his application for membership in the defendant Los Angeles Medical Association had been refused; that since then he has suffered damages as a result of the acts and conduct of defendants. The plaintiff has affirmatively alleged that the defendants have conspired and combined to dominate and control the practice of medicine in Los Angeles County in such a manner as to prevent competition between licensed doctors in the area and members of the defendant Los Angeles County Medical Association particularly when the licensed doctor has come from out of state; that pursuant to this conspiracy and combination, the defendant Los Angeles Medical Association has established a minimum scale of fees to be charged for services rendered by its members to the public; that pursuant to the said conspiracy and combination, the defendants have not left open membership in the defendant Los Angeles Medical Association to doctors of medicine of even the highest professional and ethical qualifications; that defendants have established disciplinary sanctions against members of the defendant Los Angeles County Medical Association who consult with or cooperate with doctors of medicine who are not members of the defendant association; and that pursuant to the said conspiracy and combination, a grading system of hospitals has been set up, the result of which is that only members of the defendant Los Angeles County Medical Association are eligible for membership on the staffs of over 90 per cent of the hospitals in the Los Angeles County area.

Plaintiff further alleges that his professional and ethical qualifications are of the highest calibre; that he was, prior to August 1, 1953, when he came to Los Angeles County, a member of the Yakima County Medical Association, Yakima, Washington; that while practicing in Los Angeles County, he has at all times charged fees for treatment lower than those prescribed as minimum by the defendant Los Angeles Medical Association; that he made his services available to the public at a greater number of hours per day and days per week than the members of the defendant association practicing in his community; that he applied for, and was denied, membership in the defendant Los Angeles Medical Association without any reasons having been given for his rejection; that thereafter he was expelled from the staff of the Behrens Memorial Hospital even though his services had been completely satisfactory; that when he attempted to construct a hospital of his own in the community in which he practiced the members of the defendant Los Angeles County Medical Association refused to cooperate with him in any way, and actively took steps to make the construction impossible by opposing the granting of a zoning variance by the city commission.

Plaintiff caused a subpoena duces tecum to be issued to defendant William F. Quinn, secretary-treasurer of defendant Los Angeles County Medical Association, requiring him to appear for deposition and to produce the following: All letters written by any member of the Los Angeles County Medical Association or Yakima County Medical Association or by any officer of either association regarding Dr. Sylvan O. Tatkin; all investigation report or reports by investigator or investigators regarding the professional, personal, ethical or moral background of Dr. Sylvan O. Tatkin; all documents presented to the council of the Los Angeles County Medical Association at any meeting pertaining to any application of Dr. Sylvan O. Tatkin for membership or used by the council or any member thereof in connection with the determination of Dr. Sylvan O. Tatkin's qualification for membership in the Los Angeles County Medical Association; all other books, records, papers, documents and files of every type or nature whatsoever obtained by the Los Angeles County Medical Association in connection with its deliberations on Dr. Sylvan O. Tatkin's application for membership in the Los Angeles County Medical Association.

Quinn, on advice of counsel, refused to answer any and all questions put to him concerning the criteria, rules, regulations or policies of the defendant Los Angeles County Medical Association in passing on membership applications and all questions put to him concerning the consideration of plaintiff's application for membership. He also refused to produce any of the documents subpoenaed, as the documents dealt with the same subject matter as the questions, and both the documents and the questions were objected to on the ground of irrelevancy and immateriality.

The defendant's refusal to answer was thereupon duly certified to respondent court resulting in an order to answer questions numbered one and two but sustaining objections to the remaining 21 questions.

[1] Since an appeal from the final judgment would not afford plaintiff an adequate remedy for correcting the order of respondent court sustaining said defendant's refusal to answer the questions on deposition, mandamus is the proper remedy. I. E. S. Corporation v. Superior Court, 44 Cal.2d 559, 564, 283 P.2d 700; McClatchy Newspa-

pers v. Superior Court, 26 Cal.2d 386, 392, 159 P.2d 944.

[2, 3] As was said in the McClatchy case (26 Cal.2d at pages 393, 394, 395, 159 P.2d at page 948): "Ordinarily the trial court has no discretion to refuse to exercise its powers so far as necessary to secure to a litigant the right to a deposition in the cases defined by the code. (Citations.) The language of section 2021 of the Code of Civil Procedure providing that 'The testimony of a witness * * * may be taken by deposition' confers upon litigants the *right* to take depositions. (Citation.) * * By refusing to compel a witness to answer proper questions, a trial court may effectively deny a litigant the right to take a deposition, since a right without means of enforcement, if such can exist, is of little practical value. Consequently, trial courts have been directed by writ of mandate to compel witnesses to answer questions on the taking of their depositions on the theory that it is their judicial duty to secure to a party the means of obtaining in advance of the trial information concerning the issues and the means of producing at the trial the evidence necessary to sustain his action or defense. (Citations.) * *

"The respondent court declined to compel plaintiff to answer the questions upon the ground that they were directed to defenses which had been eliminated by the ruling on demurrer, and that therefore the answers would be incompetent and immaterial as not within the issues. While the order on demurrer ruled out certain issues for the time being, the status of the pleadings as so limited is not the exclusive measure of the scope of inquiry on deposition. Different principles govern the determination of the materiality of evidence sought to be obtained by means of depositions and the admissibility of evidence offered upon the trial. The relevancy of evidence on the taking of a deposition is to be determined by the subject matter of the action and by the potential as well as actual issues in the case. (Citations.) * * * The fact that the ruling on demurrer eliminated the issues embraced by the deposition does not prevent such issues from being classed as potential. The sustaining of a demurrer relates only to the issues raised by the pleadings as they exist at the time of the ruling on the demurrer. A trial court may nevertheless properly permit an amendment to the pleadings during the course of trial; it may reconsider its ruling during trial; or the ruling may be reversed upon appeal."

[4, 5] And as said in I. E. S. Corporation v. Superior Court, supra, 44 Cal.2d 559, at pages 562, 563, 283 P.2d 700, at page 703: "In the interest of full disclosure, the witness in a deposition taken pursuant to section 2021, subd. 1, of the Code of Civil Procedure must answer all questions seeking nonprivileged information that is material to the subject matter of the pending action (citations), and he cannot block the interrogation by contending that it is a 'fishing expedition' or by urging the secrecy of his methods of doing business. At the same time, the taking of a deposition must not be abused (citation), and the witness need not answer questions that serve no proper purpose or are irrelevant. (Citations.) * * *

"* * * Similarly, plaintiff was entitled to learn the sources of the goods to determine whether they were sold to defendant in the condition and at the prices represented and whether the sellers had conspired with defendant to defraud plaintiff."

The trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings. Dowell v. Superior Court, 47 Cal.2d 483, 486, 304 P.2d 1009; Union Trust Co. of San Diego v. Superior Court, 11 Cal.2d 449, 462, 81 P.2d 150, 118 A.L.R. 259.

In further indication of this trend, section 2021 of the Code of Civil Procedure has now been replaced by section 2016 which provides for the taking of the deposition of any person for the purpose of discovery, or for use as evidence in the action or for both purposes. Subsection (b) of section 2016 provides: "[*Scope of examination.*] Unless otherwise ordered by the court as provided by subdivision (b) or (d) of Section 2019 of this code, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction."

In the light of these rules relating to discovery it is evident that unless the matters sought to be elicited by the refused questions are privileged against disclosure under the law of this state upon the trial of the action by plaintiff against defendants, the real parties in interest herein, or are clearly irrelevant as determined by the subject matter of such action and by the potential as well as actual issues in the case, the questions should be answered.

Plaintiff's complaint is based on the theory that plaintiff, a qualified doctor, has been denied the use of hospital facilities and association with other doctors by reason of the individual defendants' conspiracy to illegally limit these associations and the use of these facilities to members of the defendant Los Angeles County Medical Association. The gist of the action is that the effect of the domination of the practice of medicine in Los Angeles County by the defendant Los Angeles County Medical Association has been to remove a qualified practitioner from competition with those in the select body, and that defendants have in this manner engaged in a course of conduct constituting an illegal conspiracy in restraint of trade. In addition, plaintiff alleges a cause of action on the theory of an unjustifiable, concerted refusal to deal, and on the theory of an unjustifiable interference with contractual and advantageous relationships. Plaintiff is seeking damages for injuries caused to him by the tortious conduct of defendants. He is not seeking either directly or indirectly to compel the defendant association to admit him to membership.

In considering what would be relevant to this issue, it is plaintiff's theory that the alleged practices of the defendant association, particularly those respecting the use of hospitals and the cooperation and consultation of member doctors of medicine with nonmember doctors of medicine, have been calculated to make it impossible for a nonmember to compete with a member of the association in the practice of medicine. It is plaintiff's position that membership was denied to him in order to prevent him from competing successfully with members of the defendant association by charging lower rates for treatment, and working longer hours than other doctors in his community.

The basic issue presented by the pleadings in the instant case is the existence or nonexistence of a combination by the named defendants to restrain competition by the plaintiff.

[6-9] The statutory privileges set forth in section 1881, Code of Civil Procedure, provide against the examining of a witness as to confidential communications between husband and wife, attorney and client, confessor and confessant, physician and patient, public officers and certain newspaper personnel. As said in Samish v. Superior Court, 28 Cal.App.2d 685, 695, 83 P.2d 305, 310: "Since the protection against privileged communications often leads to a suppression of the truth and to a defeat of justice, the tendency of the courts is toward a strict construction of such statutes.

Dwelly v. McReynolds, 6 Cal.2d 128, 131, 56 P.2d 1232; 27 Cal.Jur. 44, sec. 30. Unless the statute expressly extends the privilege to specific persons or classes, the law will not justify such individuals in refusing to disclose facts contained in documents which would otherwise be competent evidence in a particular proceeding. In the Dwelly Case, supra, the court said * * *:

> "'"The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute." (Citations.) The statements to be privileged and hence inadmissible *must come within the express terms of the section.* (Citations.)'"

Measuring the matters here in question no privilege against disclosure is extended defendants by the provisions of section 1881, Code of Civil Procedure.

Defendants argue that public policy demands that documents, communications and information of the nature and type sought herein should be treated as confidential and not available for disclosure and inspection as desired by the petitioner. They cite Runyon v. Board etc. of Cal., 26 Cal.App.2d 183, 79 P.2d 101, in support of their contention. This case involved letters and other communications sent voluntarily by various individuals to a public agency, the State Board of Prison Terms and Paroles, in connection with the hearing and determination of applications for parole of prisoners. The facts of the Runyon case are not analogous to a situation as here involved where communications are sent to a private voluntary association relating to the applications for membership therein and the action taken thereon.

In the case of I. E. S. Corporation v. Superior Court, supra, 44 Cal.2d 559, 283 P.2d 700, the complaint alleged that plaintiff entered into a series of contracts and options for the purchase of machinery from defendant. The complaint also alleged that defendant had conspired with various sellers of war surplus engines, and plaintiff's former president to induce plaintiff to purchase nonexistent, inferior and highly overpriced machinery, and that defendant had made an extensive buying trip in which he carried on activities in furtherance of the conspiracy. In giving his deposition, defendant refused to reveal from whom, in what manner, and at what prices he had acquired the engines, or any questions dealing with the identity of his sources and the nature of his transactions with them. All refusals were on the ground that the questions were immaterial and irrelevant. In ordering the defendant to answer, the court stated (44 Cal.2d at page 563, 283 P.2d at page 703): "* * * [P]laintiff was entitled to learn the sources of the goods to determine whether they were sold to defendant in the condition and at the prices represented and *whether the sellers had conspired with defendant to defraud plaintiff.*" (Emphasis added.) Implicit in the statement of the court is the proposition that the defendant was required to reveal his course of dealing with the other conspirators *as that course of dealing related to the plaintiff* because that was the only way in which the plaintiff could show that a conspiracy did or did not exist. In the instant case, the course of dealing between the alleged coconspirators respecting the plaintiff had the same relevancy and materiality as in the I. E. S. case in that it goes to the existence, nature and scope of the alleged conspiracy.

Defendants assert that the denial by the respondent court of the right of plaintiff to inquire, by means of depositions and subpoenas duces tecum, into the activities of the Los Angeles County Medical Association, its admissions committee and its council, was a responsible control of such right. More especially they contend that since the courts will not interfere in the internal affairs of a voluntary association respecting applications for membership nor compel membership therein, questions or documents dealing with the reasons for petitioner's denial of membership therein and related rules in general become immaterial and irrelevant. They cite cases to the effect that a voluntary association has the power to enact laws governing the admission of members and to prescribe the necessary qualifications for membership. Membership therein is a privilege which the society may accord or withhold at its pleasure, with which the courts will not interfere, even though the arbitrary rejection of the candidate may prejudice his material interest: Harris v. Thomas, Tex.Civ.App., 217 S.W. 1068, 1076–1077; Medical Soc. of Mobile County v. Walker, 245 Ala. 135, 16 So.2d 321; Chapman v. American Legion, 244 Ala. 553, 14 So.2d 225, 228, 147 A.L.R. 585; Gold Knob Outdoor Advertising Co. v. Outdoor Adv. Ass'n, Tex.Civ.App., 225 S.W.2d 645, 646–647; and Mayer v. Journeymen Stone-Cutters Ass'n, 47 N.J.Eq. 519, 20 A. 492, 494.

Harris v. Thomas, supra, a Texas case, was an action to restrain the defendant doctors from interfering with plaintiff's practice in the defendant hospital and, in the alternative, for damages. Plaintiff, an osteopath, was practicing in the defendant hospital when the medical association recommended the staff system to the defendant hospital. The defendant hospital followed the recommendations of the local medical association as to what doctors should be on the staff. The recommendations included only those doctors who were members of the medical association and omitted plaintiff. Plaintiff by virtue of not being a member of the medical association, was thereafter denied the right to practice in defendant hospital. Plaintiff filed suit and obtained a temporary injunction. The trial court thereafter ordered the temporary injunction dissolved and plaintiff appealed. In affirming the order of the trial court, the appellate court said (217 S.W. at pages 1076, 1077): "* * * It seems to be appellant's contention that his exclusion from the organization and appellees' refusal to affiliate with him and holding that his license or diploma as an osteopath did not entitle him to fellowship with them influenced others against him and deprived him of the fruits of his preparation as a practitioner. *If appellees were acting to further their legitimate purpose or to advance the practice of their profession, this, we think, would be justified,* even if it had the result claimed by appellant. *Unless the organization was itself illegal or the methods used by it were wrongful,* appellant has no just complaint. * * * It is provided by such association that an applicant for membership must be of good moral character and licensed to practice under the laws of the state of Texas; that he must not support or profess an exclusive system of medicine or advertise as such. The appellant was admittedly an osteopath, and his license to practice was obtained upon a diploma from a school of that system. His advertisement and card so gave his school of practice.

"* * * Courts sometimes interfere where members have been wrongfully excluded or expelled, but as a rule they do not interfere with the right of an association to make laws or rules *unless they are against good morals or violate the laws of the state* * * *. If it deemed appellant an osteopath, and that as such he was supporting an exclusive system, the association and its members were within their rights, under its rules, in rejecting him as a member. They also had the right to refuse to assist him in operations. They could, if they deemed it to the interest of medicine or surgery, or the welfare of humanity, agree among themselves not to assist appellant in surgery *if they did so in good faith and with no intent to injure appellant.* * * * *If without malice or evil intent* the appellees did interfere with the privilege of appellant, *if they did so to serve some legitimate right or interest of their own,* they could do such acts themselves or cause others to do them *so long as no definite legal right of appellant is violated.*" (Emphasis added.)

Medical Soc. of Mobile County v. Walker, supra, 245 Ala. 135, 16 So.2d 321, an Alabama case, was an action to restrain the medical society from admitting applicants for membership until the requirements of the society's by-laws were complied with. In reviewing the rights of applicants to membership in a medical society, the court said (at page 324): "* * * Societies of the sort here considered have the right to make their own rules upon the subject of admission or exclusion of members, and these rules may be considered as articles of agreement, to which all who are members become parties. * * * They may make their own constitution and by-laws; and so long as they remain unchanged, each member is alike bound and shielded by them. * * * *Of course such constitution and by-laws to be obligatory, must not contravene public law, nor any principle of public policy.* * * *" (Emphasis added.)

In Chapman v. American Legion, supra, 244 Ala. 553, 14 So.2d 225, an Alabama case, plaintiffs petitioned for a writ of mandamus to require the American Legion, Alabama Department, to issue a charter for the establishment of a local post. The court examined the Acts of Congress incorporating the Legion and the pertinent provisions of the Legion's constitution and by-laws and found them to establish minimum requisites for membership but that eligibility alone did not require a person's acceptance. The court (at page 228) quoted from 7 C.J.S. Associations § 23, p. 56, "In other words, membership is a privilege which the society may accord or withhold at its pleasure, and a court of equity will not interfere to compel the admission of a person not regularly elected, even though the arbitrary rejection of the candidate may prejudice his material interests, *where no rights of property or of person are affected*, and no rights of citizenship are infringed on. * * *" (Emphasis added.)

A review of the foregoing cases cited by defendants discloses that they do not go to the extent of holding that the courts will never under any circumstances inquire into the reasons for denial of membership in a voluntary association. On the contrary they demonstrate that inquiry will not be precluded where tortious or illegal purpose and conduct are involved. They fail to support the contention that inquiry into the reasons for denial of membership will be precluded where, as here, it is charged that membership was denied for the purpose of restraining trade and competition, as a part of a conspiracy to restrain trade and competition, an unjustified concerted refusal to deal and an unjustified interference with contractual and advantageous relationships.

Plaintiff asserts and the defendants, the real parties in interest, deny that a physician, injured by an unreasonable restraint of the practice of medicine, has a cause of action for restraint of trade under both common law principles and the Cartwright Act. Bus. & Prof.Code, §§ 16700–16758. While this question, so far as our research discloses, has never been directly decided by the courts of this state, certain cases from other jurisdictions construing the federal antitrust laws and analogous state statutes may be considered.

There are six relevant federal court opinions decided under the Sherman Act, 15 U.S.C.A. § 1 et seq., which have been concerned with the issue of whether certain activities in the medical field constitute "trade." Three of these six opinions arose in the course of a single case in which the American Medical Association and others were indicted for an alleged conspiracy to restrain trade in the District of Columbia in violation of the Sherman Act. In the first of these opinions, United States v. American Medical Ass'n, 72 App.D.C. 12, 110 F.2d 703, certiorari denied, 1940, 310 U.S. 644, 60 S.Ct. 1096, 84 L.Ed. 1411, the Court of Appeals for the District of Columbia reversed a trial court judgment sustaining a demurrer to the indictment. The indictment charged that the defendant medical societies combined and conspired to impose restraint on physicians affiliated with a group health association engaged in the business of arranging for provision of medical care and hospitalization to members on a risk-sharing prepayment basis, by threat of or actual expulsion from the societies, by denying them essential professional contacts with other physicians, and by using coercive power to deprive them of hospital facilities for their patients, all constituting unreasonable "restraint of trade" within the provisions of the Sherman Anti-Trust Act. A demurrer to the indictment had been sustained, the trial court holding that the practice of medicine is not a trade within the meaning of section 3 of the Sherman Act. In reversing this ruling the court said (110 F.2d at page 707): "The trial court was of opinion that the practice of medicine and the business of Group Health and the hospitals do not constitute 'trade' within the intent of the statute. The question is new, at least to the extent that there is no case in which, in the circumstances existing here, it has been decided, but a careful consideration of the language of the Act, its legislative background and the various statements of the Supreme Court concerning the source from which the congressional purpose may be gathered, leads us to conclude the trial court was in error.

"The phrase 'restraint of trade" had its genesis in the common law, and its legal import and significance is declared again and again in the decisions of English courts, both before and after the date of our independence, as well as in American decisions in many of the States. The Supreme Court has said that Congress passed the Sherman Act with this common law background in mind."

At page 710 the court quotes with approval from Styles v. Lyon, 87 Conn. 23, 86 A. 564, 566, as follows:

"'The defendant insists there is a distinction between a business and a profession; that, while the period of restriction as to a business may be unlimited, the rule should not apply to a profession, since it is a purely personal relation whose benefits cease upon death or the cessation from practice. We do not think the distinction tenable. A profession partakes on its financial side of a commercial business, and its good will is often a valuable asset.'"

The court then said: "The indubitable effect of all these cases, English and American, is to enlarge the common acceptation of the word 'trade' when embraced in the phrase 'restraint of trade' to cover all occupations in which men are engaged for a livelihood. We think it makes no difference that, after the practice of medicine had been recognized as embraced in the doctrine of 'restraint of trade', Davis v. Mason, supra, a number of judges preferred to speak in broader terms of 'public policy' and the like, without using the word 'trade'. The foundation of the rule in restraint of trade cases is the rule of public policy, and always was from Mitchel v. Reynolds, [1711] 1 P.Wms. 181, 24 Eng.Rep. 347, on down, without distinction based on type of occupation involved.

"Perhaps the most illuminating of the English cases is Pratt v. British Medical Association, [1919] 1 K.B. 244. The case was a tort action to recover damages for molesting plaintiff doctors in the pursuit of their calling. The facts there and here are strikingly similar. The plaintiffs had joined the staff of an organization known as Coventry Provident Dispensary, which had fallen under the ban of the medical society because the members of the latter were opposed to what was called contract practice. The doctors who joined the staff of the organization were expelled from the society for violation of its rules of ethics and other members of the society were forbidden to consult with them on pain of expulsion. A 'black list' was published in the British Medical Journal, and the court found that the effect was to boycott the plaintiffs in their practice, greatly to their injury, and likewise that the purpose of the boycott was to increase the area of practice and the financial returns of the members of the society. On this subject the court said (p. 272): 'If the Coventry Dispensary had been destroyed as a lay organization, then the local doctors would obviously have taken such steps as would have increased their area of private practice, and their emoluments would have gained a corresponding expansion. This was the fundamental object of the defendants. The non-participation in such aim by the plaintiffs was the head and front of their offending.'

"And considering the validity of the action of the defendants and their right by means of their own rules or canons to impose a restraint upon non-conforming physicians, the court said (p. 274): 'The public interest must be regarded conjointly with the interest of individuals when restraint of trade is in question. * * * Upon considering the rules in question I have arrived at the conclusion that they are in restraint of trade, and are void on the ground of public policy. They gravely, and in my view unnecessarily, interfere with the freedom of medical men in the pursuit of their calling, and they are, I think, injurious to the interests of the community at large. It may well be that the opinion I have just expressed will, if upheld, destroy the cogency of the defendants' scheme of boycott; but it leaves them with the safer and more kindly weapons of legitimate persuasion and reasoned argument.' * * *

"We think enough has been said to demonstrate that the common law governing restraints of trade has not been confined, as defendants insist, to the field of commercial activity ordinarily defined as 'trade', but embraces as well the field of the medical profession. And since, as we think, we are required by the decisions of the Supreme Court to look to the common law as the chart by which to determine the class and scope of offenses denounced in Sec. 3, it follows that we must hold that a restraint imposed upon the lawful practice of medicine,—and a fortiori—upon the operation of hospitals and of a lawful organization for the financing of medical services to its members, is just as much in restraint of trade as if it were directed against any other occupation or employment or business. And, of course, the fact that defendants are physicians and medical organizations is of no significance, for Sec. 3 prohibits 'any person' from imposing the proscribed restraints. Congress did not provide that one class, any more than another, might impose restraints or that one class, any more than another, might be subjected to restraint."

After reversal and remand to the trial court, the defendants were convicted of having violated the Sherman Act, as charged in the indictment, and on an appeal from that conviction the same question—whether the practice of medicine was within the meaning of "trade or commerce" as used in the Sherman Act—was again raised. American Medical Ass'n v. United States, 76 U.S.App.D.C. 70, 130 F.2d 233. In affirming the conviction, the court stated (at page 236): "The trade or commerce which was involved in the present case was of three kinds: (1) The making available and financing of medical and hospital services; (2) medical service itself, i. e., service rendered by medical doctors; (3) hospital service, i. e., service rendered by hospital staffs and the use of hospital facilities. As we indicated in our earlier opinion the common law recognized the practice of medicine as being trade * * *"

Certiorari was granted by the Supreme Court of the United States to review the affirmance of the convictions. American Medical Ass'n v. United States, 317 U.S. 519, 528, 63 S.Ct. 326, 87 L.Ed. 434. The Supreme Court affirmed the convictions on the ground that restraints of trade were proved under the Sherman Act but expressly reserved opinion as to whether the practice of medicine and the rendering of medical services as described in the indictment are "trade" under section 3 of such act.

Two of the remaining relevant federal court opinions in this area also were rendered in the course of deciding a single case. In this suit the United States brought an action against the Oregon State Medical Society and others to enjoin a conspiracy to monopolize and restrain prepaid medical care or business in the State of Oregon.

In United States v. Oregon State Medical Society, D.C., 95 F.Supp. 103, the district court held that certain Oregon doctors had not violated the Sherman Act in the formation of the Oregon Physicians Service, a doctor-sponsored prepaid medical care plan. The trial court found that the practice of medicine as conducted by the involved physicians is not trade or commerce within the meaning of the Sherman Act. On direct appeal to the United States Supreme Court, the district court decision was affirmed in United States v. Oregon State

Medical Soc., 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978. The Supreme Court again found it unnecessary to decide whether the scope of the word "trade" in the Sherman Act extends far enough to include the practice of medicine in the traditional sense. The court stated as follows (343 U.S. at page 336, 72 S.Ct. at page 697): "Since no concerted refusal to deal with private health associations has been proved, we need not decide whether it would violate the antitrust laws. We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."

The sixth federal decision is Riggall v. Washington County Medical Society, 8 Cir., 249 F.2d 266, certiorari denied 1958, 355 U.S. 954, 78 S.Ct. 540, 2 L.Ed.2d 530. The plaintiff physician sued the defendant society to recover treble damages for alleged violations of the Sherman Act because of allegedly wrongful refusal to admit him as a member. It was held that his complaint alleging that the practice of his profession as a physician would have been more profitable to him had the defendant society and its members not deprived him of membership therein, but not alleging that he had been prevented from practicing his profession was insufficient to allege a cause of action under the act.

The Supreme Court of the State of Washington had occasion to consider the general question here presented in Group Health Cooperative of Puget Sound v. King County Medical Soc., 39 Wash.2d 586, 237 P.2d 737. This was an action by plaintiff charging defendants with an alleged combination or arrangement in restraint of competition in the field of independent contract medicine and hospital service. In finding certain acts of defendants violative of provisions of the constitution of the state relating to monopolies and trusts, the court stated (237 P.2d at page 765): "As our constitutional provision bespeaks the common law, so it should be permitted to afford the same protection and serve the same broad public interest which is available at common law. Monopolies affecting price or production in essential service trades and professions can be as harmful to the public interest as monopolies in the sale or production of tangible goods. The constitutional provision was designed to safeguard this public interest from whatever direction it may be assailed. The language used must therefore be liberally construed with that end in view."

In United States v. National Ass'n Real Estate Bds., 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007, it was held that the adoption by an association of real estate brokers of standard rates for commissions to its members constitutes a conspiracy in restraint of trade within the provisions of section 3 of the Sherman Act although no penalties are imposed by the association for deviations therefrom. At pages 489–490, of 339 U.S., at page 714 of 70 S.Ct. the court said: "Price-fixing is per se an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve. That is the teaching of an unbroken line of decisions. (Citations.) And the fact that no penalties are imposed for deviations from the price schedules is not material. (Citations.) Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line."

In holding that the business of a real estate agent consisting largely of the rendition of personal services, is included in the word "trade" within the meaning of the act the court at pages 490–492 of 339 U.S., at page 715 of 70 S.Ct. stated: "The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of 'trade' within the meaning of § 3 of the Act. The Act was aimed at combinations organized and directed to control of the market by suppression of competition 'in the marketing of goods and services.' (Citation.)

"Justice Story in The Schooner Nymph [C.C.Me., 1 Sumn. 516], 18 Fed.Cas.No. 10,388, pages 506, 507, while construing the word 'trade' in the Coasting and Fishery Act of [Feb. 18] 1793, 1 Stat. 305 [ch. 8], said,

"'The argument for the claimant insists, that "trade" is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion that such is not the true sense of the word, as used in the 32d section. * * * In the first place, the word "trade" is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain or a livelihood, *not in the liberal arts or in the learned professions,* it is constantly called a trade. Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoemaker, though some of these may be, and sometimes are, carried on without buying or selling goods.' (Italics added.)

"It is in that broad sense that 'trade' is used in the Sherman Act. That has been the consistent holding of the decisions. The fixing of prices and other unreasonable restraints have been consistently condemned in case of services as well as goods. Transportation services (citations), cleaning, dyeing, and renovating wearing apparel (citation), the procurement of medical and hospital services (citation), the furnishing of news or advertising services (citations) —these indicate the range of business activities that have been held to be covered by the Act. In Atlantic Cleaners & Dyers v. United States, supra (286 U.S. [427] 435, 437, 52 S.Ct. [607], 609, 610, 76 L.Ed. 1204 [1208, 1209]), the Court rejected the view that 'trade' as used in § 3 should be interpreted in the narrow sense which would exclude personal services. It held, speaking through Mr. Justice Sutherland, that § 3 used the word in the broad sense in which Justice Story used it in The Schooner Nymph [C.C.Me., 1 Sumn. 516, 18 Fed.Cas.No.10,388], supra. Chief Justice Groner made an extended analysis and summary of the problem in United States v. American Medical Ass'n, 72 App.D.C. 12, 110 F.2d 703, 707–711, where the Court of Appeals for the District of Columbia held that the practice of medicine in the District was a 'trade' within the meaning of § 3 of the Act. Its conclusion was that the term included 'all occupations in which men are engaged for a livelihood.' We do not intimate an opinion on the correctness of the application of the term to the professions."

While the United States Supreme Court, in the foregoing case, again reserved opinion as to application of the term "trade" to the professions, it is observed that the analysis of the problem by Chief Justice Groner in the American Medical Ass'n case, supra, is specifically and favorably mentioned. In that case at page 709 of 110 F.2d, Justice Groner points out that the italicized portion of Justice Story's opinion in The Nymph case, "*not in the liberal arts or in the learned professions,*" does not compel the conclusion that the Supreme Court has held that the professions are not trades.

In the California case of Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867, the Supreme Court considered the question as to whether an alleged combination between a board of fire underwriters and insurance companies, which are members of the board, to stifle competition in the insurance field by dominating the business of insurance agents was an unlawful trust. In finding that it was the court said (29 Cal.2d at page 44, 172 P.2d at page 873):

"The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. Thus, under the common law of this state combinations entered into for the purpose of restraining competition and fixing prices are unlawful. (Citations.) The public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand."

We are not concerned here with an appeal from a judgment after a trial of the case on its merits. The question before us for determination is whether the respondent court should be directed to enter an order compelling defendants to answer the refused questions.

[10] Whether or not the Cartwright Act may be deemed to apply to the facts presented by the pleadings herein, plaintiff has sufficiently alleged a purpose on the part of the defendants to restrain competition by him, as well as acts done in pursuance of that purpose to state a cause or causes of action under common law principles. Perhaps some of these acts could be proved by plaintiff without the aid of discovery proceedings but probably the motives and purposes of the defendants could never be. Unless plaintiff is permitted to obtain answers to proper questions he will be deprived of the means of obtaining in advance of the trial information concerning the issues and means of producing at the trial the evidence necessary to sustain his action. A review of the 21 questions which the defendants have refused to answer brings us to the conclusion that the matters, facts and information sought to be elicited thereby are not privileged against disclosure under the law of this state and are relevant as determined by the subject matter of the action and by the potential as well as the actual issues in the case.

Let a writ of mandate issue directing respondent to set aside its order and to make the necessary orders to enable completion of the deposition in accord with the views expressed herein.

ASHBURN, Acting P. J., concurs.

HERNDON, Justice (dissenting).

I dissent. The majority opinion strongly argues, and apparently holds, that the practice of medicine in California constitutes "trade or commerce" within the meaning of the Cartwright Act. The uncertainty as to what the majority opinion actually holds in this regard stems from the following described aspects thereof:

(1) The opinion discusses and quotes from several federal court decisions which arrive at divergent and conflicting conclusions as to whether or not the practice of medicine is "trade or commerce" within the meaning of the federal anti-monopoly statutes. By its treatment of these and other decisions discussed, the opinion seems to indicate a definite preference for the affirmative view.

(2) However, in the next to the last paragraph in the prevailing opinion it is stated: "Whether or not the Cartwright Act may be deemed to apply to the facts presented by the pleadings herein, plaintiff has sufficiently alleged a purpose on the part of the defendants to restrain competition by him, as well as acts done in pursuance of that purpose to state a cause or causes of action under common law principles."

Does this quoted sentence mean that there exists in California law another basis, apart from the Cartwright Act, upon which to premise liability for the acts of defendants allegedly done pursuant to a purpose "to restrain competition" by plaintiff? Does this reference to unspecified "common law principles" mean that the common law of California reaches further than the Cartwright Act in denouncing combinations entered into for the purpose of restraining competition? Does the majority opinion mean that under the common law of California any association of practitioners is guilty of an unlawful combination if its policies or practices tend in any substantial way to restrict or limit competition or to fix fees to be charged in the practice of any of the learned professions? Or does the opinion here have reference only to some of those more recently developed concepts having to do with the protection of the so-called "interest in freedom from concerted interference with advantageous business relationships?"

It is my understanding that the Cartwright Act was intended to constitute a complete embodiment of the common law of California on the subject of unlawful combinations in restraint of trade and competition. In Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 44, 172 P.2d 867, 872, the court observed that "[t]he Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law." Any rules of the common law at variance or inconsistent with the intent and policy of California statutes are deemed to be superseded and are not the law of this state. Monterey Club v. Superior Court, 48 Cal.App.2d 131, 145, 119 P.2d 349. In the last cited case, the appellate court rejected common law definitions of a public nuisance, and citing People v. Lim, 18 Cal.2d 872, 118 P.2d 472, concluded that any action in California to abate a nuisance "must be predicated upon the statutes of this state rather than upon the common-law definition of 'public nuisance.'" Monterey Club, supra, 48 Cal. App.2d at page 144, 119 P.2d at page 356.

In further support of its holding that the definitions of a public nuisance contained in our Civil Code operated to supersede common law definitions, the court referred to section 4 of the Civil Code which provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

Accordingly, I would regard as erroneous a holding that the common law of California reaches further than the provisions of the Cartwright Act with respect to combinations in restraint of trade.

The Sherman Act also is described as an embodiment or restatement of the common law. Apex Hosiery Co. v. Leader, 310 U.S. 469, 498, 60 S.Ct. 982, 84 L.Ed. 1311; see, also, Rolley, Inc., v. Merle Norman Cosmetics, 129 Cal.App.2d 844, 849, 278 P.2d 63, 282 P.2d 991. The Supreme Court of the United States has twice expressly declined to hold that the practice of medicine constitutes "trade or commerce" within the meaning of that statute. American Medical Ass'n v. United States, 317 U.S. 519, 528, 63 S.Ct. 326, 87 L.Ed. 434; United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S.Ct. 690, 96 L.Ed. 978.

Since no California decisions have been reported which discuss the application of the Cartwright Act to the practice of the so-called learned professions, I agree that it is entirely appropriate to consider the decisions of the federal courts dealing with the application of the federal anti-trust laws. However, I would not concede that such federal decisions would necessarily be controlling in determining the proper construction of the California statute.

In United States v. National Ass'n Real Estate Boards, 339 U.S. 485, 490, 70 S.Ct. 711, 715, 94 L.Ed. 1007, in an opinion by Mr. Justice Douglas, the coverage of the word "trade" as it appears in the Sherman Act is defined as follows:

"Justice Story in The Schooner Nymph [C.C.Me., 1 Sumn. 516], 18 Fed.Cas.No. 10388, pp. 506, 507, while construing the word 'trade' in the Coasting and Fishery Act of [Feb. 18] 1793, 1 Stat. 305 [ch. 8], said,

" 'The argument for the claimant insists, that "trade" is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion that such is not the true sense of the word, as used in the 32d section [46 U.S.C.A. § 325]. In the first place, the word "trade" is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain or a livelihood, *not in the liberal arts or in the learned professions,* it is constantly called a trade. Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith and a shoe-maker, though some of these may be, and sometimes are, carried on without buying or selling goods.'" (Emphasis added.)

As the majority opinion indicates, three of the six relevant federal court decisions therein discussed dealt with an alleged conspiracy to hinder and obstruct the business operations of an organization called "The Group Health Association, Inc." There was no charge of monopoly, restraint of competition or price fixing in the practice of medicine as such. Group Health was a commercial enterprise engaged in the business of providing medical care and hospitalization on a pre-payment basis. In a very real sense, the Association was in the insurance business. To hold that interference with the activities of such a commercial enterprise amounts to a restraint upon trade or commerce quite obviously is a far cry from holding that the traditional practice of medicine is "trade" within the meaning of the statute.

The majority opinion places great reliance upon the decisions of the Court of Appeals for the District of Columbia in United States v. American Medical Ass'n, 72 App. D.C. 12, 110 F.2d 703, and American Medical Ass'n v. United States, 76 U.S.App.D.C. 70, 130 F.2d 233. It must be remembered, however, that the language of those decisions so extensively quoted in the majority opinion was expressly and pointedly denied the benefit of sanction by the United States Supreme Court in American Medical Ass'n v. United States, supra, 317 U.S. 519, 528, 63 S.Ct. 326, 87 L.Ed. 434, and United States v. Oregon State Medical Society, supra, 343 U.S. 326, 336, 72 S.Ct. 690, 96 L.Ed. 978.

It is further to be noted that Chief Judge Groner in his decision in the American Medical Ass'n cases relied heavily upon the English case of Pratt v. British Medical Association [1919] 1 K.B. 244. The opinion in that case was written by McCardie, J., presiding in a court of first instance. It appears that the gravamen of the defendants' conduct in that case was their alleged conspiracy to destroy the Coventry Dispensary, an institution which provided its members with medical attendance, medicines, etc., in return for their annual dues. The doctors on the staff of the dispensary were compensated by allowing them a specified share of the funds derived from the dues of members. This was described as "contract practice." Hence, it is apparent that the Coventry Dispensary was essentially the same in character and purpose as the Group Health Association involved in the American Medical Ass'n cases.

In this connection it seems fair to observe that the policy of the English law as declared by McCardie, J., in 1918, is no reliable guide in searching for the intent of the California legislature when it enacted the Cartwright Act in 1907. The policy of twentieth century English law has embraced many socialistic concepts which have not yet gained general acceptance in this country.

A more authoritative and more recent English decision is that of the Judicial Committee of the Privy Council in Thompson v. British Medical Association [1924] A.C. 764. This decision sustained the Supreme Court of New South Wales in reversing a judgment against the New South Wales branch of the British Medical Association and certain of its officers for the sum of 2000£. This sum had been awarded the plaintiff doctor upon a jury verdict by way of damages which he claimed to have suffered as a consequence of his expulsion from the association and an ensuing boycott by its members. The general nature of his complaint is indicated by the following quotation from the opinion rendered by Lord Atkinson:

"In the first count of the declaration the plaintiff alleges that the defendant association maliciously and unjustifiably conspired and combined with certain of its members whose names were unknown to him to do certain things. These things were (1.) to pass a resolution for his expulsion, (2.) to expel him, (3.) to induce, persuade and procure medical practitioners members of the association to refuse to meet him in consultation or to accord him professional recognition in any other form, (4.) to intimidate, coerce and unduly influence such practitioners into refusing to meet him in consultation or to accord him professional recognition in any other form, and (5.) to seriously prejudice the plaintiff and injure his practice. The count goes on to allege that each of these objects was carried out in pursuance of this conspiracy and combination, as a consequence of which the plaintiff suffered damage."

The remaining four counts of the complaint charged other wrongful acts including coercion, intimidation, defamation, etc. In support of his action, the plaintiff relied strongly upon his contention that the following regulations of the society were illegal:

"(1) Where any member shall have been expelled he shall not be met in consultation or accorded professional recognition in any other form by any member until it shall have been otherwise decided by the council. (2) Where any medical practitioner shall have been declared by the Council (a) To have been guilty of conduct detrimental to the honour and interests of the profession and calculated to bring the profession into disrepute, or (b) to have grossly contravened the custom of the medical profession, or (c) to have acted detrimentally to the interests of the association or omitted to comply with any of its rules or resolutions; no member shall consult with or extend professional recognition in any form to such practitioner until it shall have been otherwise decided by the council."

In rejecting this contention, their Lordships declared:

"During the argument it was persistently urged that this regulation operated in general restraint of trade and was therefore void. That involves a misuse of language. Even if it did so operate it would not be void at common law but merely unenforceable at law, while under ss. 3 and 4 of the Trades Union Act, 1871, it would be valid at law, but not directly enforceable: Joseph Evans & Co. v. Heathcote.[1] But the more important consideration is this, that this regulation was framed long before the appellant became a member. It was not specially directed at him. The respondents have not attempted to enforce it in any way whatever. It is not designed to coerce. It can only coerce—if coerce at all—members of the association. People who never were members, or, like Dr. Thompson, were members, but have ceased to be so, may snap their fingers at the association, and as far as that body is concerned meet in consultation with any one they please. The object of the rule is, in their Lordships' view, not to penalize or impoverish or injure Dr. Thompson, or any former member, but soley to keep up the discipline of and 'moral' of the members of the association to protect and promote its interests, though indirectly and as an entirely undesigned result some injury may incidentally be sustained by an expelled member in the practice of his profession. The difference between two such intentions is well established in trade competition. A trader may deliberately with the object of securing and developing his trade, by advertisement, lowering of prices or suchlike means, do something which may result in injuring the trade of a rival trader, but if that be not the designed and intended results of the first trader's action, but only an undersigned incidental consequence of it, the first trader is blameless. The well-known case of Mogul Steamship Co.[2] establishes this distinctly."

Returning now from this digression into British law, reference will be made to more recent decisions of the federal courts of the United States which tend to contradict those relied upon in the majority opinion.

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[1] [1918] 1 K.B. 418.

[2] [1892] A.C. 25.

In United States v. Oregon State Medical Society, 95 F.Supp. 103, 118, the United States District Court held that an association of Oregon doctors had not violated the Sherman Act in the formation and operation of Oregon Physicians Service, a doctor-sponsored plan for prepaid medical care. It is a significant fact that in this case the court was dealing with activities beyond the scope of the traditional practice of medicine. Nevertheless, the court held that these activities did not constitute "trade" within the coverage of the Sherman Act. The court expressly posed the question: "Are the Professions exempt from the Sherman Act?" The court declared its conclusion in this language: "The practice of medicine as conducted within the state of Oregon by doctors of Oregon, including defendants, is not trade or commerce within the meaning of section 1 of the Sherman Anti-trust Law, * * *"

This decision was affirmed on direct appeal to the United States Supreme Court in United States v. Oregon State Medical Society, supra, 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978. In this decision the Supreme Court again found it unnecessary to decide whether the word "trade" in the Sherman Act comprehends the practice of medicine. The language of the court in that regard is as follows:

"Since no concerted refusal to deal with private health associations has been proved, we need not decide whether it would violate the antitrust laws. We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual consideration prevailing in ordinary commercial matters. *This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.* Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086." (Emphasis added.)

The pointed distinction between professional and commercial relationships which is made in the foregoing language seems highly significant, and might reasonably be regarded as an indication of the court's leaning with respect to the question reserved.

The *most recent* federal decision, and one involving a complaint in substance very similar to the complaint of the petitioner in the case at bar, was rendered by the United States Court of Appeals for the Eighth Circuit in Riggall v. Washington County Medical Society, 8 Cir., 249 F.2d 266 (certiorari denied March 3, 1958; 355 U.S. 954, 78 S.Ct. 540, 2 L.Ed.2d 530). In that case, the plaintiff doctor sought to recover damages from the County Medical Society of Washington County, Arkansas. He alleged that he was in all respects qualified for membership in the Society, but that notwithstanding such qualifications, his applications for membership in due form were rejected on four different occasions; that his applications had been wrongfully, capriciously and arbitrarily rejected; that because of these denials of membership, he had been and was prevented from doing a number of enumerated things, all of which had been of great economic benefit and importance to him as well as to his patients and the public and society in general, and that the defendants had combined and conspired to commit various acts amounting to violations of the Sherman Anti-Trust Act. He prayed for compensatory damages in the sum of $100,000; for treble damages; for an injunction and for other specific relief.

The federal district court dismissed the complaint, holding that it failed to state a cause of action. In affirming the judgment of dismissal, the Court of Appeals cited and quoted with approval the opinion of the District Court of Oregon in United States v. Oregon State Medical Society, supra, 95 F.Supp. 103. The following is the concluding paragraph of the opinion:

"As has been observed, plaintiff's complaint in substance is that the practice of his profession would have been more profitable to him had the defendants not deprived him of membership in the Washington County Medical Society. Plaintiff was not prevented from practicing his profession and the complaint, we think, is wholly lacking in allegations essential to a cause of action under the Sherman Anti-Trust Act." Riggall v. Washington County Medical Society, 8 Cir., 249 F.2d 266, 270.

In summary, it seems fair to say that the greater weight of federal authority favors the conclusion that the traditional practice of medicine, in particular, and the practice of the learned professions generally, do not constitute "trade or commerce" within the meaning of the Sherman Act. The above quoted language of Justice Jackson in United States v. Oregon State Medical Society, supra, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978, seems at the very least to suggest a leaning in favor of this conclusion.

But even had the federal courts come to the opposite conclusion, there would still have remained other reasonable and sufficient grounds to support the view that the Cartwright Act was intended to exclude the learned professions from the coverage of its provisions.

In the first place, the words and phrases of California statutes generally "are construed according to the context and the approved usage of the language." Civ.Code, § 13; Code Civ.Proc. § 16; Pol.Code, § 16. In modern usage of the English language in the United States the word "trade" does not generally connote the practice of the learned professions. In the second place, our Business and Professions Code evidences a conscious legislative recognition of the distinctions which we make here. When the legislature has intended to include the professions within the scope of regulatory statutes, it has made that intention clear by the use of appropriate language.

Section 16600 of the Business and Professions Code, [3] which codifies the law relating to *restrictive covenants,* is made expressly applicable to a "*profession*" as well as to a "*trade*" or "*business.*" Section 1673 of the Civil Code, the statutory antecedent of section 16600, was enacted in 1872. The Cartwright Act, which codifies the law relative to "*Combinations* in Restraint of Trade", was not enacted until 1907. It seems to be a matter of some significance, therefore, that it does not use the word "profession" in defining the scope of its coverage.

This difference in legislative treatment of restrictive covenants and restraint of trade was undoubtedly intentional. It indicates an awareness of the fact that the common law rules relating to ancillary covenants not to compete were based upon different considerations of public policy from those which motivated the more recent development of rules denouncing monopolies, restraint of trade, price fixing and the like. The ancient law of covenants was based largely on the view that an agreement not to compete imposed a form of servitude on the individual promisor. Such covenants unless reasonably restricted in duration and territorial scope were held to be void. The modern anti-trust laws are premised upon very different considerations and very different purposes. See, Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311.

The exemption of members of the learned professions and their associations from the regulatory prohibitions of state and federal statutes denouncing restrictions upon competition, price fixing, and the like, does not place them in any unique or "most-favored" position. It is common knowledge that labor organizations have been expressly exempted from the application of these laws. On the basis of these exemptions, numerous other immunities have accrued to labor organizations, and these immunities are rationalized by implications drawn from the declared and assumed reasons underlying the exemption. It seems to me that substantially the same immunities in favor of the professions may be implied by a similar process of reasoning.

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[3] § 16600. "Invalidity of contracts. Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

As to the effectiveness of the exemption as a basis for other immunities logically to be implied therefrom, it seems to me to make no difference that in the one case (that of labor organizations) the exemption was effected by an express exclusionary clause limiting the general coverage, whereas in the other case (that of the professions) it was effected by the use of language of coverage designed to exclude them. The situation is somewhat analogous to the mechanics involved in drafting a contract of insurance. If the purpose is to exclude certain risks, it may be accomplished in either of two ways. The language affirmatively defining coverage may be so chosen that it will not include the risks not intended to be covered. Or, if the language used to define coverage might include them, they may be excluded by express words of limitation or exclusion. Assuming the use of appropriate language, the result should be precisely the same, whichever method is used.

In addition to the considerations underlying the policy of exempting the professions from laws denunciatory of price fixing and of restrictions upon competition suggested by the decisions above discussed, there are, I think, other substantial reasons which logically entitle the professions to some of the same immunities which have been accorded to labor organizations. I have particularly in mind the immunities from liability for concerted refusal to deal and from liability for concerted interference with contracts and other advantageous economic relationships. See, Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 35, 112 P.2d 631; Los Angeles Pie Bakers Ass'n v. Bakery Drivers, 122 Cal.App.2d 237, 243, 264 P.2d 615, and cases cited. I shall attempt hereinafter to set forth some of these additional reasons.

One of the emphasized allegations of petitioner's complaint in the case at bar is that the defendants are engaged in a conspiracy to fix prices. Indeed, petitioner in paragraph XLII of his complaint assigns as the true reasons for the rejection of his application for membership in the defendant association the following:

"XLII.

"That plaintiff has at all times charged members of the public for medical treatment in his offices rates lower than those prescribed as minimum rates, by the Los Angeles County Medical Association for its members; that plaintiff's charges have not conformed to the mathematical formula-type charges endorsed by the California Medical Association, the non-observance of which, as hereinabove set forth, The California Medical Association has stated would constitute the basis of disciplinary action by the Los Angeles County Medical Association: that plaintiff further made his services available to the public during a greater number of hours per day and a greater number of days per week than did the members of the said association practicing in his community; that as a condition for admission into the said association, plaintiff would have been required to conform to the standards for fees and hours prescribed by the associations; that acceptance of these conditions would have been the domination of the medical practice and the profession and business of the plaintiff by the defendants."

Yet the promulgation, publication, use and enforcement of minimum fee schedules for professional services has been common in many parts of the country for nearly a century. (See Marcus, Civil Rights and the Antitrust Laws, 18 U.Chi.L.Rev. 171, 201–202, citing public announcements of minimum fee schedules for medical services in Alabama, Illinois, Michigan, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Carolina, and the District of Columbia; see, also, Rohlf v. Kasemeier, 140 Iowa 182, 118 N.W. 276, 23 L.R.A.,N.S., 1284.) The minimum fee schedules of local bar associations are constantly being revised and republished in the legal journals of California.

With respect to charges of price fixing and the taking of measures designed to restrict competition, it should be borne in mind that the professions are given certain monopolistic privileges in return for their submission and adherence to legally prescribed standards and regulations. As a corollary to these privileges, the professions are expected to police themselves and to maintain the highest standards of ethics. Not the least important among these ethical requirements are those which relate to the reasonableness of fees and of the duty to render their services to the indigent.

In every state of the union associations of lawyers and doctors are engaged in concerted efforts to discourage or prohibit advertising and unauthorized practice and otherwise to limit and discourage commercialism and competition. I would not be inclined to question the right of a local bar association to reject the membership application of a lawyer known as one who sought to increase his clientele by consistently cutting his fees below those set by its minimum schedule (or below the standards of the statutory fees set by the Probate Code).

My conclusion is that petitioner has stated no cause of action under the Cartwright Act, or under any other law or theory suggested by him. In so concluding, I accept the premise stated in the majority opinion that "[t]he basic issue presented by the pleadings in the instant case is the existence or nonexistence of a combination by the named defendants to restrain competition by the plaintiff." My conclusion in this regard is substantially supported by the decision in Riggall v. Washington County Medical Society, supra, 8 Cir., 249 F.2d 266, certiorari denied 355 U.S. 954, 78 S.Ct. 540, 2 L.Ed.2d 530.

But even if I were compelled to concede that a cause of action had been stated, or might be stated on the general state of facts as represented, I would still vote to deny the writ for two reasons: (1) to grant the writ is to deny the trial court the essential power reasonably to control discovery procedures through the exercise of a sound discretion; and (2) any questions or papers relating to the reasons which motivated the rejection of petitioner's membership application are not relevant or material to any substantial triable issue. I shall discuss these two points in order.

The majority opinion alludes to the greater "liberality" of the new rules which are designed to facilitate pre-trial discovery. It is devoutly to be hoped that these new rules will prove fully as salutary as their most ardent advocates expect them to be. There may be some basis, however, for the apprehension of those who fear that the new rules are susceptible of being abused and misused for purposes of annoyance and harassment. To my mind, the key to this situation is the exercise of a proper control by the trial court.[4] If this control is to be effectively exercised, a substantial area of discretion must be vouchsafed to the trial judges. Indeed, the language of section 2019(b) of the Code of Civil Procedure seems clearly intended to vest the court with a broad discretion in limiting and regulating the use of discovery procedures.

Every lawyer who is familiar with discovery practice under the Federal Rules of Civil Procedure, rules 26–37, 28 U.S.C.A. will testify to the importance of adequate and reasonable control by the trial court. Although the federal rules are generally regarded as salutary in effect, it is well known that they have been grossly abused with resultant injustices of a most serious character in cases where adequate control has not been exercised.

It is an established rule that the extraordinary writ of mandamus is not available as a matter of law, but the issuance thereof rests solely within the discretion of the court to which application is made. The right to the writ must be clear and certain since its purpose is to prevent a failure of justice. Irvine v. Gibson, 19 Cal.2d 14, 15–16, 118 P.2d 812. The writ of mandate is not designed and should not be utilized to unduly control and circumscribe the rulings of trial courts. In matters involving discretion, the writ will not lie to control the exercise of such discretion "except in those rare instances where under the facts it cannot be exercised in but one way." Monroe v. Superior Court, 97 Cal.App.2d 470, 472, 218 P.2d 136, 138.

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[4] "In view of the wide discretion vested in trial judges to protect against abuse, as well as to enforce discovery, the significance of an able trial bench to sound and just judicial administration is further emphasized." (Louisell, "Discovery Today", 45 Cal.L.Rev. 486, 514.)

On the question whether the writ of mandamus should issue to compel a lower court to uphold the right of a party to an action to take depositions, to have questions answered, and documents produced, the California cases divide into two groups. In one category are those in which the trial court has refused to compel a witness or a party to complete his deposition, to answer questions that clearly appear to be proper, or to produce documents clearly appearing to be relevant and material. In the other category are those in which the trial court properly has exercised a reasonable control. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 393, 159 P.2d 944. Where the trial court has acted in such a manner as to deny the right of a party to take depositions and to use subpoenaes, its action may be directed by mandamus. I. E. S. Corp. v. Superior Court, 44 Cal.2d 559, 283 P.2d 700; Zellerbach v. Superior Court, 3 Cal.App.2d 49, 39 P.2d 252. However, while ordinarily a party is entitled to the taking of a deposition, or to the use of a subpoena as a matter of right, at any time after service of summons or appearance of the defendant, the exercise of that right is subject to a reasonable control by the trial court, and under appropriate circumstances may be denied. Hays v. Superior Court, 16 Cal.2d 260, 264, 105 P.2d 975; Patrick Farms, Inc., v. Superior Court, 13 Cal.App.2d 424, 425–426, 56 P.2d 1283.

The absolute right of the medical association to reject petitioner's application for membership for any reason, good or bad, being expressly conceded, I fail to see the relevancy or materiality of the hoped-for evidence to any substantial issue, either existing or potential. But assuming the existence of the issue and the relevancy and materiality of the evidence, its pretrial discovery would seem to be relatively unimportant to the development of petitioner's case. This evidence would have no bearing whatsoever upon any of the numerous other more basic and essential issues of fact tendered by the allegations of petitioner's complaint. If the petitioner proves to be able to make out a substantial case, and if, in the context of the evidence developed at the trial, it appears to the trial judge that the questions now before us are properly directed to a material issue essential to the just determination of the cause, it will not be too late to require the witness to answer and to compel disclosure of the contents of the membership file.

It may be conceded that the files of the medical association relating to applications for membership are not "privileged" in the strict sense of that term. But that concession does not detract from the validity of the rule of policy which the association seeks to invoke on the authority of Runyon v. Board, etc. of California, 26 Cal.App.2d 183, 79 P.2d 101, namely, that the confidential nature of the contents of such files should be recognized and respected. The law should not compel the disclosure thereof in violation of clearly implied confidences except for cogent and satisfactory reasons. The trial judge will be in the best position to determine the necessity and propriety of requiring a disclosure and to evaluate the conflicting interests involved. I cannot see that the petitioner would be materially prejudiced by deferring the determination to that stage of the proceeding.

In short, I think the trial court has properly exercised its discretion in this matter. I would deny the writ of mandate.

Hearing denied; SCHAUER, SPENCE and McCOMB, JJ., dissenting.

161 Cal.App.2d 267

Thomas Wallace CORDRY, III, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for COUNTY OF SANTA CLARA, Respondent,

Louis P. Bergna, Esq., District Attorney of Santa Clara County, Real Party in Interest.

Civ. 18244.

District Court of Appeal, First District, Division 2, California.

June 11, 1958.

As Modified on Denial of Rehearing July 11, 1958.

Hearing Denied Aug. 6, 1958.

Mandamus proceeding to require the Superior Court to permit defendant to inspect statements made to prosecution officials. The District Court of Appeal, Draper, J., held that where defendant charged with murder had made statements to law enforcement officers which were reduced to writing and were in possession of district attorney and defendant alleged that he could not recall the contents of the statements and needed them to refresh his recollection of their contents, and counter-affidavits alleged that defendant's attorney had never stated that defendant had any trouble recalling the facts of the crime, and representative of district attorney alleged that defense counsel had never stated that defendant "did not remember * * * the contents of the statement", defendant was entitled to inspect such statements with right to make copies thereof.

Order in accordance with opinion.

Criminal Law ⚿627½

Where defendant charged with murder had made statements to law enforcement officers which were reduced to writing and were in possession of district attorney and defendant alleged that he could not recall the contents of the statements and needed them to refresh his recollection of their contents, and counteraffidavits alleged that defendant's attorney had never stated that defendant had any trouble recalling the facts of the crime, and representative of district attorney alleged that defense counsel had never stated that defendant "did not remember * * * the contents of the statement" defendant was entitled to inspect such statements with right to make copies thereof.

John A. Pettis, Jr., Alan A. Lindsay, Oakland, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Richard S. L. Roddis, Deputy Atty. Gen., for respondent and real party in interest.

DRAPER, Justice.

Petitioner is charged with murder. Shortly after he surrendered himself to the Palo Alto Police Department, he made statements to law enforcement officers. He alleges, on information and belief, that these statements were reduced to writing and are in the possession of the District Attorney. These allegations are not denied. It is not contended that petitioner signed any statement. Petitioner applied to respondent court for leave to inspect these statements. His affidavit alleges that "I cannot recall the contents of said statement or statements," cannot "relate to my attorneys" the contents thereof, and need them "to refresh my recollection of their contents." Counter-affidavits of a captain of detectives and of the administrative assistant to the District Attorney admit the taking of statements. They allege that when petitioner made his statements "his recollection seemed very clear as to all of the events involved in said crime." Both allege that petitioner's attorney has never stated that petitioner had any trouble recalling "the facts * * * of the crime," and the representative of the District Attorney also alleges that defense counsel has never stated that his client "did not remember * * * the contents of the statement."

This case is governed by the rule of Powell v. Superior Court, 48 Cal.2d 704, 312 P.2d 698, but the prosecution seeks to distinguish that decision upon two grounds.

First, it is argued that Powell applies only where a defendant lacks memory of the facts about which he made his statements, as distinguished from the contents and language of the statements. But in Powell, defendant alleged that he could neither recall nor relate to his attorney "the things contained" in the statements. Clearly the test there applied concerned defendant's recollection of the contents of his statements, rather than his memory of the facts to which the statements were addressed. In the case at bar, the prosecution has asserted only that defendant's attorney has not complained that his client cannot remember the facts or the contents of his statements. Thus no fact issue was raised as to the determinative issue, and, as in Powell, there is no implied finding by the trial court upon conflicting evidence.

The prosecution next contends that Powell merely requires the exercise of discretion by the trial court. It is argued that the trial court there mistakenly assumed that it had no power to grant the right of inspection, and that the Supreme Court held only that there was error in this refusal to exercise discretion. In our case, it is contended, the trial court did exercise its discretion. But in Powell the case was not remanded for exercise of discretion by the trial court. Rather, writ of mandate issued, requiring the court to order inspection. As we have pointed out, the essential fact—lack of memory of the contents of the statements—is not denied in the case at bar. It follows that the rule of Powell governs.

We are well aware that "cases are conceivable in which it might improperly hamper the prosecution" to grant inspection of confessions or statements. Powell v. Superior Court, supra, 48 Cal.2d at page 708, 312 P.2d at page 700. But no facts alleged in the affidavits purport in any way to bring this case within that classification.

We give no consideration to petitioner's claim that the statements are needed for submission to a psychiatrist for determination of petitioner's mental condition at the time of the offense alleged. No plea of not guilty by reason of insanity has been made, and the request for reservation of the right to enter such plea has been withdrawn. Of course, such a plea may later be entered, with leave of court, but we are satisfied to rest our decision upon the authority of Powell v. Superior Court, supra.

Let a peremptory writ of mandate issue, requiring respondent court to set aside its order denying inspection and to issue an order for inspection of the written records of all statements by petitioner to law enforcement officers of Santa Clara County made before March 31, 1958, with the right to make copies thereof.

KAUFMAN, P. J., and DOOLING, J., concur.

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161 Cal.App.2d 50

The BOARD OF TRUSTEES OF THE CONTRA COSTA JUNIOR COLLEGE DISTRICT, and George R. Gordon, its President, Fred R. Abbott, O. J. Wohlgemuth, Elton Brombacher and Edgar W. Dale, members of said Board, Plaintiffs and Respondents,

v.

John SCHUYTEN, Defendant and Appellant.

The BOARD OF TRUSTEES OF THE RICHMOND UNION HIGH SCHOOL DISTRICT and Robert Collins, its President, Dana Murdock, Manuel Mello, Meredith Morgan, Jr., and Joe Martyn Turner, members of said Board, Plaintiffs and Respondents,

v.

Inez G. SCHUYTEN, Defendant and Appellant.

Civ. 17304, 17305.

District Court of Appeal, First District, Division 2, California.

June 4, 1958.

Actions for dismissal of junior college and high school teachers. The Superior

Court of Contra Costa County, Wakefield Taylor, J., rendered judgments discharging the teachers, and they appealed. The District Court of Appeal, Dooling, J., held that under statute authorizing inquiry as to Communist Party membership of school district employees after September 10, 1948, composite questions propounded by legislative subcommittee concerning membership "during the years 1946, 1947 and up to and including part of the year 1950" were unfair and refusal to answer such questions did not warrant dismissal of teachers.

Reversed with directions.

Kaufman, P. J., dissented.

1. Colleges and Universities 🔑8
Schools and School Districts 🔑141(4)
States 🔑34

Where legislative subcommittee stipulated with college and high school teachers who were under investigation, in view of their lack of time to consult attorney, that any refusal to answer questions would be on grounds of all legal and constitutional rights that might be available, refusal to answer "on the basis of all legal and constitutional rights" was sufficient to raise the objection that question about teacher's Communist Party membership was compound or duplicitous because referring to periods both before and after time authorized by statute, and hence teachers could not be dismissed for refusal to answer. U.S.C.A.Const. Amends. 1, 5; West's Ann. Education Code, §§ 12604, 13529.

2. Appeal and Error 🔑232(1)

In actions to dismiss junior college and high school teachers for failure to answer questions in legislative investigation, demurrers to complaints were sufficient to raise in trial court the objection that questions addressed to teachers were compound or duplicitous, as basis for urging such objection on appeal.

3. Witnesses 🔑236(1)

Compound or duplicitous questions are objectionable, especially where they include both inadmissible and admissible matters.

4. Colleges and Universities 🔑8
Schools and School Districts 🔑141(4)
States 🔑34

Under statute authorizing inquiry as to Communist Party membership of school district employees after September 10, 1948, composite questions propounded by legislative subcommittee to junior college and high school teachers concerning membership "during the years 1946, 1947 and up to and including part of the year 1950" were unfair and refusal to answer such questions did not warrant dismissal of teachers.

Albert M. Bendich, Staff Counsel American Civil Liberties Union of Northern California, San Francisco, for appellants.

Francis W. Collins, Dist. Atty. of Contra Costa County, John B. Clausen, Deputy Dist. Atty., Martinez, for respondents.

DOOLING, Justice.

The appeals of John Schuyten and Inez G. Schuyten, though presented on separate records, were consolidated in this court and both appeals present identical questions of law. Appellant John Schuyten was a certificated employee of Contra Costa Junior College District, employed as a teacher by the district from 1950 to the date of his discharge. Appellant Inez G. Schuyten was similarly employed as a teacher by Richmond Union High School District from 1949 until her discharge.

On May 8, 1954, both appellants appeared before a one-man subcommittee of the Fact Finding Committee of the California Senate on Un-American Activities. They had been given less than twenty-four hours notice to appear for this hearing and requested a continuance to enable them to consult with their attorney and to be represented by him in their interrogation by the subcommittee. This request was denied and the interrogation proceeded under a stipulation by which, as found by the trial court, as to any question which either refused to answer, such "defendant refused to answer said questions on the basis of all legal and constitutional rights, both State and Federal, available to the defendant, including, specifically, but not limited to the First and Fifth Amendments to the United States Constitution and the corresponding sections of the Constitution of the State of California."

Both appellants refused to answer various questions about their past associations and activities, including the following questions:

Appellant John Schuyten refused to answer this question:

> "Q. Is it not a fact that you were a member of the Communist Party during the years 1946 and 1947 and up to and including a portion of the year 1950?"

Similarly appellant Inez G. Schuyten refused to answer this question put to her:

> "Q. Is it not a fact, Mrs. Schuyten, that you were a member of the Communist Party at the time you accepted the position that you now attain and that your membership in the Communist Party continued during the years 1946, 1947 and up to and including part of the year 1950?"

Each appellant was given a notice of intention to dismiss him from his position on the ground that the failure to answer these questions was a violation of Education Code section 12604, each demanded a hearing and respondents thereupon instituted these actions in the superior court to dismiss appellants under section 13529 of the Education Code.

The portion of section 12604 Education Code which is here involved provided at that time (Stats.1953, p. 3341):

> "It shall be the duty of any employee of any school district who may be subpenaed by * * * a California Legislative Un-American Activities Committee or a subcommittee thereof * * * to appear before said committee or subcommittee and specifically to answer under oath a question or questions propounded by any member or counsel of the committee or subcommittee relating to:
>
> * * * * * *
>
> "(d) Past knowing membership of such employee in the Communist Party at any time since September 10, 1948.
>
> * * * * * *
>
> "Any employee who fails or refuses to answer * * * any such question * * * shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law."

It is conceded by counsel for respondents that the failure to answer the two questions quoted above is the sole ground relied upon by respondents as justification for the judgments discharging appellants from which these appeals are taken.

Various constitutional attacks are leveled against the judgments and the proceedings leading up to them, but in our view these need not be considered. It is to be noticed that the Legislature, for reasons best known to it, in this section and in the cognate section 12602 (Stats.1953, p. 3341) enacted at the same time, fixed a demarcation point at September 10, 1948. With membership in the Communist Party prior to that date neither section concerns itself. It is only with regard to membership in the Communist Party at any time since September 10, 1948, that a teacher must file the affidavit required by Education Code section 12602, and it is only the refusal to answer questions concerning membership in the Communist Party since September 10, 1948, which is made grounds for dismissal by Education Code section 12604.

In view of this fact counsel for appellants point out that each of the crucial questions here involved was compound or duplicitous in relation to the provision of section 12604 (d) in that in each the appellant was asked in a single question about membership in the Communist Party both before September 10, 1948, and after September 10, 1948. As to that portion of each integrated question which was addressed to the period from

1946 to September 10, 1948, the appellant was privileged by the express terms of the section to refuse to answer it without incurring the penalty of dismissal.

[1] Counsel for respondents argue that no objection to the compound form of the question was interposed before the subcommittee. The stipulation, as found by the trial court, under which the testimony was given could not have been broader. We repeat "defendant refused to answer * * * on the basis of *all legal* and constitutional rights * * *" The stipulation was proposed to meet appellants' request for a continuance so that they might have the benefit of their attorney's presence in the protection of their rights at the hearing. It was intended to be and is broad enough in its language to cover any legal objection which their attorney might have interposed on their behalf had he been present. To construe it as not including objection to a compound question a part of which appellants had the legal privilege by force of the statute to refuse to answer without incurring the penalty of dismissal would be to ignore the realities. The senator acting as the one-man subcommittee stated the stipulation in the following language:

> "And then you will make the stipulation, and I want this clear in the record for your sake, and be sure there is no misunderstanding about it, that the witness declines to answer the questions on the grounds of all the legal and constitutional rights, both State and Federal that may be available to her."

[2] Counsel for respondents further argue that the question was not raised in the trial court. It was in fact raised at the first possible opportunity by the demurrer to each complaint, the demurrer pointing out specifically, after quoting the compound question, in Mrs. Schuyten's case that "Section 12604 covers only questions relating to membership in the Communist Party since September 10, 1948," and a similar specification being found in the demurrer interposed by Mr. Schuyten.

[3] The vice of the compound or duplicitous question is generally recognized. 27 Cal.Jur. Witnesses, § 56, pp. 73–74; 58 Am.Jur. Witnesses, § 567, p. 317; 98 C.J.S. Witnesses § 328, pp. 33–34; Godfrey v. Miller, 80 Cal. 420, 423, 22 P. 290; Davis v. Baugh, 59 Cal. 568, 578. Particularly is such a question objectionable when it includes both inadmissible and admissible matters. In such cases the objection to the entire question is properly sustained. Davis v. Baugh, supra, 59 Cal. 568, 578; 27 Cal. Jur. Witnesses, § 56, p. 73; 58 Am.Jur. Witnesses, § 567, p. 317.

In the comparable situation of an offer of proof it is stated in 1 Wigmore on Evidence, 3d Edition, section 17b(2), page 320: "If *several facts* are included in the offer, some admissible and others inadmissible, then the whole (if properly objected to) is inadmissible; in other words, it is for the proponent to sever the good and the bad parts." (Emphasis the author's.) This rule is well settled in the decisions of our own courts. Swafford v. Board of Education, 127 Cal. 484, 487, 59 P. 900; Shumate v. Johnson Publishing Co., 139 Cal.App.2d 121, 134, 293 P.2d 531; Eaton v. Brock, 124 Cal.App.2d 10, 16, 268 P.2d 58; Clark v. Bradley, 106 Cal.App.2d 537, 545, 235 P.2d 439; Lewis v. Western Truck Line, 44 Cal.App.2d 455, 465, 112 P.2d 747.

[4] The unfairness of the composite questions in this case is particularly clear. In neither question was the date fixed by section 12604, i. e. September 10, 1948, specified or referred to. In the single sweeping question each appellant was asked about membership in the Communist Party from 1946 until 1950. As to the period between 1946 and September 10, 1948, the Legislature had given appellants the privilege of refusing to answer without incurring the penalty of dismissal. How were they to exercise this privilege in the face of a question which integrated such a period of time with another period of time as to which such privilege was denied them by the same statute? To meet their objection of appearing without the legal

protection of their attorney's presence the senator acting as subcommittee voluntarily offered them a stipulation, which they accepted, that their refusal to answer any question would be on every legal ground open to them. An objection that the questions included a period of time as to which they were privileged by the statute to refuse to answer without incurring the penalty of dismissal with a period of time as to which they had no such statutory privilege, if expressly interposed, would have been good. The broad stipulation under which they were testifying must be held to be the equivalent of such an objection.

It must be remembered that appellants were not charged with past or present membership in the Communist Party. Respondents' counsel expressly disavow any such claim. They were charged with, and the whole case against them rests on, the failure to answer the two questions quoted herein. Their refusal to answer those questions is not proof that if they had been asked any question limited to a time after September 10, 1948, they would have refused to answer such question. The plain fact is that they were never put to that test.

On the record before us we must hold that the violation by appellants of Education Code section 12604(d) was not proved.

The judgments are reversed with direction to the trial court to enter judgments for appellants.

DRAPER, J., concurs.

KAUFMAN, P. J., dissents.

KAUFMAN, Presiding Justice.

I dissent. Here the Superior Court very properly concluded from the record that judgment be entered dismissing appellants as school teachers in our public school system.

Appellants, husband and wife, were school teachers in Contra Costa County. They appeared before a subcommittee of the California Senate Fact-Finding Committee on Un-American Activities in California. They were interrogated about past Communist Party membership and knowledge or connection with other organizations and persons. They refused to answer these questions.

On May 14, 1954, notices of intention to suspend and dismiss appellants as school teachers were served on them. Appellants demanded hearings and respondents instituted these actions in the Superior Court under Education Code, section 13529.

The specific testimony of appellants, cited in the charges filed against them, is as follows:

> "Q. Have you ever been a member of the Communist Party, Mr. Schuyten? A. I decline to answer.
>
> "Q. Is it not a fact that you were a member of the Communist Party during the years 1946 and 1947 and up to and including a portion of the year 1950? A. I decline to answer."

The testimony of appellant Inez Schuyten cited in the charges filed against her involved questions about her knowledge of or affiliation with the California Labor School, the Tom Payne Club of the Communist Party and the Joint Anti-Facist Refugee Committee. She was asked if she attended meetings of the Communist Party held at the home of Professor Haakon Chevalier and if she was acquainted with Professor Chevalier or Frank Oppenheimer when she was an undergraduate at the University of California. All these questions she declined to answer asserting her constitutional and legal rights.

The following testimony also occurred:

> "Is is not a fact, Mrs. Schuyten, that you were a member of the Communist Party at the time you accepted the position that you now attain and that your membership in the Communist Party continued during the years 1946, 1947 and up to and including part of the year 1950?
>
> "A. I decline to answer."

Section 12604 of the Education Code provides:

> "It shall be the duty of any employee of any school district who may be subpoenaed by a United States Congressional Un-American Activities Committee or a subcommittee thereof or a California Legislative Un-American Activities Committee or a subcommittee thereof or any other committee or subcommittee of the United States Congress or the California Legislature or of either house of either thereof to appear before said committee or subcommittee and specifically to answer under oath a question or questions propounded by any member or counsel of the committee or subcommittee relating to:
>
> "(a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United States or of any state or political subdivision.
>
> "(b) Present knowing membership in any organization which, to the knowledge of such employee, advocates the forceful or violent overthrow of the Government of the United States or of any state or political subdivision.
>
> "(c) Past knowing membership at any time since September 10, 1948, in any organization which, to the knowledge of such employee, during the time of the employee's membership advocated the forceful or violent overthrow of the Government of the United States or of any state or political subdivision.
>
> "(d) Past knowing membership of such employee in the Communist Party at any time since September 10, 1948.
>
> "(e) Present knowing membership of such employee in the Communist Party.
>
> "Any employee who fails or refuses to answer under oath on any ground whatsoever any such question propounded by any member or counsel of any such committee or subcommittee shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employement in the manner provided by law." (The 1955 amendment is not applicable here.)

Section 12607 provides:

> "Any certificated employee of a school district who violates any of the provisions of Sections 12601 to 12606, inclusive, of this code shall be guilty of unprofessional conduct and shall be suspended and dismissed in the manner provided by law."

Section 13521 provides in part: "No permanent employee shall be dismissed except for one or more of the following causes: * * *

"(j) Violation of any provision in Section 12601 to 12607, inclusive, of this code."

It was held in Board of Education etc. v. Mass, 47 Cal.2d 494, 497, 304 P.2d 1015, 1018, that "The state of California has the power to require teachers in our public schools, as a condition to continued employment, to give evidence with respect to matters bearing upon their fitness to teach". It has been established by legislative findings and judicial decisions that the Communist Party is a continuing conspiracy against our Government. Loyalty on the part of public employees is essential to orderly and dependable government and is therefore relevant to fitness for employment. A teacher may be properly required to disclose information relative to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure under some circumstances may amount to self-incrimination. See Steinmetz v. California State Board of Education, 44 Cal.2d 816, 285 P.2d 617.

Appellants contend that there is no evidence that they violated the Dilworth Act. They claim that the only question propounded by the subcommittee relating to the categories listed was the one directed to each of them concerning whether each was a member of the Communist Party "during the years 1946, 1947, and up to and including part of the year 1950."

Since subdivision (d) of section 12604 of the Act involves "past knowing membership of such employee in the Communist Party at any time since September 10, 1948", an employee could not be discharged for refusing to answer as to 1946 or 1947, but certainly could be discharged for refusing to answer as to membership since September 10, 1948. It is true that this question was somewhat compound, but it certainly was not misleading and did not result in any prejudice to the appellants. The question was clearly related to and included the subject matter of section 12604(d). Appellants did not specifically object to the form of the question at the hearing, nor did their answer to the complaint raise that issue. There is no showing that they misunderstood the question and the record shows that they were clearly asked if they were members of the Communist Party since September 10, 1948.

Question asked by Committee of John Schuyten was "Have you *ever* been a member of the Communist Party?" Ans. "I decline to answer."

Dilworth Act provides:

Subd. (e) Present knowing membership in Communist Party.

Subd. (c) Past knowing membership in Communist Party since September 10, 1948.

The question asked by the Committee is substantially within the Act and should have been answered.

The majority opinion reverses the judgment of the trial court on a technicality and without any showing of prejudice to the appellants. I cannot vote to overthrow the judgment of dismissal on such a technicality.

Furthermore, from the record the trial court impliedly found that appellants were not mislead by the so-called compound questions and had no intention of answering any questions touching on their fitness to teach.

It is clear to me that the appellants have violated both the letter and the spirit of the Dilworth Act and they should be dismissed as school teachers. They have demonstrated their unfitness to teach our children in the public schools. Are the people of California required to retain school teachers who refuse to honestly and truthfully answer the questions hereinbefore set forth? In my opinion the answer is no, and the judgment of dismissal should be affirmed.

161 Cal.App.2d 71

Harris G. ASHBURN and Virginia E. Ashburn, Plaintiffs and Respondents,

v.

L. M. MILLER and Doris L. Miller, Defendants and Appellants.

Civ. 22584.

District Court of Appeal, Second District, Division 2, California.

June 4, 1958.

Action to recover for misrepresentation concerning fact that lot sold to plaintiffs consisted largely of uncompacted fill. The Superior Court of Los Angeles County, Otto J. Emme, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Ashburn, J., held that evidence supported finding of fraud.

Affirmed.

1. Fraud 🔑58(2)

In action to recover for misrepresentation concerning fact that lot sold to plaintiffs consisted largely of uncompacted fill, evidence supported finding of fraud.

2. Fraud 🔑11(1)

Misrepresentation or concealment of known fact of fill in lot sold constitutes material inducement which works a fraud upon buyer who is ignorant of fact.

3. Fraud 🔑18

What the parties deemed material will be accepted by courts as such.

4. Fraud 🔑20

Being bound by contract to buy, later information of falsity of its inducement could not alter purchasers' legal rights, unless they waived fraud in some manner.

5. Escrows 🔑5

Escrow instructions did not make new contract but were merely vehicle for carrying out one which parties had already signed.

6. Fraud 🔑22(1)

In action to recover for misrepresentation concerning fact that lot sold to plaintiffs consisted largely of uncompacted fill, it would not lie in defendant's mouth to say that plaintiffs should not have trusted him completely.

7. Fraud 🔑22(2)

Vendor who prevents investigation, or directly or indirectly induces purchaser to refrain from making one, cannot, in ensuing fraud action, have benefit of results which would have followed a thorough investigation if actually made.

8. Fraud 🔑62

In action to recover for misrepresentation concerning fact that lot sold to plaintiffs consisted largely of uncompacted fill, evidence supported award of $3,000 as damages. West's Ann.Civ.Code, § 3343.

9. Appeal and Error 🔑1033(8)

Where evidence would sustain judgment for $3,500, error, if any, in fixing amount at $3,000 was in favor of defendants, and hence was not ground for complaint by them on appeal in fraud action. West's Ann.Civ.Code, § 3343.

10. Appeal and Error 🔑996

Inferences to be deduced from evidence are for trial judge, if reasonable.

11. Fraud 🔑58(2)

In action to recover for misrepresentation concerning fact that lot sold to plaintiffs consisted largely of uncompacted fill, evidence would not support finding that defendant had had actual knowledge that lot consisted largely of uncompacted fill, but evidence did establish that his representations to contrary had been made as positive assertions of fact and that same had not been warranted by information possessed by him. West's Ann.Civ.Code, § 1572, subd. 2.

12. Fraud 🔑4

Intent to defraud is not of essence of suit for deceit; and it is intent to induce action by other party that counts. West's Ann.Civ.Code, § 1572, subd. 2.

13. Appeal and Error 🔑931(1), 989

Reviewing court was not free to weigh evidence or to accept that favorable to appellants which was opposed to proof presented by respondents.

Conroy & Conroy, Los Angeles, for appellants.

Melvin Klarin, Hollywood, and Jerome D. Savenick, Los Angeles, for respondents.

ASHBURN, Justice.

Plaintiffs Harris G. Ashburn and Virginia E. Ashburn, husband and wife, sued defendants Lawrence M. Miller and Doris L. Miller, husband and wife, for damages for fraud in the sale to them of a hillside lot in the Mulholland Drive—Laurel Canyon area of Los Angeles, the fraud consisting of misrepresentations concerning the fact that the lot consisted largely of uncompacted fill. The lot sloped downward to the east and the rear or north. In the process of preparing a site for building a residence plaintiffs had to excavate filled material varying in depth from 6 feet to 13 feet, a total of some 1,000 to 1,100 cubic yards, and also had to bring in approximately 500 cubic yards of dirt in order to compact a suitable building site, all at a cost of $1,605.75. The court, after a nonjury trial, found for plaintiffs on the charge of fraud and awarded damages in the sum of $3,000. Defendants appeal, urging insufficiency of the evidence to prove a fraud or to sustain the award of damages. The evidence is conflicting upon both of said issues.

We stated the applicable principles of review of conflicting evidence in New v. New, 148 Cal.App.2d 372, 383–384, 306 P.2d 987, 994: "The appellate court must accept as established all facts and all inferences favorable to respondent which find substantial support in the evidence. 'And where appellant urges the insufficiency of the evidence to sustain the findings * * * the rule is that, "Such contention *requires defendants to demonstrate* that there is no substantial evidence to support the challenged findings." Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552. (Emphasis added.) It is said in Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184, that: "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deduction for those of the trial court."' Hartzell v. Myall, 115 Cal.App.2d 670, 673, 252 P.2d 676, 677. * * * Industrial Indem. Co. v. Golden State Co., 117 Cal.App.2d 519, 538, 256 P.2d 677, 689; '[I]t is settled law that if conflicting inferences may reasonably be drawn from the evidence, even if it is uncontradicted or all facts are admitted, which inference shall be drawn is a question for the trier of facts and its decision cannot be set aside by the appellate court. * * * Only where there is no conflict in the evidence *and no conflicting inferences can be drawn therefrom* does the finding of the trial court amount to a conclusion of law and is the finding not binding on a reviewing court.'"

[1] The evidence adequately supports the finding of fraud. The subject lot adjoins the residence of defendants Miller and had been owned by them since November, 1952. Plaintiffs first talked to defendant[1] about this property in November, 1954. They agreed to purchase it on January 7, 1955, opened an escrow on March 18, 1955, which was closed on March 30, 1955. Mr. Ashburn was and had been for eight years business manager of the Music Department of Universal Pictures. Before that he and his wife had been vaudeville performers, doing a dance number. They had had no experience with filled hillside lots but had been alerted to the supposed dangers of such building sites by what they had read and heard. They admired this particular lot especially. On the November occasion they found Mr. Miller on the property, which had a "for sale" sign upon it. They asked the price and according to plaintiff defendant said $7,900 or $7,950; they said that was too much money for them and Miller responded: "Well, the beautiful part of this lot is that it's solid and in the hills it's unusual to find a practically level lot that is solid." Mrs. Ashburn testified, concerning the same conversation: "Then, as we were saying that it was a lot of course that was way above our figure, he said, 'If you are interested in the hills here, that is not expensive.' He said, 'If you buy a hillside lot, most of it is either fill or cutting.' I said, 'Is there any fill on this lot?' I was the one that asked him. He said, 'This is a solid building site. As you can see for yourself, there is hardly any grade.' He said, 'That is why I am getting this price for this lot.' He said, 'You can find cheaper lots, yes, but,' he said, 'because there is hardly any grade and it is a solid lot, that is why I am able to ask this price for it.'"

The parties met again at the Miller home on the evening of January 7, 1955. Mr. Ashburn testified: "We went up there and we told him we had been looking at a lot of lots, that some of them were filled, and that inasmuch as he had stated that this one was solid, that we were interested in it, but we wanted to know whether he wouldn't come down on the price of $7,950. They wanted to know how high we could go. I said we wanted to spend between $5,000 and $6,000, but in this case it being a solid lot we would go to $7,000. So Mrs. Miller suggested that inasmuch as were weren't too far apart that they would make the price $7,500. We thought a moment and then we decided that we would take it. It was above our price, but with no excavation to speak of and it being solid * * *." Again, "We told them we only had so much money to spend and inasmuch as we could save on excavation and it being a solid lot, that we could cut down on the house and take the lot, and we gave them $500 and bought the lot at that time." Plaintiffs were intending to build an adobe home and so told defendants, showing them a sketch of same. Plaintiff said, "that one of the things that some of the people I had talked to said that it was very necessary to have a good solid lot to put the house on because it was very heavy. He assured me that I had no worry on that lot because it was solid in front." This was the first qualification of the flat representation that the lot had no fill in it. It was followed by the further statement: "'Back here in the wing, in the back, there is about two feet of fill, but you won't have to worry about that because your building site is up here and your house will fit in the front part of the lot and it will be fine for you.'" Mrs. Ashburn testified that they discussed the heavy construction of an adobe house and Miller said, "that it was a solid lot, no fill in the front, and we would have practically no excavation. So he said everything would work out all right." Defendant also told plaintiffs he was a hauler of dirt, had a fleet of trucks and hauled dirt. The result of all this, as expressed by plaintiff-husband, was: "We liked them both very much and we believed —we took their word for everything they said because they seemed like such nice people at that time." Defendant had a printed form of contract which he filled in. The parties signed it and plaintiffs paid $500 on account of the purchase price at that time.

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[1] The singular "plaintiff" or "defendant," as used herein, will refer in each instance to the husband unless otherwise indicated.

About a week later plaintiff took his mother, Mrs. Aschenbrener, to see the lot and they were invited into the Miller home. The mother testified to the conversation with defendant as follows: "I told them that I thought the lot was a beautiful lot but I thought the price was out of line. Of course, I was accustomed to Wisconsin prices. He assured me it was a good lot, a lot ready to build, not filled, and consequently the price was right. And I didn't know what fill meant. I didn't know what solid lots meant because in our country we just don't have those. They explained to me what it was all about and convinced me that the price was probably right." Plaintiffs each testified substantially to the same effect.

About two weeks after the contract was signed plaintiff took to the lot Mr. William Mellenthin, a building contractor of 33 years experience, whom he expected to construct his house. There they met defendant. In his presence Mellenthin told plaintiff the lot had all the earmarks of having a fill in it, whereupon defendant said: "'This is one lot that was solid up there.' Mellenthin said, 'How can you be sure on that?' Miller said, 'Well, I owned the lot. I ought to know.' Mr. Mellenthin said, 'Well, then, if you owned it I suppose you do know.'" Nevertheless, Mellenthin remarked that test holes should be made. Miller reiterated that there was no fill. However, Mr. Ashburn did not hear the remark about test holes for he was not present when it was said. Later, when Mrs. Ashburn asked defendant about test holes he replied: "'If you want to waste $200 to dig test holes, take the $200 and hire Chabot and he'll fix the lot.'"

Mr. Arthur L. Glasscock, a neighbor of plaintiff, testified that plaintiff introduced him to defendant about April, 1955, when they were on or near the lot in question. "I heard Mr. Miller make a statement to Mr. Ashburn that it was a solid lot and ready to build on, and that he should have his home completed within three months."

Also, "Mr. Miller said to myself or to myself and Mr. Ashburn that it was a good price, but that you couldn't buy lots in the hills ready to build on for any less; cheaper lots would have an expensive excavating charge connected with them." Also that the lot was ready to build on and was solid ground. No mention was made of any fill.

Plaintiff took Mr. Harry W. Keas to see the lot in March, 1955; he is an experienced building contractor. He told plaintiff there was some evidence of fill. On the same occasion Keas "asked him [defendant] what he thought there was to the fact that the lot might be filled. He said there might be a small amount but not very much, and anyhow in my contract, in the clause in there, I was protected. * * * He said possibly if there was any it would be back around where the fruit trees were. Q. Would that affect the building site in any way? A. No. If it was there it wouldn't affect it."

When digging cesspools about the middle of April plaintiff gained his first knowledge of the location and extent of the fill. The cesspool was located about 125 feet back from the curb in a lot which was about 177 feet deep on one side and 152 feet on the other. When the hole had reached 6 or 7 feet in depth the workers had not yet struck solid ground. Plaintiff told Miller about it and they dug down at the corners of the prospective Ashburn house, came to a dark layer of soil and defendant said that was natural top soil. "He said that he knew that this was top soil; that he worked with excavators and he was familiar with this type of soil and that the dark soil was the top soil and that was solid ground." Defendant also said that Mr. Chabot could fix the lot to build on by working a half day or a day at most.

About this same time, late April or early May, Miller took plaintiff to see Mr. Howard C. Brown, whose home adjoined the subject lot on the east, and who, according to defendant, had formerly owned it and had lived in the neighborhood for 20 years. Miller had been telling Ashburn that there was only a little bit of fill next to the road. "Mr. Miller said, 'Brown, do you know of any fill on that lot?', and Brown said, 'As far as I know, I don't know of any fill.' And he says, 'The only fill that I have put on the lot was in the back end of the lot.' * * * That that was way in the rear part of the lot. Q. Mr. Miller asked Mr. Brown whether he knew of any fill on the property? A. He did. Q. And Mr. [Brown] said he didn't know of any fill except the back part of the lot that he put on himself? * * * A. Yes." It later developed that the depth of fill was 15 feet where a portion of the house was to go. Mr. Cecil F. Collins, engineer associated with the Warren Company which did certain engineering work pertaining to the compacting of this lot, testified that a distance of 30 feet from the curb 3 feet of fill was removed; at the back line of the house 10 feet; at the front building line 6 feet; and 15 feet back of the building line 15 feet.

Mr. Keas had made a contract with plaintiff to build the house. Early in June his tractor man, Holmes, diagnosed the land as filled. Keas, who was present, warned plaintiff of probable extra costs and Miller, also there, said that Keas was scared of the thing and he could have Chabot do it in a day or a day and a half and he would have the lot leveled off. Plaintiff tried to get Chabot to do the job but he was unavailable.

After Gordon D. Firestone had excavated filled material to a depth of 16 or 17 feet plaintiff told defendant " 'Look, Dick, this thing has gotten all out of hand now. I can't stand this kind of expense. I bought this lot with the understanding that it was solid. Here we are running up bills.' I said 'I can't afford this any more.' He said, 'Harris, I feel very bad. I know you are getting a royal ——— on this thing.' Those were the words I think that he used. He said, 'Come on up (and he made a date for either that night or the following night), and Doris and I will talk it over and we will see what we can do about it.' " At the appointed time plaintiffs went to the Miller home; defendants say that Ashburn was fighting mad; he and his wife offered to give the lot back with the cesspools in it, to pay for the work that had been done, if defendants would restore the $7,500. This was rejected. Plaintiffs then sought an adjustment in the price but without success, Mrs. Miller observing that plaintiffs saw the lot, bought it and were stuck with it. Mr. Miller followed plaintiffs out of the house, promised to talk his wife into making some adjustment and the two men agreed to meet the next day at noon. Defendant did not appear and plaintiff was not able to contact him after that, so he brought suit.

[2] That misrepresentation or concealment of the known fact of a fill in a lot sold to another constitutes material inducement which works a fraud upon the buyer who is ignorant of the fact is recognized by the adjudicated cases. See, Clauser v. Taylor, 44 Cal.App.2d 453, 454, 112 P.2d 661; Tatham v. Pattison, 112 Cal.App.2d 18, 21, 245 P.2d 668; Burkett v. J. A. Thompson & Son, 150 Cal.App.2d 523, 526, 310 P.2d 56; Central Mutual Ins. Co. v. Schmidt, 152 Cal.App.2d 671, 673, 313 P.2d 132.

[3] Plaintiff testified that the question of whether or not this lot had a fill on it was very important to him. Defendant's own conversations, as above narrated, show that he also considered absence of fill a material inducement to any sale. Also, his recognition of the importance of the matter is attested by the fact that he took plaintiff and earlier prospects to Brown to receive assurances on the subject. What the parties deem material will be accepted by the courts as such. Rest. of Torts, § 538, p. 86; Prosser on Torts (2d Ed.), p. 555.

Appellants say that plaintiffs were not justified in relying upon defendants' misrepresentations because they made their own investigation and thereby precluded themselves from further placing credence in defendants' statements. The argument overlooks or ignores important considerations.

[4, 5] The so-called investigation is the visit of Mellenthin to the lot and his assertion that the property bore all the earmarks of a fill. This occurred about two weeks after plaintiffs signed a contract to purchase; before that time they had no intimation of the fact of any fill except the small one that Brown later spoke about. Being bound by written contract to buy, later information of falsity of its inducements could not alter their legal rights unless they waived the fraud in some manner, and this they did not do.[2] The escrow instructions did not make a new contract; they were merely the vehicle for carrying out the one which the parties had already signed. King v. Stanley, 32 Cal.2d 584, 589, 197 P.2d 327; Katemis v. Westerlind, 120 Cal.App.2d 537, 542, 261 P.2d 553; 18 Cal.Jur.2d § 29, p. 351. Appellants' cited cases (Elko Mfg. Co. v. Brinkmeyer, 216 Cal. 658, 15 P.2d 751; Cameron v. Cameron, 88 Cal.App.2d 585–594, 199 P.2d 443; Neet v. Holmes, 25 Cal.2d 447, 154 P.2d 854) are not in point.

[6] When Mellenthin suggested the possibility of a fill, Ashburn, believing defendant's statements and echoing them, said there was none, and Miller immediately said the same thing, adding that he ought to know because he owned the lot. The Ashburns believed defendant implicitly. Mellenthin's suggestion of test holes was not followed because plaintiffs trusted defendant completely. It does not lie in his mouth to say that plaintiffs should not have done so. "As a general rule negligence of the plaintiff is no defense to an intentional tort. See Prosser, Torts, 402. The fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar his recovery (Rest. Torts, sec. 540; see cases cited in 12 Cal. Jur. 758, 759) * * *. Nor is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to re-

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[2] The delay from January 7 to March 18, in opening the escrow, is explained by the fact that plaintiffs had their home up for sale and were actually paying defendants the sum of $25 a month during the period of delay.

cover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. See cases cited in 6 Cal.Jur.Supp. 45 (note 13); Prosser, Torts, 749. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' Chamberlin v. Fuller, 59 Vt. 247, 9 A. 832, 835, 836." Seeger v. Odell, 18 Cal.2d 409, 414, 415, 115 P.2d 977, 980, 136 A.L.R. 1291. "'Where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case no duty rests upon him to employ such means of knowledge. * * * It is said not to be just that a man who deceives another should be permitted to say to him, "You ought not to believe or trust me," or "You are yourself guilty of negligence."' 12 Cal.Jur., § 34, p. 758." United States Nat. Bank of Los Angeles v. Stiller, 216 Cal. 324, 333, 14 P.2d 78, 81. See, also, Hefferan v. Freebairn, 34 Cal.2d 715, 719, 214 P.2d 386.

[7] When Mrs. Ashburn later asked Miller about test holes he told her it would be a waste of money. A defendant who prevents an investigation or directly or indirectly induces his buyer to refrain from making one, cannot have the benefit of the results which would have followed a thorough investigation if actually made. "Where positive statements regarding the value of property are made by the owner as facts and not as mere expressions of opinion, and his acts or conduct result in dissuading the purchaser from making an independent investigation respecting the value, the owner is estopped from relying upon a lack of independent inquiry as a defense in an action for rescission on the ground of fraud." Vah Dah Dunshee v. Boadway, 119 Cal.App. 678, 686, 7 P.2d 325, 328. "Another answer is that there was substantial evidence that Sime was dissuaded from pursuing the investigation and prosecuting his cross-complaint by the very frauds which the defendants claim he should have uncovered. * * * It is well settled that one who has acted in a manner which would reasonably induce another to forego or discontinue an investigation of his fraudulent acts will not be heard to say that the facts would have been developed had inquiry been made." Sime v. Malouf, 95 Cal.App.2d 82, 107, 108, 212 P.2d 946, 961, 213 P.2d 788. See, also, 23 Cal.Jur.2d § 38, p. 93. The investigation argument falls of its own weight.

[8] Re damages. The claim that the finding of the amount of damages to be $3,000 is without support in the evidence also proves to be without merit. After the trial judge had decided for plaintiffs, but before he signed any findings, he concluded that he had erred in fixing the amount of damage, re-appraised the same and awarded judgment for $3,000, which was carried into the findings and judgment. Appellants, relying upon § 3343, Civil Code,[3] as the exclusive measure of damages in a vendor-vendee fraud case (Bagdasarian v. Gragnon, 31 Cal.2d 744, 759–762, 192 P.2d 935; Gagne v. Bertran, 43 Cal.2d .81, 490, 275 P.2d 15; Central Mutual Ins. Co. v. Schmidt, supra, 152 Cal.App.2d 671, 676, 313 P.2d 132), argue that there is no evidence that the property was worth less than the amount paid for it.

Defendants' only expert fixed the value of the filled lot on the date of sale at $8,000 to $9,000, and further said that if there had been no fill it would have been worth $11,500 to $12,500,—a difference of $3,500.

[9] Plaintiff produced one expert, Mr. Ted Hekt, a broker of ten years' experience who had specialized in hillside property in the area including the subject lot. On direct examination he pursued the theme that a filled lot would be worth only half of the owner's asking price, whatever that figure might be. He also said he knew of filled lots in the area priced from $1,000 to $5,000,

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[3] Civ.Code, § 3343. "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction. * * *"

but he fixed no specific value on this particular lot. However, on cross-examination he testified:

"Q. By Mr. Conroy: What in your opinion would be the value of that lot compacted as it is now as of January 7, 1955? I think that is the question. A. Compacted as it is now on January 7, 1955? That is better than a year ago. With the drop-off, with the lack of vegetation in that area, $4,000 would be a fair price.

"Q. $4,000? A. I think so. That is a high price. That is a good price."

On redirect:

"Q. I am not sure I asked you what the valuation of this property would have been as filled property, not compacted, but filled, as of January 7, 1955. A. It would be the same, counsellor.

"Q. It would be the same? A. It would be the same.

"Q. There hasn't been any appreciable change in value to your knowledge? A. Not to my knowledge."

The effect of this testimony is that the filled lot, with or without compaction, was worth $4,000 on the date of sale, $3,500 less than the price paid. The witness emphasized that he was talking about market value as distinguished from asking prices, and he gave examples of recent sales. It does not appear that his valuation was based principally or largely on asking prices. The ultimate thought seems to have been that a filled lot is a filled lot, and compaction of the fill does not change the picture in the eyes of prospective purchasers. "I would say this: Due to compaction, if you sell a lot with this amount of fill you are apt to get a downslope; you are apt to get a fall-off, which has occurred in this case, that would give a great resistance value for a potential resale. * * *

"Q. If there were, for instance, 10 prospects on this particular piece of property to buy it at some future date, out of the 10 prospects how many in your experience would shy away, if they would, if they knew the property had been compacted? * * *

"Q. I asked you a question, whether out of 10 people in your experience—A. They would ask questions. Nine of them would probably ask why and walk away from the property today.

"Q. In opposition to—A. In opposition to the flat level lot, yes.

"Q. Or in opposition to the compacting, or just the shape, or the levelness of the lot, or which? A. Most buyers do not know what compaction means unless they have seen it. They would ask me what the cracks in the ground mean and in all honesty I would have to explain it, that it was due to compaction.

"Q. Did you see cracks in the ground on Sunday when you were up there? A. Oh, yes."

The witness admitted that compacted lots are selling in the Hollywood Hills and Doheny Estates areas, but he was voicing the views of those who believe that a filled lot does not appeal to the ordinary buyer, that he knows little, if anything, about the process or effect of compaction and is not interested in buying any kind of filled lot.[4]

The witness, Cecil F. Collins, soil engineer, though enlarging upon the engineer's view that compacted fills are better bearing soils than solid natural earth, said: "There is a continuing process of education regarding fills. The word 'fill' has been a dirty word in construction for a hundred years and, as I say, in the last 25 years it has become controlled. It is perfectly satisfactory, but there is some resistance among the hard-to-change group."

[10] The inferences to be deduced from the evidence are for the trial judge, if reasonable, and we see no error in his accepting Hekt's view that there is so much re-

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[4] This evidence would sustain a judgment for $3,500. Error, if any, in fixing the amount at $3,000 was in favor of defendants and hence not ground for complaint. See Dutra v. Cabral, 80 Cal.App. 2d 114, 118, 181 P.2d 26; Employees' Participating Ass'n v. Pine, 91 Cal.App. 2d 299, 302–303, 204 P.2d 965; Union Hollywood Water Co. v. City of Los Angeles, 184 Cal. 535, 539, 195 P. 55; 15 Cal.Jur.2d § 233, p. 47.

sistance of buyers toward filled lots that the known fact of fill adversely and substantially affects the market price or value. This attitude seems not without foundation in other portions of this record.

Originally, Mellenthin was going to build the residence for plaintiffs, but when he suspected the lot was filled, notwithstanding Miller's and Ashburn's assurances to the contrary, declined the job of constructing an adobe house on such suspected foundation.[5] He testified: "I am a little biased. I don't like fill of any kind, whether it's compression or not. I built lots of houses on compression lots. It took me a long time before I was sold on any kind of compression." Mr. Keas, building contractor of 30 years experience, after visiting the property and being told by defendant that there might be a small amount of fill around the fruit trees which did not affect the building site, made a contract with plaintiff to construct the residence; but he persuaded plaintiff to release him from his contract when he discovered the extent of fill, saying he had no faith in a compacted lot. "It had been my experience for many years that a compacted lot was not as good as natural soil, and you put heavy weight on there, especially where he could not get his compaction clear out to his property line, and a wall would have to be built on the cleavage between the property that was not compacted and the property that was compacted, and I just didn't have any faith in it and I just didn't want to build on it." Also, "Q. In that connection, let me ask you this: You have built on many filled lots, haven't you, on compacted lots? A. I have built on several and I have never found one satisfactory yet. * * * A. I am of the opinion on any slope where soil is compacted it still is subject to slippage and the falling away, no matter how much they compact it, and regardless of what any engineer says, it has been my experience that it will do so."

There is solid basis for the rule of the above cited cases (Clauser v. Taylor, supra, 44 Cal.App.2d 453, 112 P.2d 661; Tatham v. Pattison, supra, 112 Cal.App.2d 18, 245 P.2d 668; Burkett v. J. A. Thompson & Son, supra, 150 Cal.App.2d 523, 310 P.2d 56; Central Mutual Ins. Co. v. Schmidt, supra, 152 Cal.App.2d 671, 313 P.2d 132) that disclosure of the fact of a fill is obligatory upon a seller who knows of same; that is because it affects the value in the eyes of the ordinary buyer; at least, that was a reasonable inference for the trial judge to draw at bar.

[11, 12] The court found that defendant had actual knowledge "that in truth and in fact the greater portion of the said land, and especially the area fronting upon said Torreyson Drive, contained loose earth and uncompacted fill." The evidence does not support this finding of actual knowledge, but it does establish "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." Civ.Code, § 1572, subd. 2. It shows without contradiction that no fill had been placed on the land since 1937 or 1938 when Mr. Brown bought the property except the small amount, one to three feet, that he put on the north or rear end about that time. As a witness he shrewdly guessed that the fill found by plaintiff had been done as a part of the original subdividing. Prior to plaintiffs' purchase defendant had taken three or four prospective buyers to Brown to ask about fill and they had been told that he had put a maximum of approximately three feet on the lot and had no knowledge of any other. While defendant's conduct after plaintiff's discovery of the extensive fill gives rise to a suspicion that he had actual knowledge, it does not amount to substantial evidence of the fact. On the other hand, it is clear that defendant unequivocally and repeatedly assured plaintiffs and others brought to the property by them that there was no fill on the front part of the lot or in the building site. Mr. Ashburn testified: "He never said as far as he knew there was no fill

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[5] Later, when adobe was abandoned in favor of lighter construction, Mellenthin did erect plaintiff's residence.

on the lot." Mrs. Ashburn: "When we went up there after we found the fill in the cesspools, I was sick when my husband came back and told me about it. We went up to his place several times and he always said he knew there was no fill on the building site; that that little bit would mean nothing because we had to dig anyhow up in the corner where we found the 3½ feet of fill; that we had to cut that down because that was a hillside. He said, 'I don't know what you are worried about,' and he always reassured us that there was no fill." The inference is also inescapable that defendant did not have any information which warranted such positive assertions. That spells fraud. 23 Cal.Jur.2d § 27, page 66: "Actual fraud according to the Civil Code is committed where, with intent to induce another to act in reliance thereon, a person makes a positive assertion, in a manner not warranted by his information, of that which is not true, though he believes it to be true. If, therefore, one asserts that a thing is true within his personal knowledge, or makes a statement as of his own knowledge, or makes such an absolute, unqualified, and positive statement as implies knowledge on his part, when in fact he has no knowledge of whether his assertion is true or false, and his statement proves to be false, he is as culpable as if he had wilfully asserted that to be true which he knew to be false, and is equally guilty of fraud. This is the rule even though the one making the assertion believes it to be true, unless it appears that such belief is based on reasonable grounds." Intent to defraud is not of the essence of a suit for deceit; it is intent to induce action by the other party that counts. Gagne v. Bertran, supra, 43 Cal. 2d 481, 488, footnote 5, 275 P.2d 15.

[13] We have not overlooked the denials of defendants or the other testimony favorable to their side of the case. We are not free to weigh the evidence or to accept that favorable to appellants which is opposed to the proof presented by respondents.

Paragraph I of the findings of fact is amended to read: "That all of the allegations contained in Paragraphs I, II, III, IV, V, VI, VII, IX, X, XI, XII, XIII and XV of plaintiffs' complaint are true, with the exception that with reference to Paragraph III the date of March 18, 1955, and all other references to said date contained in plaintiffs' subsequent allegations should be and is January 7, 1955. It is also true that said representations were made as positive assertions of fact and that same were not warranted by the information possessed by defendants or either of them."

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

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161 Cal.App.2d 59

Morris LAVINE, Plaintiff and Appellant,

v.

Roger JESSUP, Herbert Legg, Leonard Roach and William A. Smith, Individually and as Members and Former Members of the Los Angeles County Board of Supervisors; County of Los Angeles, a Public Corporation and Body Politic; Walt Briggs and Jack Hazard, Individually, and as Partners and Sole Owners of the Stock of the Civic Center Auto Park, Inc.; Civic Center Auto Park, Inc.; John Anson Ford, Kenneth Hahn and Burton Chase, as Members of the Los Angeles County Board of Supervisors and Individually; John Doe Corporations I to VI Inclusive; John Doe I to VIII Individually, Inclusive, and Jane Doe I to IV Individually, Inclusive, Defendants.

Roger Jessup, Herbert Legg, Leonard Roach, William A. Smith, Deceased, County of Los Angeles, Walter M. Briggs, sued as Walt Briggs, and Civic Center Auto Parks, a corporation, sued as Civic Center Auto Park, Inc., Respondents.

Civ. 21759.

District Court of Appeal, Second District, Division 1, California.

June 4, 1958.

Hearing Denied July 30, 1958.

Taxpayer's action against county supervisors and others. From a judgment and order of the Superior Court, Los Angeles County, Bayard Rhone, J., the plaintiff appealed. The District Court of Appeal, Lillie, J., held, inter alia, that in taxpayer's action against county supervisors based on theory that supervisors were trustees, that they breached mandatory duty in use of courthouse property for private parking lot, that defendants violated due process and impairment of contract provisions of the United States Constitution and negligently or intentionally wasted taxpayer's money, complaint which contained indefinite charges and unsupported conclusions and which in effect attacked the wisdom of the supervisors rather than legality of their action failed to state a cause of action.

Attempted appeal from order dismissed and judgment affirmed.

See also 314 P.2d 528.

1. Appeal and Error 🔑719(1), 934(1)

Reviewing court cannot be expected to prosecute an independent inquiry for errors, but will only notice those assignments properly brought to its attention, since all presumptions and intendments must be indulged in favor of judgment or order appealed from.

2. Pleading 🔑34(1), 229

Pleadings and amendments thereto should be allowed and construed liberally with object of affording every litigant his day in court and to render substantial justice between the parties.

3. Pleading 🔑4

The title or label which embellishes a pleading does not determine the nature of the action therein, and its legal effect depends upon allegations set out.

4. Pleading 🔑34(1)

Pleadings must be read and construed as a whole.

5. Pleading 🔑34(4)

While a liberal interpretation of pleading is permitted by statute, a pleading must be construed most strongly against the pleader, and in absence of a contrary allegation, no intendment can be indulged in that pleader has not stated his case as strongly as it is possible to do. West's Ann.Code Civ.Proc. § 452.

6. Counties 🔑59
Trusts 🔑179

In a proper case trustees may be held liable for damage occasioned by their activities, and county supervisors are public trustees.

7. Courts 🔑72

Duty of providing adequate quarters for courts is mandatory, explicit and imposed by law on the county, but the law leaves to the boards of supervisors to determine, in each case, what is required to constitute suitable quarters.

8. Courts 🔑72

The very authority of county supervisors to build a courthouse carries with it the necessarily implied power to exercise discretion in manner of building and in selection of a proper site, since the board could not efficiently act without such discretionary power.

9. Officers 🔑114

Officials should be free from the harassing and intimidatory effect which constant threat of actions to impose civil liability would constitute so that they are immune from actions, involving an exercise of judgment and discretion.

10. Counties 🔑196(1, 7)

That county supervisors' action in changing courthouse site allegedly resulted in waste of money did not necessarily give rise to cause of action on behalf of a taxpayer, and taxpayer's allegation in respect to supervisors' unwise actions resulting in expenditure of much money did not supply the requisite material for a cause of action, particularly where supervisors were clothed with a broad discretion in reference to their decisions.

11. Courts 🔑72

Discretionary power to select a site for a courthouse necessarily includes the discretion to relocate and reselect a new site where such action is deemed necessary, and county supervisors or other officials, not otherwise restricted by law, should not be tied down by a restriction which would render them powerless to act in the best interests of the public.

12. Counties ⚷196(7)

A taxpayer suing county supervisors on theory of breach of mandatory duty in use of courthouse property for a private parking lot, and charging supervisors with conspiracy and acts of oppression, fraud and malice justifying an award of punitive damages had duty of definitely alleging how and in what manner the alleged facts rebutted the statutory existing presumption of regularity of official conduct. West's Ann.Code Civ.Proc. § 1963, subd. 15.

13. Counties ⚷196(7)

A taxpayer suing county supervisors did not make out a case by stressing the later use of original courthouse location as a parking lot leased to private party since supervisors, after deciding upon change in location, may have sought to recoup the losses by leasing the property which was a matter of discretion, and if there was fraud, conspiracy or other acts of misfeasance or of malfeasance, it was taxpayer's duty to declare the same precisely so that defendants would be enabled to determine the exact nature of the accusation to be faced in court.

14. Constitutional Law ⚷254

Due process requirement is not an academic, exacting one in which the citizen or taxpayer may demand a notice or a hearing of his own making. U.S.C.A. Const. Amend. 14.

15. Constitutional Law ⚷254

A county supervisors' action in selection of courthouse site and changing such site did not violate due process provisions of constitution because of failure to give to taxpayers notice of hearing, particularly where matter was one of discretionary nature. West's Ann.Gov.Code, §§ 25080, 25081; U.S.C.A.Const. Amend. 14.

16. Civil Rights ⚷13
Constitutional Law ⚷120

A taxpayer suing county supervisors on theory of breach of mandatory duty in use of courthouse property for a private parking lot did not state cause of action on theory that supervisors' action violated constitutional prohibition against impairment of contract rights or those protected by federal civil rights statute, where pleadings were indefinite or silent as to what contract rights were involved, no contracts were involved except those for courthouse plans and there was nothing to indicate that those were not fulfilled, and it did not appear that taxpayers' rights, contractual or otherwise, had been impinged upon. U.S.C.A.Const. art. 1, § 10.

17. Municipal Corporations ⚷313

A public body may rescind its action and abandon improvement proceedings without other liability than that flowing from a breach of contract.

18. Pleading ⚷8(1), 18

The purpose of a complaint is to furnish defendants with certain definite charges which can be intelligently met, and mere general assertions by way of conclusion or those indefinite in character cannot be deemed sufficient compliance with long-established rules of pleading.

19. Pleading ⚷8(17)

A taxpayer's complaint against county supervisors seeking to predicate liability on vague charges of negligence, willful neglect of duty, failure or neglect to take proper precautions to determine proper site for a courthouse, unwarranted delay, fraud, misrepresentation, bad faith, oppression, malice, and the like was demurrable as alleging mere conclusions since use of such terminology could not cure a failure to point out exactly how or in what manner defendants had transgressed.

20. Conspiracy ⚷18
Fraud ⚷41

Fraud and conspiracy are actionable, but the mere use of such terms is not enough, but facts constituting bad faith or fraud must be specifically alleged.

21. Declaratory Judgment ⚿321

A taxpayer's claimed cause of action against county supervisors based on alleged breach of mandatory duty in use of courthouse property for a private parking lot was neither created nor enhanced by allegations and prayer relating to declaratory relief, since while such remedy is a most valuable one in a proper case, and possessed of considerable latitude, it is not a catchall, and without facts other than those alleged, which were in nature of conclusions, its application was not called for.

22. Declaratory Judgment ⚿394

A judgment refusing to entertain a complaint for declaratory relief is not reviewable on appeal except for an abuse of discretion.

23. Pleading ⚿8(1)

A cause of action is not created by mere use of legal, generic, or other terms.

24. Counties ⚿196(7)

In taxpayer's action against county supervisors based upon theory of breach of mandatory duty in use of courthouse property for private parking lot, taxpayer's prayers for injunction, a bill of peace and application of estoppel by judgment, punitive damages, etc., added nothing to the sum total nor did they serve to state a cause of action in absence of a definitive statement of actionable facts.

25. Counties ⚿196(7)

In taxpayer's action against county supervisors based on theory that supervisors were trustees, that they breached mandatory duty in use of courthouse property for private parking lot, that defendants violated due process and impairment of contract provisions of the United States Constitution and negligently or intentionally wasted taxpayer's money, complaint which contained indefinite charges and unsupported conclusions and which in effect attacked the wisdom of the supervisors rather than legality of their action failed to state a cause of action.

26. Appeal and Error ⚿103

Where judgment of dismissal entered after sustaining of demurrers was affirmed, attempted appeal from order striking last amended complaint would be dismissed.

◆

Morris Lavine, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Iver E. Skjeie, Deputy County Counsel, Los Angeles, for respondents Roger Jessup, Herbert Lagg, Leonard Roach, William A. Smith, deceased, County of Los Angeles.

Wm. J. Cusack, Los Angeles, for respondents Walter M. Briggs and Civic Center Auto Parks, a corporation.

LILLIE, Justice.

The plaintiff here appeals from a judgment of dismissal entered after the sustaining of demurrers, and from an order striking the fourth and last amended complaint. The original complaint bore the title, "Taxpayer's Suit for Diversion and Waste of Public Funds; Conspiracy to Damage; Conspiracy to Defraud; Negligence in Public Office; Conversion." The third and fourth amended complaints charged fraud and misrepresentation, gross negligence, conspiracy, intentional and wilful breach of statutory duty and delay in building a county courthouse; and sought to have the court declare a constructive trust of public monies collected from public properties by defendants Briggs and Civil Center Auto Parks.

The present controversy emanates from an action of the Board of Supervisors of Los Angeles County changing the location of the county courthouse from its first designated site on Temple Street to First and Hill Streets. It is claimed that this relocation was effected after the supervisors had wastefully expended $2,225,086.61, including planning, architects' fees and other expenses, for the Temple Street site. Plaintiff also complains of the board's action in leasing the original site after it had been acquired by the county to certain other defendants for use as a parking lot operated for profit.

It is appellant's contention that not one but several good causes of action have been stated in the fourth amended complaint and that it was error to dismiss the action. The several counts and amendments are based upon various legal concepts, but all seek to predicate liability upon the above facts. There is no particular controversy with reference to the various record steps which were taken in choosing and relocating the courthouse site. Appellant does, however, seek to make use of certain alleged inferences and conclusions which he claims to be indicative of misfeasance or malfeasance on the defendants' part.

Appellant claims his capacity to sue is derived from the fact that he is a taxpayer bringing the action on behalf of himself and all other taxpayers. He is also an attorney at law and submits that the defendants owed a duty to furnish proper courthouse facilities for judges, lawyers, litigants and the public.

A reading of the allegations contained in the third amended complaint discloses the following specified causes of action: (1) intentional breach of statutory duty and resulting damage to the taxpayers; (2) wilful neglect of public mandatory duty to build a courthouse; (3) intentional gross negligence in performance of public mandatory duty and failure to accord taxpayers due process by notice and hearing in the selection of a courthouse site; (4) fraud and misrepresentation by public officers aided and abetted by the parking lot defendants in selection and abandonment of the Temple Street site and resulting damage to taxpayers; (5) restitution of public monies wasted by defendants' actions; (6) to declare and impress a trust on the defendants' private property; (7) to declare the rights and duties of defendants in connection with the courthouse site; (8) to prevent impairment of obligation of contract in violation of article I, section 10 of the U. S. Constitution and to recover damages for the waste of taxpayers' money and property without due process of law; (9) injunction; (10) conversion and misappropriation of public funds in connection with abandonment of the Temple Street site; (11) prayer for a bill of peace and application of estoppel by judgment; and (12) for damages in the alternative and punitive damages.

Plaintiff's fourth amended complaint sought to amend the first cause of action by asking for damages for intentional and wilful breach of statutory duty and for delay in building the courthouse, and asked the court to declare a constructive trust of all monies collected from public properties, namely the income received from the Temple Street parking lot.

As a basis for plaintiff's alleged right of action, it is asserted that the supervisors are trust officers having the duties and liabilities of trustees; that there has been a breach of mandatory duty in the use of courthouse property for a private parking lot; that the defendants have violated the due process and impairment of contract provisions of the United States Constitution and have intentionally and/or negligently wasted the taxpayers' money. Not only are the defendants alleged to have breached statutory ministerial duties but they are also charged with conspiracy and "acts of oppression, fraud and malice, both express and implied," justifying an award of punitive damages.

The respondents argue that in the complaint as finally amended, appellant has included no allegation of any act, official or otherwise which (1) was not authorized by law; (2) did not follow prescribed modes; (3) constituted an illegal expenditure of funds; or (4) which was in any way wrongful or fraudulent. They also contend that appellant has, by a failure to discuss such matters, waived and abandoned any error in the rulings of the trial court. As pointed out by respondents, demurrers, both general and special, had been filed which challenged such vital matters as plaintiff's legal capacity to sue; improper joinder of actions and a failure to separately state various causes of action; misjoinder of parties defendant; lack of jurisdiction over the person of the defendant William A. Smith, deceased; uncertainty; and the statute of limitations.

[1] Fundamental is the principle that a reviewing court cannot be expected to prosecute an independent inquiry for errors, but will only notice those assignments properly brought to its attention. Philbrook v. Randall, 195 Cal. 95, 104, 231 P. 739. The basic reason for this rule is obvious since all persumptions and intendments must be indulged in favor of the judgment or order appealed from.

It is indeed problematical whether the appellant has sufficiently complied with the principle just stated. In some instances, important matters, challenged by demurrer or otherwise, have received little or no substantial discussion or answer at appellant's hands; in others there has been no more than a dogmatic assertion or a resort to unamplified conclusion. In certain instances there has been nothing more substantial than a generalization which seems to assume the existence of the very facts upon which any cause of action must rest. This is neither good pleading nor is it what the opposing parties have a right to expect.

Perhaps appellant may have answered some of his attacks by inference, if not by direct statement. The charge of uncertainty in the complaint, in itself a serious charge in the present case, may perhaps be deemed answered by appellant's general assertion of the existence of one or several causes of action and his amplification of this theme. The matter, however, is not free from doubt.

[2] It is true, as stated by the court in Kauffman v. Bobo & Wood, 99 Cal.App.2d 322, at page 323, 221 P.2d 750, 751, that: "pleadings and amendments thereto should be allowed and construed liberally with the object of affording every litigant his day in court and to render substantial justice between the parties." By way of the many amendments, appellant has been accorded this very right.

Notwithstanding the fact that there may well have been at least a technical abandonment or waiver of matters not discussed, nevertheless appellant will be given the benefit of the doubt so that the merits of the appeal may be considered. This leads to a survey of the complaint in its final amended forms, and to the conclusion that no cause of action has been stated therein.

[3–5] It is axiomatic that the title or label which embellishes a pleading does not determine the nature of the action therein; its legal effect depends upon the allegations set out. Shimmon v. Moore, 104 Cal.App.2d 554, 556, 232 P.2d 22. Quite as elementary is the proposition that pleadings must be read and construed as a whole. And, while a liberal interpretation is permitted by section 452 of the Code of Civil Procedure, yet it is also true that a pleading is to be construed most strongly against the pleader, and in the absence of a contrary allegation, no intendment can be indulged in that the pleader has not stated his case as strongly as it is possible to do. Scafidi v. Western Loan & Bldg. Co., 72 Cal.App.2d 550, 571, 165 P.2d 260. Known to every lawyer and needing no citation of authority these fundamental principles are nevertheless of importance in the present controversy, and especially so where, as here, the pleadings are voluminous in character.

[6, 7] The respondents readily concede, as indeed they must, that in a proper case trustees may be held liable for damage occasioned by their activities and that county supervisors are public trustees. In respect to their obligation to build a courthouse, the Supreme Court in County of Los Angeles v. Byram, 36 Cal.2d 694, at page 699, 227 P.2d 4, 7, stated: "There is no doubt that the duty of providing adequate quarters for courts is mandatory, explicit and imposed by law on the county. It has no choice in the matter." However, the court continued: "Such state law leaves to the boards of supervisors to determine, in each case, what is required to constitute 'suitable quarters.'"

[8] While this basic obligation is clearly recognized it does not follow that the supervisors were under duty to build a courthouse at any particular location, nor does there appear to be any prohibition against changing the building site once acquired and selecting one deemed more appropriate. The very authority to build carries with it the necessarily implied power to exercise discretion in the manner of building and in the selection of a proper site. It is difficult to imagine how a board of supervisors could efficiently act without such discretionary power.

In Simpson v. Hite, 36 Cal.2d 125, 130, 222 P.2d 225, 228, the Supreme Court, in discussing this matter, said: "It seems obvious beyond the reach of serious argument that the board of supervisors cannot perform the duty of providing 'suitable quarters' for the courts without selecting and designating the sites of the buildings to house the courts, as well as the character and size of the buildings. The determination of what is 'suitable' * * * necessarily includes the selection of a site. * * *"

The court, in the earlier case of Nickerson v. San Bernardino, 179 Cal. 518, 177 P. 465, 467, one of many cases expressing the same idea, held: "All these matters (purchase of land for a hospital site) were committed by the statute solely to the board, and their determination involved both legislative action and the exercise of discretion, neither of which was subject to review or control of any court. Whether, in the exercise of legislative powers, a board acts wisely or unwisely, is no concern of the courts."

Whatever the terminology employed in the various complaints, appellant's purported cause of action is predicated basically upon the supervisors' act in changing the courthouse location and the subsequent use of the site for a parking lot. But the authorities cited by him do not support appellant's contentions, nor do they furnish a basis upon which to predicate any legal cause of action. Such cases either deal with fundamental concepts about which there can be no controversy or they involve factual situations foreign to those set up in appellant's pleadings.

[9] Reason supports the proposition that officials should be free from the harassing and intimidatory effect which the constant threat of actions to impose civil liability would constitute. From this stems the long-established doctrine of immunity for actions involving an exercise of judgment and discretion.

[10] That supervisors, like other mortals, may act inadvisedly and that they are capable of committing serious errors which result in loss to public or private interests cannot be doubted. If such has been the case in respect to the supervisors' action in changing the courthouse site, and if money has been wasted, it should be borne in mind that such losses occur in private as well as public affairs. They do not, however, in and of themselves necessarily give rise to a cause of action. And so, appellant's allegations in respect to defendants' unwise actions resulting in the expenditure of much money do not supply the requisite material for a cause of action. This is more particularly true since these officials are clothed with a broad discretion in reference to their decisions.

In considering the propriety of the change of location it seems not unreasonable to consider that, due to a change of conditions, a board of supervisors might find it advisable to alter its original decision in respect to a courthouse site. Appellant himself has even suggested a plausible reason for a change by alleging that during the period in question Los Angeles County had experienced a great increase in population with a corresponding increase in court business. But regardless of the reason, no abuse of discretion has been pointed out save by innuendo.

[11] It seems obvious that such a discretionary power did not and could not fully expend itself with the original decision. In the selection of a site, being in the first instance a discretionary matter, such

power necessarily includes the discretion to relocate and reselect a new site where such action is deemed necessary. There is no reason why supervisors or other officials, not otherwise restricted by law, should be tied down by a restriction which would render them powerless to act in the best interests of the public.

[12] There is, of course, a presumption of the regularity of official conduct prescribed by section 1963, subdivision 15, Code of Civil Procedure. The appellant's complaint in its varied forms seems not to fully recognize the importance of this presumption and the corresponding duty of definitely alleging how and in exactly what manner the alleged facts rebut the existing presumption of regularity.

The case of Curtis v. City of Boston, 239 Mass. 401, 132 N.E. 181, in this respect parallels the instant one. With approval of the police commissioner, a site for a police station had been chosen and acquired. Thereafter, war conditions had rendered it inadvisable to build. It was held that the commissioner was not bound by the previous designation when he later determined that a greater area was necessary. The reviewing court, 132 N.E. at page 184, said: "A long time has since elapsed. The present requirement of the police commissioner must be presumed to be founded upon changed conditions rendering imperative larger accommodations." Although factually different from the instant controversy, the fundamental principle is clearly applicable.

[13] Nor does the pleader make out a case by stressing the later use of the original courthouse location as a parking lot. Having spent much money in acquiring the original location, the county officials, after deciding upon the change, may have sought to recoup the losses by leasing the property for parking purposes. Again the matter of discretion comes into play; again the presumption is that of regularity, not of irregularity, as appellant seems to infer. If there was fraud, conspiracy, or other acts of misfeasance or of malfeasance, it was appellant's duty to declare the same precisely so that the defendants would be enabled to determine the exact nature of the accusation to be faced in court.

In this connection may be noted, for purposes of analogy, the recent case of Arechiga v. Housing Authority of the City of Los Angeles, Cal.App., 324 P.2d 973, 975, decided by division two of this court on April 24, 1958. Therein the reviewing court said: "Property acquired in fee simple by a public body for a particular public purpose may nevertheless be diverted to another use. Ritzman v. City of Los Angeles, 38 Cal.App.2d 470, 10 P.2d 541; Reichelderfer v. Quinn, 287 U.S. 315, 53 S.Ct. 177, 77 L.Ed 331. * * * The reason underlying this principle is that it enables public bodies to meet changing conditions."

[14, 15] Appellant's contention that the complaint as amended presents a case involving the due process provisions of the Constitution is untenable. There is no statutory provision which requires the giving to taxpayers of notice of a hearing in respect to the selection of a courthouse site. Sections 25080 and 25081 of the Government Code merely require that the selection shall be made at a regular public meeting of the board of supervisors. This was done and was all that the appellant had a right to demand or expect. The due process requirement is not an academic, exacting one in which the citizen or taxpayer may demand a notice or a hearing of his own making. Whatever the requirement may be in other situations, no cogent reasons appears why the plaintiff taxpayer herein should receive special notice, or a special hearing, particularly where the matter is one of a discretionary nature. The Supreme Court of the United States, in the case of Rindge Co. v. County of Los Angeles, 262 U.S. 700, 43 S.Ct. 689, 693, 67 L.Ed. 1186, with reference to condemnation and notice of a hearing as to adoption of a resolution of necessity by the county, made this statement: "a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment. * * * The question is

purely political, does not require a hearing, and is not the subject of judicial inquiry."

[16] Nor is there merit in appellant's argument that respondents' action violated constitutional prohibitions against impairment of contract rights or those protected by the federal civil rights statute. The pleadings are indefinite or silent as to what contract rights the pleader may have had in mind. No contracts are involved save those for courthouse plans and there is nothing to indicate that these were not fulfilled; even a breach thereof would not necessarily involve the principles just mentioned. The building of a courthouse is a matter of statewide concern as appellant alleges, but it does not follow that any taxpayers' rights, contractual or otherwise, have been impinged upon.

[17] The right of a public body to rescind its action and abandon improvement proceedings without other liability than that flowing from a breach of contract has been recognized in various cases, such as Brooks v. City of Gilroy, 219 Cal. 766, 29 P.2d 212. This was an action by an engineer to recover for services rendered in connection with certain improvement work. Although the city had a city engineer, the court held it had the power to appoint an engineer for the improvements in question after declaring the office of city engineer vacant and the contract so made with the second engineer was declared legal. The present controversy, of course, is not an action for breach of contract but one making far more serious charges.

[18, 19] The pleader's bald assertions seeking to predicate liability on vague charges of negligence, wilful neglect of public duty, failure or neglect to take proper precautions to determine the proper site for a courthouse, unwarranted delay, and similar allegations, add little or nothing to the sum total. The purpose of a complaint is to furnish the defendants with certain definite charges which can be intelligently met. Mere general assertions by way of conclusion or those indefinite in character, such as here presented, cannot be deemed sufficient compliance with the long-established rules of pleading.

The same may be said in respect to the employment of such terms as fraud, misrepresentation, bad faith, oppression, malice, and the like, found in appellant's complaints. Use of such terminology cannot cure a failure to point out exactly how or in what manner the defendants have transgressed. Did they do something not authorized by law or accomplish some purpose by other than prescribed and legal methods? The answer is not in appellant's complaints.

[20] There appears to be, rather, an attempt to create a general impression that the defendants' acts, ostensibly complying with law, were, nevertheless, part of a gigantic conspiracy to acquire the Temple Street site for alleged courthouse purposes and thereafter lease the same for profitable parking uses. These are broad and bold assertions, easily made, but not legally sufficient. This is not to say that officials may not or should not be held responsible for their nefarious acts—quite the contrary. The point is that the accuser must place his finger squarely and directly upon whatever dereliction is relied upon. Fraud and conspiracy are actionable, but the mere use of such terms is not enough. The facts constituting bad faith or fraud must be specifically alleged. People v. Milton, 35 Cal.App.2d 549, 96 P.2d 159.

[21, 22] Appellant's claimed cause of action is neither created nor enhanced by the allegations and prayer relating to declaratory relief. While this remedy is a most valuable one in a proper case, and possessed of considerable latitude, it is by no means a catchall. Without facts other than those here alleged, its application is not called for. Moreover, as was the situation in Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 489, 110 P.2d 396, 399, "all of the acts of which he complains were concluded before his suit was commenced. * * * These allegations do not measure up to the requirements of an action for declaratory relief, and the superior court properly re-

fused to exercise its power to entertain the complaint upon that count. Code Civ.Proc., secs. 1060, 1061. * * * a judgment refusing to entertain a complaint for declaratory relief is not reviewable upon appeal except for an abuse of discretion, which is not here shown. Cutting v. Bryan, 206 Cal. 254, 274 P. 326."

[23, 24] As hereinbefore indicated, the pleader's use of terminology relating to trusts, whether express, implied, or constructive, deals with generalities not disputed, but conversely fails to pin down any specific conduct on defendants' part which will bring into play the principles urged. A cause of action is not created by the mere use of legal, generic, or other terms, and this principle applies to much of the appellant's pleading. The appellant's prayers for injunction, a bill of peace and application of estoppel by judgment, punitive damages, etc., likewise add nothing to the sum total nor do they serve to state a cause of action in the absence of a definitive statement of actionable facts.

It will serve no useful purpose to further discuss the individual words and phrases utilized in appellant's complaints. Rather, the sum total of the variant terminologies employed and the legal significance thereof is important in determining the propriety of the trial court's action. Whatever the language employed and whatever rationalization may be attempted, the over-all picture is that of a blending of indefinite charges and unsupported conclusions which fail to state a cause of action.

[25] Considering the allegations as an entirety rather than piecemeal, and giving the same every reasonable intendment, appellant is here seeking to effect a judicial interference with discretionary powers without a sufficient showing of any abuse of such discretion or other actionable conduct. The attack is rather on the wisdom of the action taken than on its legality. As hereinbefore indicated, a cause of action, if any there be, must arise from something other than an unwise decision. Otherwise than by unsupported inference, no definite cause of action on any plausible theory stands alleged in any of the five complaints presented, whether considered separately or in combination. The disposition made by the trial court was therefore justified and no abuse of discretion is apparent.

[26] The attempted appeal from the order is dismissed and the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

50 Cal.2d 383

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edward Simon WEIN, Defendant and Appellant.

Cr. 6130.

Supreme Court of California,
In Bank.
May 27, 1958.
As Modified on Denial of Rehearing
June 25, 1958.

Defendant was convicted of robbery, rape, sex perversion, kidnapping, and kidnapping for the purpose of robbery. The Superior Court of Los Angeles County, LeRoy Dawson, J., rendered judgment and defendant appealed. The Supreme Court, Spence, J., held, inter alia, that the conduct of the prosecutor on voir dire examination and in argument was in no way prejudicial to the rights of the defendant.

Affirmed.

Carter, J., dissented.

1. Jury ⚷131(8)

A prosecutor, in a case where death penalty may be imposed, clearly has right to ascertain views of potential jurors on capital punishment so that he can intelligently exercise challenges against those whose consciences would preclude them from imposing the penalty. West's Ann. Pen.Code, §§ 209, 1074.

2. Jury ⚷131(13)

Prosecutor, during voir dire examination, could properly explain law applicable to case and could use explanation as basis for hypothetical questions to determine whether jurors would follow instructions of court and to ascertain their states of mind on issues to be presented.

3. Jury ⚷131(13)

Prosecutor's statement that he represented all people of state and not merely victims or police was proper as a remark of public officer informing panel of his functions.

4. Criminal Law ⚷1037(1)

Where defendant failed to object to alleged improper remarks of prosecutor during voir dire examination, he could not successfully make his protest thereto for the first time on appeal, since any danger that the jury might have misunderstood the remarks could have been alleviated by proper instructions.

5. Criminal Law ⚷713

Argument should be addressed to jury as a body, and practice of addressing individual jurors by name, during argument, should be condemned rather than approved, though the practice is not necessarily prejudicial in every case.

6. Criminal Law ⚷713

Prosecutor may properly urge his points vigorously as long as he does not act unfairly, and he may thus vigorously urge the jury to convict and impose the death penalty in the light of the evidence.

7. Criminal Law ⚷713

Prosecutor may use appropriate epithets which are warranted by the evidence without being chargeable with prejudicial misconduct.

8. Criminal Law ⚷1037(1)

Prosecutor's argument, in which he referred to one or more jurors by name on three separate occasions, and in which he vigorously urged the jury to impose the death penalty and in which he referred to the defendant as being among that strange breed of kidnappers, robbers and forcible rapists, was not a ground for reversal of conviction where it was not objected to at the trial, since any possible harmful effect of the comments therein could have been obviated by a timely admonition to the jury and since the evidence was not closely balanced it did not present any grave doubt as to the defendant's guilt. West's Ann.Pen.Code, §§ 209, 1074.

9. Criminal Law ⚷1171(1)

In prosecution for robbery, kidnapping, rape, and sex perversion, even if prosecutor transcended bounds of legitimate argument when he stated that the defendant made another individual look like amateur by comparison, his remarks did not warrant a reversal of conviction since the evidence of defendant's guilt was so strong that there was no reasonable probability that any result more favorable to defendant would have been reached in the absence of the claimed misconduct. West's Ann.Pen.Code, §§ 207, 209, 211, 261, subd. 3, 288a.

10. Criminal Law ⚷1171(1)

A prosecutor's remarks that a sentence of life imprisonment without possibility of parole would not necessarily mean that defendant would remain in prison for the remainder of his life but that the sentence might be commuted by the Governor, that a pardon could be granted by him or that the Legislature might enact a law changing the punishment, where such remarks could only have been taken by jurors as factors to be considered in assessing penalty, were not prejudicial.

11. Criminal Law ⚷1159(2)

It is not the function of an appellate court in a criminal case to reweigh the evidence.

12. Criminal Law ⚷553

In prosecution for, inter alia, rape and sex perversion, evidence was insufficient to sustain the defendant's contention that it had been physically impossible for him to have performed the acts ascribed to him or to sustain his contention that the numerous asserted victims' testimony to the effect that he had performed the acts was inherently improbable. West's Ann.Pen. Code, §§ 261, subd. 3, 288a.

13. Kidnapping ⚷1

It was not the intention of the Legislature, in enacting the statute permitting imposition of death penalty against any person kidnapping an individual, if such individual suffers bodily harm, that the movement be over any substantial distance rather than merely between the rooms of the dwelling. West's Ann.Pen.Code, § 209.

14. Criminal Law ⚷13

The statute which permits imposition of death penalty against any person who kidnaps an individual if such individual suffers bodily harm is not invalid under claimed infirmity of not conveying fair notice as to what acts are prohibited thereby but rather the statute contains terms well enough known to enable a defendant to understand their import. West's Ann. Pen.Code, § 209.

15. Criminal Law ⚷13

A statute to validly apprise a defendant of what acts are prohibited does not need to include detailed plans and specifications of the proscribed conduct.

16. Criminal Law ⚷407(2)

Testimony of asserted victim of defendant that, after she had identified him in a "line-up" in jail that she, at request of police, confronted him and stated "Well, I'm glad they caught you, kid," was correctly admitted in order to permit jurors to evaluate its accusatory nature and the weight to be accorded to defendant's failure to make any reply.

17. Criminal Law ⚷1036(1)

Admission of testimony of asserted victim of defendant that, at behest of police officers, she had asked defendant several questions and that he had cast his eyes toward the floor and stated that he would not answer questions unless he had attorney present, though it might well have been excluded if objected to at trial, formed no ground for reversal where complained of for first time on appeal.

18. Criminal Law ⚷1037(1)

A defendant may not successfully make, on appeal, his first attack on arguments of prosecutor with regard to admissions where any error therein could have been obviated at the trial.

19. Criminal Law ⚷781(2)

In prosecution for robbery, rape, sex perversion, and kidnapping, evidence warranted the giving of standard instructions defining an admission and stating the effect of silence or of a false or evasive reply. West's Ann.Pen.Code, §§ 207, 209, 211, 261, subd. 3, 288a.

20. Criminal Law 🔑778(10)

In prosecution for robbery, rape, sex perversion, and kidnapping, evidence warranted the trial court's giving the standard instruction on consciousness of guilt and falsehood. West's Ann.Pen.Code, §§ 207, 209, 211, 261, subd. 3, 288a.

21. Criminal Law 🔑814(3)

In prosecution for, inter alia, rape, the giving of standard instruction to the effect that neither prosecution nor defense is required to produce all available evidence could not be held erroneous on any theory that it was inapplicable because of the prosecution's failure to produce available witnesses. West's Ann.Pen.Code, § 261, subd. 3.

22. Criminal Law 🔑829(16), 1172(2)

In prosecution for robbery, kidnapping, rape and sex perversion, the giving of the standard instruction on contradictory statements, with its clause applicable when a defendant is a witness, did not prejudice the defendant by unduly emphasizing contradictions made by him and the court was not required to give a general instruction, other than the standard one, pertaining to credibility of all witnesses.

23. Criminal Law 🔑810

In prosecution for, inter alia, kidnapping and kidnapping for purpose of robbery, instruction properly and clearly charged jury's absolute discretion in imposition of either death penalty or confinement for life without possibility of parole, if jury found that defendant had kidnapped for purpose of robbery, with resultant bodily harm, and permitted jury to take all evidence into consideration on that inquiry alone, and other instructions were not such that they could have confused or misled the jury in that respect. West's Ann.Pen.Code, §§ 207, 209.

24. Criminal Law 🔑796

The statute providing that where a person subjected to kidnapping suffers bodily harm, kidnapper shall, upon conviction, suffer death or be punished by imprisonment for life without possibility of parole, at discretion of jury, sets no limits upon the evidence which jury may consider in determining punishment, and in case where defendant is charged on several counts, court is not required to charge that jury may refer only to evidence introduced on a particular count but may properly charge that jury has absolute discretion in imposition of either death penalty or confinement without possibility of parole. West's Ann.Pen.Code, § 209.

25. Criminal Law 🔑796

In prosecution for, inter alia, kidnapping resulting in bodily harm, charge that insofar as selecting penalty, whether death or life imprisonment without possibility of parole, law does not prescribe or authorize court to innovate any rule circumscribing exercise of jury's discretion, but rather commits whole matters to exercise of judgment and conscience of jurors, was proper. West's Ann.Pen.Code, § 209.

26. Criminal Law 🔑824(14), 1173(2)

In prosecutions for sex offenses, even if such an instruction is not requested, it is incumbent on the court, on its own motion, to charge that accusations of such matters are easily made and difficult to disprove and that the testimony of the prosecuting witnesses should be carefully examined; however, the failure to give such instructions is not always prejudicial error. West's Ann.Pen.Code, §§ 261, subd. 3, 288a.

27. Criminal Law 🔑1173(2)

In prosecution for, inter alia, rape and sex perversion, the failure of the court to charge that accusations of sex offenses are easily made but difficult to disprove and thus the testimony of prosecuting witnesses should be carefully examined, where such charge was not requested, was not prejudicial error, in view of the weight of the evidence against defendant. West's Ann.Pen.Code, §§ 261, subd. 3, 288a.

28. Criminal Law 🔑680(1)

Order of proof rests largely in sound discretion of trial court.

29. Criminal Law ⚷1036(1)

Where desirability of admitting testimony at questioned point may be debatable, no abuse of discretion on part of trial court will be found when court has not had point brought to its attention.

30. Criminal Law ⚷1168(2)

In prosecution for, inter alia, kidnapping, robbery and rape, even if district attorney or his aids indulged in proscribed withholding of matter properly belonging to their case in chief, where, though they had information two days prior to the close of the case in chief of evidence of an asserted fingerprint of defendant on a glass at home of an asserted victim, the matter was held for rebuttal, the procedure did not warrant reversal of conviction, as defendant was granted additional time to meet testimony and it merely corroborated other direct testimony of asserted victims. West's Ann.Pen.Code, §§ 207, 209, 211, 261, subd. 3, 288a.

31. Constitutional Law ⚷257
Criminal Law ⚷270, 623

Procedure under Penal Code sections providing for bifurcated trials on issues of guilt and insanity, whereby prospective jurors are examined on views on issue of insanity during their selection at the beginning of the trial, though the issue of insanity is tried by jury only after it finds the defendant guilty, does not operate to unconstitutionally deny a defendant a fair trial or due process of law on any theory that jury could only believe he admitted guilt by offering plea of insanity or that it could not give him impartial trial on insanity issue after being so examined in trying issue of guilt. West's Ann.Pen. Code, §§ 1016, 1026.

32. Criminal Law ⚷286

Record failed to support contention of convicted defendant that withdrawal of his plea of not guilty by reason of insanity had been forced upon him or that he had not been sufficiently advised of the consequences of his decision thereon which he had made in judge's chambers upon being denied a separate trial on issue of insanity and being informed that voir dire examination of jurors on matters touching insanity was required to be done before the trial on the issue of guilt. West's Ann. Pen.Code, §§ 1016, 1026.

33. Criminal Law ⚷1177, 1209

Though it was improper to sentence defendant separately for kidnapping and for robberies and sex crimes, which, under the circumstances, were essential parts of kidnapping violations, as such procedure amounted to double punishment condemned by statute, where defendant was otherwise subject to five validly imposed death sentences, judgment would not be reversed because of the erroneous double punishment. West's Ann.Pen.Code, §§ 207, 209, 211, 261, subd. 3, 288a, 654.

34. Criminal Law ⚷641(1)

Handling of defense by counsel of accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such lack of diligence and competence as to reduce trial to a farce or sham. U.S.C.A.Const. Amend. 14, § 1.

35. Constitutional Law ⚷268
Criminal Law ⚷1166½(1)

Any mistakes which a defense counsel of the accused's own choice may make respecting strategy employed at trial cannot constitute a denial of due process of law or allow a reversal of the conviction. U.S.C.A.Const. Amend. 14, § 1.

36. Criminal Law ⚷1110(1)

Defendant was not entitled to augment record on appeal by inclusion of certified copy of minutes of Municipal Court before which his preliminary examination was conducted where he made no showing that minutes were ever used in proceedings in Superior Court or that they ever became a part of that court's record. West's Ann.Rules on Appeal, rule 12(a).

37. Criminal Law ⚷1031(1)

Defendant cannot claim for first time on appeal that he was not seasonably brought before magistrate.

Russell E. Parsons, Beverly Hills, and Henry E. Kappler, Los Angeles, for appellant.

Louis Licht, Los Angeles, as amicus curiae on behalf of appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Ray R. Goldie and Joe Yasaki, Deputy Attys. Gen., for respondent.

SPENCE, Justice.

Defendant was charged by information with three counts of robbery (Pen.Code, § 211), six counts of rape (Pen.Code, § 261, subd. 3), six counts of sex perversion (Pen.Code, § 288a), two counts of kidnaping (Pen.Code, § 207), and five counts of kidnaping for the purpose of robbery (Pen. Code, § 209). Defendant initially entered pleas of not guilty and not guilty by reason of insanity, but he withdrew the latter plea prior to trial. The jury found defendant guilty on all the counts charged in the information. They further found that in each count charging kidnaping for the purpose of robbery, the person named therein suffered bodily harm, and they fixed the penalty at death; and that in each count charging robbery, the crime was in the first degree. A motion for a new trial was denied. Defendant was sentenced to death on the five counts of kidnaping for the purpose of robbery done with bodily harm, and to the state prison for the term prescribed by law on each of the remaining counts, the last mentioned sentences to run consecutively. This appeal from the judgments of death comes before us automatically. Pen.Code, § 1239, subd.(b). Defendant's present counsel have been substituted for his trial counsel for the purpose of this appeal.

These convictions arose out of separate attacks on eight different women, which attacks occurred over a period of approximately eighteen months. It would serve no useful purpose to relate all the sordid facts surrounding the commission of the several offenses. The evidence concerning the last incident will be set forth in some detail, as it typifies the general pattern which ran through most of the attacks with but slight variations.

On October 30, 1956, the last victim advertised some furniture for sale in several newspapers circulated in the Los Angeles vicinity, giving her telephone number but not her address. She occupied a lower apartment in a house located in the Hollywood hills. At about noon on October 31, 1956, she received a telephone call from a man in response to the advertisement, and she made an appointment for him to see the furniture that afternoon. The man arrived at about 2:30 p. m. and identified himself as the party who had called earlier that day. A friend of the victim was present at her apartment when he arrived. He indicated that he was interested in beds and accompanied the victim into the bedroom to examine them. After seeing and discussing the furniture for 10 to 15 minutes, the man left, saying that he would either call or return after visiting another place. The victim drove her friend home at about 3:30 p. m. and returned to her apartment at about 3:45 p. m.

About five minutes after her return, the man reappeared at the apartment and said that he wanted to measure one of the beds to see if it would fit his living quarters. After measuring the bed, he stated that he would like to call his wife and have her view the furniture. With the victim's permission, he used her telephone, and after dialing a number and apparently getting no response, he hung up.

The man then looked at his watch and told the victim that he had lost his watch stem. She sympathized with him and got down on the floor in the small hall just outside the living room to help him look for it. Being unable to find the stem, she started to get up. The man, who was then behind her, put his arm around her waist and told her to say nothing. She felt something sharp in her back and discovered that it was a knife. He instructed her to lie down and then tied her hands with copper wire.

He then told the victim to find her billfold, and after helping her up, told her that he wanted only money and that he would not hurt her. She could not remember exactly where she had last placed her billfold. With his arms around her and the knife in her back, he forced her against her will and without consent to walk with him to a desk in the living room. This was a distance of approximately 20 to 25 feet. He opened the desk drawer but the billfold was not there. He told the victim to crawl on her knees through the living room to the bedroom, a distance of about 50 feet, and she complied out of fear. She told him to look in the dresser drawers. He found the billfold, and placed it and the $17 or $18 it contained in his pocket.

The man then pushed the victim to the floor and said, "Now I have got the money, how about some sex?" He then removed the clothing from the lower portions of her body, exposed his private parts, and forced her to engage in an act of oral copulation (Pen.Code, § 288a) while he brandished a knife. Thereafter, and without her consent, he indulged in an act of sexual intercourse.

The telephone then rang and the occupants of the upstairs apartment started to walk around. The man said that he was going to leave. He made the victim lie on the floor on her stomach, tied her legs with her hose, and shoved her undergarments into her mouth. He then picked up a towel and ripped it, using the larger portion to wipe the floor, drawers and door knobs. He tied the other part of the towel around her mouth and covered her head with another towel. After he had left, she struggled and was able to free her hands and feet. She then summoned the police.

The seven other incidents reflect in varying degrees the same techniques and show a consistent pattern of operations used by the perpetrator of these crimes. In each case, either rentals of living quarters or sales of personal property had been advertised in the newspapers. In all but one, he gained entrance on the pretext that he was answering the advertisement. He would often use some ruse to survey the premises for other occupants, such as asking to wash his hands in the bathroom, viewing the items for sale, or making a telephone call. In several instances, he left after finding some impediment to his scheme, later returning at a more opportune time. In some, he pretended to call his wife or girl friend to have her join in the selection. He feigned that he had dropped a watch stem in six cases and a watch crystal in another. He grabbed the victims from behind and threatened them with a knife. Their hands were tied with copper wire in several cases, and their legs were bound with their own stockings. In many ways, the methods that he employed in forcing the victims to part with their money and, in most instances, to submit to his lustful desires were strikingly similar. Of course, all the similarities did not appear in every case. The sexual molestations varied in degree and did not occur at all in one case. During one attack, the assailant and another man were present. Nevertheless, there can be little doubt that the same man committed all of the numerous crimes charged.

Defendant was connected with these offenses in several ways. Seven of the victims positively identified him as their assailant. The eighth said he looked like the same man. Beyond these identifications, there were four other phases of the evidence corroborating the victims. First, a man transacting business with one of the victims clearly identified defendant as the person who was with her the night before she was molested. Second, a car which defendant had borrowed from a friend was seen parked in the driveway of the residence of one of the victims by two witnesses who recognized the vehicle by the lettered part of the California license plate and the somewhat unique brand of tires on it. Third, defendant was identified as the man who answered an advertisement for the sale of a used kitchen range and who left a check in payment. A handwriting expert testified that defendant was the person who wrote the check. There was no attack involved in the last mentioned incident. Fourth, expert witnesses testified that a fragmentary fingerprint found on a water glass, used by the assailant at the home of one of the victims, was the fingerprint of defendant.

Defendant denied that he had committed any of the offenses. Witnesses were called to testify to his good reputation. He also presented testimony indicating that he was at other locations during the time that three of the offenses had been committed.

Conduct of Prosecuting Attorney During Voir Dire Examination.

[1] Defendant contends that the deputy district attorney was overly zealous in questioning the prospective jurors. He primarily objects to the examination of the jurors about their opinions on capital punishment and to the discussion of their responsibility for imposing the death penalty if warranted by the facts of the case. However, a prosecutor in a case where the death penalty may be imposed clearly has the right to ascertain the views of the potential jurors (see People v. Hoyt, 20 Cal.2d 306, 318, 125 P.2d 29; People v. Rollins, 179 Cal. 793, 795–796, 179 P. 209) so that he can intelligently exercise his challenges against those whose consciences would preclude them from imposing this penalty. See Pen.Code, § 1074, subd. 8; People v. Riser, 47 Cal.2d 566, 573–576, 305 P.2d 1.

[2] Defendant also deems portions of the prosecutor's explanation of the law applicable to the case to have been prejudicial. However, the prosecutor properly used such explanation as a basis for hypothetical questions to determine whether the jurors would follow the instructions of the court (Kramm v. Stockton Electric R. Co., 22 Cal.App. 737, 746–747, 136 P. 523) and to ascertain their state of mind on the issues to be presented. People v. Knight, 44 Cal.App.2d 887, 891–893, 113 P.2d 226.

[3, 4] Defendant challenges the prosecutor's remarks, to the effect that he represented all of the people of this state and not just the victims or police, as being calculated to impress the jurors with the importance of his position and to cause them to give undue weight to his actions. However, it was entirely proper for this public officer to inform the panel of his functions. In effect, he did little more than to state general theories underlying criminal prosecutions. In any event, since defendant failed to object to any of the alleged improper conduct during the deputy district attorney's examination of the veniremen, he cannot now complain for the first time as, upon objection, any danger that the jury might have misunderstood their duty could have been corrected by proper instructions. People v. Brice, 49 Cal.2d 434, 317 P.2d 961; People v. Guasti, 110 Cal.App.2d 456. 465, 243 P.2d 59.

Conduct of Prosecuting Attorney during Arguments.

[5–8] Defendant raises numerous objections to the deputy district attorney's arguments to the jury and states that the alleged misconduct denied him a fair trial as guaranteed by both the state and federal Constitutions. He claims that the jurors were "whipped" into their recommendation of the death penalty. This, in his view, was apparently produced by the prosecutor calling the jurors by their names, by taking them to task, and by using epithets. However, his conclusions entirely overstate the actual situation. It is true (1) that the deputy district attorney did refer to one or more jurors by name on three separate occasions; (2) that he did vigorously urge the jury throughout his arguments to impose the death penalty; and (3) that he did use "epithets" when he referred to defendant as being among that "strange breed" of "kidnapers, robbers and forcible rapists." With respect to the first point, while arguments should be addressed to the jury as a body and the practice of addressing individual jurors by name during the argument should be condemned rather than approved, it does not follow that such conduct is necessarily prejudicial in any given case. With respect to the second point, while the accused is entitled to a fair trial, the prosecutor may properly urge his points vigorously as long as he does not act unfairly; and therefore he may vigorously urge the jury to convict and to impose the death penalty in the light of the evidence. People v. Harris, 219 Cal. 727, 732–733, 28 P.2d 906. And with respect to the third point, the prosecutor may use appropriate epithets which are warranted by the evidence without being chargeable with prejudicial misconduct. People v. Carr, 113 Cal. App.2d 783, 788, 248 P.2d 977; People v. Hunter, 49 Cal.App.2d 243, 250–251, 121 P.2d 529; People v. Burnette, 39 Cal.App. 2d 215, 230, 102 P.2d 799. In any event, no objection was made in the trial court to any of the above conduct or to certain other matters of which defendant now complains, and no instructions were asked with respect thereto. We have consistently rejected such claims when the point is raised for the first time on appeal. People v. Hampton, 47 Cal.2d 239, 240–241, 302 P.2d 300; People v. Byrd, 42 Cal.2d 200, 208, 266 P.2d 505. Furthermore, this is not a case where any possible harmful effect of the comments could not have been obviated by a timely admonition to the jury (see People v. Kirkes, 39 Cal.2d 719, 726–727, 249 P.2d 1) or where the evidence was so closely balanced, presenting grave doubt as to defendant's guilt, that the prosecutor's argument materially affected the outcome. People v. Fleming, 166 Cal. 357, 381, 136 P. 291.

[9] There was one instance during the prosecutor's argument, however, where he may have strayed beyond the bounds of permissible argument and where a prompt objection was made by defendant's counsel. The prosecutor said, in part, "Why, this fellow puts Caryl Chessman to shame. He makes a rank amateur out of Caryl Chessman." At this point, the defense counsel cited this as prejudicial misconduct and requested that the jury be instructed to disregard it. The prosecutor then asserted his right under People v. Kynette, 15 Cal.2d 731, 104 P.2d 794, to proceed along these lines and the court permitted him to do so. He then contrasted Chessman's attacks from an automobile disguised as a police vehicle operating in the relative open of the public streets with defendant's assaults in the victims' homes. He then said, "Chessman, too, had ice water in his veins. That little girl [the fourteen-year-old victim in this case] * * * will carry a mark on her forever. She may end up the same way Mary Alice Meza, the 17-year-old virgin, the victim of the Chessman attack, in a mental institution unless she has a strong mind and can in some way through her religious thinking beat it." He then concluded that the death penalty was deserved because the defendant displayed the "* * * behavior pattern of a cold cruel individual with ice water in his veins."

The People attempt to justify the quoted argument, as did the prosecutor at the trial, by referring to People v. Kynette, supra. There it was said: "Counsel may illuminate his argument by illustrations which may be as various as the resources of his talents. He may refer to matters of common knowledge, not special to the case, and to well known historical incidents." 15 Cal.2d 731, 757, 104 P.2d 794, 808. It appears, however, that the comments here were more similar to those criticized in People v. Jackson, 44 Cal.2d 511, 282 P.2d 898. There the prosecutor in a kidnaping case referred to the Greenlease, Hart, and Lindbergh cases, and compared the ultimate fate of the victims. 44 Cal.2d 511, 520, 282 P.2d 898. But even assuming that the prosecutor here went beyond the bounds of legitimate argument in his comparison of this case with the Chessman case, it does not follow that a reversal is required. It was not claimed on the trial or on this appeal that the perpetrator of the several offenses should have had imposed upon him any punishment less than that which the jury imposed. Defendant's sole claim was that he was not the perpetrator. We have reviewed the record, and such review convinces us that the evidence of defendant's guilt was so strong that there is no reasonable probability that any result more favorable to defendant would have been reached in the absence of the claimed misconduct. Under such circumstances, the claimed misconduct does not constitute ground for a reversal. People v. Watson, 46 Cal.2d 818, 837–838, 299 P.2d 243.

Argument of Prosecuting Attorney as to Meaning of Life Imprisonment without Possibility of Parole and Legislative Abolition of Death Penalty.

[10] Defendant asserts that it was prejudicial error for the deputy district attorney to have stated both in his *voir dire* examination of the jury and his closing argument that a sentence of life imprisonment without possibility of parole would not necessarily mean that defendant would remain in prison for the remainder of his life. He pointed out that any such sentence could be commuted by the Governor, that a pardon could be granted by the Governor, or that the Legislature might enact a law changing the sentence. In People v. Chessman, 38 Cal.2d 166, 189–190, 238 P.2d 1001, the identical remarks, both in the argument by the prosecutor and the explanatory instructions by the court, were sanctioned insofar as they were addressed to the discretion of the jury in specifying the punishment for kidnaping for the purpose of robbery where the victim suffered bodily harm. See also People v. Reese, 47 Cal.2d 112, 116–117, 301 P.2d 582; People v. Jensen, 43 Cal.2d 572, 580–581, 275 P.2d 25; People v. Byrd, supra, 42 Cal.2d 200, 206–208, 266 P.2d 505. When the deputy district attorney's remarks are read in full, it is quite apparent that they could only have been taken by the jurors as factors to be considered in assessing the penalty. The case of People v. Morlock, 46 Cal.2d 141, 147–148, 292 P.2d 897, relied upon by defendant, is clearly distinguishable. There, the prosecutor erroneously stated that a person sentenced to life imprisonment was eligible for parole *within* seven years rather than after having served seven years. Equally unavailing is People v. Caetano, 29 Cal.2d 616, 619–620, 177 P.2d 1, since the only comments there held improper were to the effect that paroles might be granted without regard to merit in order to provide space for incoming prisoners.

Defendant also maintains that the deputy district attorney's reference to the Legislature's consideration of a bill proposing a moratorium on the death penalty may have harmed him by leading the jurors to believe that he would benefit from such a suspension. However, the deputy district attorney made it abundantly clear that he did not believe that any such moratorium would be adopted. He merely used this to show how changes in penalties could be sought in amplification of his remarks on the uncertainties of a sentence to life imprisonment without parole.

Sufficiency of Evidence.

[11] Defendant argues that there was ample evidence to have supported a verdict of acquittal, and he buttresses this conclusion by marshaling those facts which tend to show his innocence. He then characterizes parts of the People's expert testimony as "highly suspect." From this, he expresses the belief that the jury might well have accepted his alibi except for the "grossly prejudicial" conduct of the prosecutor. Insofar as this again raises the question of prejudice from the prosecutor's actions, this has been fully considered. Insofar as it challenges the sufficiency of the evidence, defendant is merely asking us to reweigh the evidence. This is clearly not our function as an appellate court. See People v. Daugherty, 40 Cal.2d 876, 885, 256 P.2d 911; People v. Headlee, 18 Cal.2d 266, 267, 115 P.2d 427; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467. Further, even though there might have been sufficient evidence to sustain a finding of not guilty, this in no way shows that the verdict of guilty was without abundant evidentiary support.

[12] Finally, defendant attempts to show that some of the evidence was so highly improbable as to be incredible and to thus allow an appellate court to set aside the conviction. See People v. Headlee, supra, 18 Cal.2d 266, 115 P.2d 427. He says that, as a small man with an injured back, he would have been unable to seize a wom-

an, tie her, and then rape her. The jury only had defendant's own testimony as to the condition of his back, but they did have a full view of his stature and the relative stature of the victims. It was within their province to reject his statements, as they apparently chose to do. They evidently believed the testimony of the various women whom he had abused. The conflict in the evidence was resolved by the triers of fact. There is nothing in the record to establish that it was physically impossible for defendant to have performed the acts ascribed to him, or to compel us to declare that the numerous victims' testimony was inherently improbable. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; People v. Wilder, 151 Cal.App.2d 698, 704–705, 312 P.2d 425.

Extent of Movement Required to Establishing Kidnaping Under Penal Code, Section 209.

[13] Defendant urges that the Legislature in enacting section 209 of the Penal Code, which permits the imposition of the death penalty against "any person who kidnaps or carries away any individual to commit robbery" if the victim suffers bodily harm, intended that the movement be over a substantial distance and not merely between the rooms in a dwelling. He expressly asks this court to reconsider the position it took in People v. Chessman, supra, 38 Cal.2d 166, 190–193, 238 P.2d 1001. There we said, "The fact that Regina in being kidnaped or carried away was forced to move only 22 feet does not make her abduction any the less kidnaping within the meaning of the statute. She was taken from the car of her chosen escort, and from his company, to the car of defendant and into the latter's company and there detained as a virtual prisoner and forced to submit to his demands. It is the fact, not the distance, of forcible removal which constitutes kidnaping in this state." 38 Cal.2d 166, 192, 238 P.2d 1001, 1017. We there reviewed the California cases and those from other jurisdictions where kidnapings were held to exist although the asportations were not great. Here, the testimony of some of the victims fixed the amounts of movement at distances ranging from a few feet up to more than 50 feet. Under the reasoning and language of the Chessman case, any of these distances sufficed for a conviction under the challenged section. This conduct went beyond a mere detention during the course of an armed robbery, which is no longer punishable by death. See People v. Taylor, 135 Cal.App.2d 201, 286 P.2d 952. To the extent that defendant's argument is predicated on legislative intent, it must be noted that the Legislature has been in session several times since the Chessman case was decided, and it has not seen fit to amend the kidnaping law to limit the rule we announced. If the section, as interpreted by this court, is regarded as too harsh, the remedy is for the Legislature to redefine kidnaping, and not for this court to engraft some uncertain distance limitation onto the plain language of the section. See People v. Knowles, 35 Cal.2d 175, 180–183, 217 P.2d 1.

Constitutionality of Penal Code, Section 209.

[14] Defendant asks that we declare section 209 unconstitutional because the language, "who kidnaps or carries away," is uncertain. This indefiniteness is supposed to be apparent from the decisions of this and other California courts. However, defendant fails to cite the decisions which he believes produce this effect. Rather, it would seem that the previously quoted language from the Chessman case clearly indicates the broad sweep of this section.

[15] While defendant concededly had a right to fair notice as to what acts were prohibited (see In re Peppers, 189 Cal. 682, 209 P. 896; People v. Neff, 117 Cal.App.2d 772, 780–781, 257 P.2d 47), it appears that the questioned statute contained terms well enough known to enable defendant and others to understand their import. See Lorenson v. Superior Court, 35 Cal.2d 49, 59–61, 216 P.2d 859; People v. Deibert, 117 Cal.App.2d 410, 417–420, 256 P.2d 355; People v. Darby, 114 Cal.App.2d 412, 427–428, 250 P.2d 743. The statute did not have

to include "detailed plans and specifications" of the proscribed conduct. Lorenson v. Superior Court, supra, 35 Cal.2d 49, 60, 216 P.2d 859, 866.

Admissibility of Accusatory Statements.

[16, 17] Defendant claims that the trial court erred in admitting certain statements and by treating his reactions to them as adoptive admissions. One of the victims testified that after she had seen defendant in a line-up in jail, she was asked by the police to confront him. When she later met him in a small room, she remarked, "Well, I'm glad they caught you, kid." Defendant made no reply. The other incident occurred when a witness, who had seen defendant at the home of one of the victims prior to an attack, later asked defendant several questions at the behest of the investigating police officers. Defendant cast his eyes toward the floor and said that he would not answer any questions unless he had an attorney present. Defendant contends that these incidents could not possibly be construed as any type of admission, and that the error in admitting them was compounded by the deputy district attorney's comments and the court's instructions.

[18, 19] While the testimony concerning the first incident involving the remarks of a victim was correctly admitted in order to permit the jurors to evaluate its accusatory nature and the weight to be accorded to defendant's failure to make any reply (see People v. Smith, 111 Cal.App. 579, 580–581, 295 P. 862), the second one, where defendant remained silent on the asserted ground that he would not speak unless he had an attorney present, might well have been excluded if objection had been made. See People v. Abbott, 47 Cal.2d 362, 373, 303 P.2d 730; People v. McGee, 31 Cal.2d 229, 238–240, 187 P.2d 706. However, defendant's objection to this line of testimony is made for the first time on this appeal. Such belated attempts to obtain reversals have been held ineffective in regard to testimony relating to alleged admissions (People v. Guarino, 132 Cal.App.2d 554, 559, 282 P.2d 538; People v. Cummings, 7 Cal.App.2d 406, 407, 46 P.2d 778) and in regard to admitting hearsay evidence (People v. Wade, 138 Cal.App.2d 531, 533, 292 P.2d 303, People v. Murray, 135 Cal.App.2d 600, 602, 287 P.2d 775). The rule should apply with equal force to testimony relating to alleged adoptive admissions. Also, defendant cannot make, as he attempts here, his first attack on the arguments of the deputy district attorney with regard to admissions on appeal, when any error could have been obviated at the trial. See People v. Brice, supra, 49 Cal.2d 434, 317 P.2d 961; People v. Hampton, supra, 47 Cal.2d 239, 240–241, 302 P.2d 300. Moreover, the giving of instructions on the definition of an admission, the effect of silence or a false or evasive reply, and the possibility of falsehoods indicating consciousness of guilt (see Cal. Jury Instrns., Crim. (1946 and supp. 1953) Nos. 29, 29–D, 30, 30–A) was not error since the evidence introduced without objection could be considered by the jury. See People v. Wade, supra, 138 Cal.App.2d 531, 533, 292 P.2d 303; People v. Murray, supra, 135 Cal.App.2d 600, 603, 287 P.2d 775. Further, although not raised by the deputy district attorney before the jury, there were other incidents in the record, admitted without objection, which fell within these instructions. When the last victim saw defendant in a public place and had him detained, she said, "This is the man that raped and kidnaped me." Defendant made what might well be considered an equivocal answer to the direct accusation when he replied, "That gal is drunk." Also, defendant's testimony placing him at another location during one of the attacks was directly contradicted by his own statements made to the investigating police officers shortly after his arrest. The jury could have considered the latter statement as a false or contradictory statement showing consciousness of guilt.

Instructions.

[20] Defendant assails certain instructions given to the jury and challenges the trial court's refusal to utilize some of the instructions offered by him. First, he complains that the standard instruction on consciousness of guilt and falsehood (Cal. Jury Instrns., Crim. (1946) No. 30–A) should not have been read because part of it pertains to situations where a defendant has "endeavored to procure false or fabricated evidence to be produced at the trial." Defendant's witnesses testified that he had spent the day of October 31, 1956, being the date of the last attack, at his sister's home. On the other hand, defendant had been positively identified by the victim in her testimony as the person who committed the offenses in her home on that date. Furthermore, defendant had told the police following his arrest that he had been at specified places, other than his sister's home, on the date in question. The jury could properly infer from this evidence that defendant had, in fact, procured false and fabricated alibi evidence with respect to October 31, 1956. There was therefore no error in giving the challenged instruction.

[21] Second, defendant maintains that while the standard instruction to the effect that neither the prosecution nor defense is required to produce all available evidence (Cal. Jury Instrns., Crim. (1946) No. 23) correctly states the law generally, this case comes within a recognized exception. Defendant relies on People v. Beal, 116 Cal. App.2d 475, 479, 254 P.2d 100, where the court in a case involving the rape of a 13-year-old girl stated that, since the prosecution failed to produce the examining physician as a witness, it was to be "presumed that his testimony would not be corroborative of that given by the complaining witness." Here, defendant points out that the brothers and sisters of the 14-year-old victim, who were in the house when defendant arrived but were not present when the criminal acts were perpetrated, and the escort of the last victim, who was with her when she encountered defendant in a public place and had him apprehended, were not called to testify. However, the Beal case is readily distinguishable. There, the testimony would have been highly material. The rape victim was examined by a physician the morning after the attack but the physician was not offered as a witness. Here, the witnesses could not have testified to any ultimate issues or essential elements of the crimes charged. Further, the reversal in the Beal case did not turn directly on the failure to call the physician. The court found that certain statements of the prosecuting attorney were highly improper. To show how this misconduct was prejudicial, the court looked to the even balance of the evidence. It was in this context that it stated the presumption. 116 Cal.App.2d 475, 477–479, 254 P.2d 100. Instead, People v. Tuthill, 31 Cal.2d 92, 102, 187 P.2d 16, would seem to be controlling. There we said, "There is no compulsion on the prosecution to call any particular witness * * * so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial." 31 Cal.2d 92, 98, 187 P.2d 16, 19. This rule applies to the instant case, and shows that there was no error in giving the challenged instructions, which substantially reiterated the rule announced in the Tuthill case.

[22] Third, defendant contends that by using the standard instruction on contradictory statements with its clause applicable when a defendant is a witness (Cal. Jury Instrns., Crim. (1946 and supp. 1953) No. 54–A–alternate), the court unduly emphasized any contradictions made by defendant. He says that a general instruction should have been given pertaining to all witnesses, since one of the victims made conflicting statements about her assailant's height. However, defendant fails to correctly analyze the alternate standard instruction. The first clause is identical to the instruction to be given when the defendant has not contradicted himself. Cal. Jury Instrns., Crim., supra, No. 54–A. The only difference is in the last sentence of the alternate instruction, which correctly states that a defendant's own contradictory statements can be used beyond impeachment to show the truth of such statements. See People v. Southack, 39 Cal.2d 578, 585, 248

P.2d 12. This alternate instruction covers contradictions by all witnesses and does not place too great emphasis on defendant's own statements. The court properly refused defendant's own more general instruction, since the applicable law had been fully covered. People v. Steccone, 36 Cal.2d 234, 240, 223 P.2d 17; People v. Eggers, 30 Cal.2d 676, 688, 185 P.2d 1.

Fourth, defendant interposes several objections to instructions on what the jurors could consider in fixing the penalties. He attempts to show uncertainty between two paragraphs of one instruction because the second did not repeat the number of the counts of the information in discussing them the second time. However, this could not have created any confusion in the minds of the jurors because the character of the offenses discussed in the second paragraph was clearly mentioned and the various counts had been fully explained in one of the preceding instructions.

[23] Defendant also tries to show a conflict between two portions of the instructions which he believes could have only led to misunderstanding on the part of the jurors. He initally refers to the paragraph telling the jury not to consider the possible penalties on those counts other than kidnaping for the purpose of robbery with bodily harm. He then contrasts a small fragment of another instruction telling the jurors, "* * * it is your duty to conscientiously consider all the evidence in the case in arriving at your decision as to the penalty to be fixed by you in this case." However, defendant has taken the latter quotation out of the context of the instruction given by the court on the penalty for kidnaping for the purpose of robbery where bodily harm has been suffered by the victim. It correctly and clearly placed in the jury's absolute discretion the imposition of either the death penalty or confinement for life without possibility of parole (Pen.Code, § 209) and permitted the jury to take all the evidence into consideration on this inquiry alone. These full instructions could not have confused the jury.

[24, 25] Defendant also asserts that the jury had no right to use all of the evidence in choosing between the two penalties. He says that it had to set the penalty by referring only to the evidence introduced on the particular count. He cites no authority for this proposition. Section 209, in committing this determination to the discretion of the jury, sets no limits. Rather, the language used in the instructions here seems entirely proper in the light of our decision in People v. Brust, 47 Cal.2d 776, 306 P.2d 480. In affirming the death penalty for multiple murders, we there held that the jurors had been correctly instructed and that they were to select the penalty on the basis of "* * * a thorough consideration of all the evidence * * *." People v. Brust, supra, 47 Cal.2d at page 789, 306 P.2d at page 487; see also People v. Friend, 47 Cal.2d 749, 767–768, 306 P.2d 463. Also, defendant claims that the following portion of the instruction about the penalty under section 209 was meaningless: "Insofar as selecting the penalty is concerned the law does not itself prescribe, nor authorize the court to innovate any rule circumscribing the exercise of your discretion, but, rather commits the whole matter of its exercise to your judgment and conscience." This portion of the instruction was neither meaningless nor incorrect. See People v. Friend, supra, 47 Cal.2d 749, 767, 306 P.2d 463. It was but another way of telling the jurors that they were charged with the final determination of the penalty, and that they were to act within their own uncircumscribed discretion.

Fifth, defendant objects to the instruction covering the manner in which the jury was to proceed in its deliberations on those counts charging kidnaping for the purpose of robbery. He extracts two phrases and says that they were a misstatement of the law. However, the court was correct in telling the jury that they could consider the evidence and the possible consequences of the two penalties in determining the punishment defendant should receive. See People v. Brust, supra, 47 Cal.2d 776, 789–790, note 4, 306 P.2d 480; People v. Friend, supra, 47 Cal.2d 749, 767, 768, 306 P.2d 463. The instruction as a whole presented an accurate summation of the process to be used in fixing the penalty for the violations of section 209.

Sixth, defendant contends that the instructions on the elements necessary to constitute a violation of section 209 were improper. However, the instructions were correctly based upon the statute and the rules enunciated in People v. Chessman, supra, 38 Cal.2d 166, 192, 238 P.2d 1001. Also, defendant says that there was a mere detention involved here, and that the instructions on kidnaping under section 209 were inapplicable. However, there was far more than a mere detention here as hereinabove indicated.

[26, 27] Seventh, defendant urges that the court erred in failing to give a cautionary instruction to the effect that, in prosecutions for sex offenses, accusations are easily made and difficult to disprove, and that the testimony of the prosecuting witnesses should be carefully examined. Even if such an instruction is not requested, as here, it is incumbent upon the court to give one on its own motion. People v. Nye, 38 Cal.2d 34, 40, 237 P.2d 1; People v. Willis, 129 Cal.App.2d 330, 336, 276 P.2d 853. However, it is not always prejudical error for the court to fail to give the instruction, since the circumstances of each case are the determinative factor. People v. Nye, supra, 38 Cal.2d at page 40, 237 P.2d at page 5; People v. Willis, supra, 129 Cal. App.2d at page 337, 276 P.2d at page 857. Here, seven of the eight prosecuting witnesses testified with a high degree of certainty as to defendant's identification and criminal acts. Their testimony revealed a set pattern in which their assailant operated. To this extent their stories were mutually corroborative. One the whole, their narrations were completely consistent in all important respects. The only possible discrepancy that defendant is able to show was where the fourteen-year-old victim was uncertain of defendant's height. Further, other substantial evidence connected defendant with the crimes. As was said in People v. Nye, supra, 38 Cal.2d at page 41, 237 P.2d at page 5: "A careful examination of the entire record in accord with Article VI, Section 4½ of the California Constitution, leads us to the conclusion that it is improbable that the jury would have rejected the testimony of the prosecuting witnesses had a cautionary instruction been given and that there has therefore been no miscarriage of justice requiring reversal of the judgment."

Admission of Evidence on Rebuttal.

[28, 29] Defendant makes two objections to evidence presented by the prosecution on rebuttal. First, he claims that a woman witness, who was not attacked, should not have been allowed to testify that defendant answered her newspaper advertisement offering an electric range for sale. She identified a check as having been given to her by defendant under an assumed name. Later, a handwriting expert expressed his opinion that the check was written by defendant. This chain of evidence was produced on rebuttal after defendant had denied on cross-examination all the essential facts of the incident. The practice of allowing the district attorney or his aides to withhold a part of their case in chief and to offer it after the defense has closed has been condemned in People v. Carter, 48 Cal.2d 737, 753–754, 312 P.2d 665, and People v. Rodriquez, 58 Cal. App.2d 415, 418–419, 136 P.2d 626. But here the testimony was clearly introduced primarily for purposes of impeachment of defendant in his denial on cross-examination of an incident not charged in the information. In any event, no objection was made to the introduction of this evidence. Further, the order of proof rests largely in the sound discretion of the trial court. Pen.Code, §§ 1093, subd. 4, 1094; People v. Byrd, supra, 42 Cal.2d 200, 211–212, 266 P.2d 505; People v. Avery, 35 Cal.2d 487, 491, 218 P.2d 527. Where, as here, the desirability of admitting the testimony at the questioned point may be debatable, no abuse of discretion on the part of the trial

court should be found when that court has not had the point brought to its attention. See People v. Carter, supra, 48 Cal.2d 737, 754, 312 P.2d 665.

[30] Second, defendant claims that the expert testimony that defendant's fingerprint was found on a glass at the home of one of the victims should not have been received on rebuttal. The prosecution had this information two days prior to the close of its case in chief. Again we come to the question whether the district attorney or his aides indulged in a proscribed withholding of matter properly belonging in their case in chief. People v. Carter, supra, 48 Cal.2d 737, 753–754, 312 P.2d 665; People v. Rodriquez, supra, 58 Cal.App.2d 415, 418–419, 136 P.2d 626. An affirmative answer seems possible. However, under the facts of this case, a reversal is not warranted. To the extent that defendant may have been unfairly surprised, this was obviated by the granting of his request for additional time to meet this testimony. The fingerprint was probably not unduly magnified in significance, since it merely corroborated the direct testimony of one of the victims. It was not as crucial as the defendant's confession withheld in People v. Rodriquez, supra, or the defendant's apparel found near where the murder weapon was abandoned and withheld in People v. Carter, supra, a case resting entirely on circumstantial evidence. In short, it cannot be said that any claimed error in admitting this testimony on rebuttal warrants a reversal. See People v. Byrd, supra, 42 Cal.2d 200, 212, 266 P.2d 505; People v. Avery, supra, 35 Cal.2d 487, 491, 218 P.2d 527.

Constitutionality of Sections 1016 and 1026 of the Penal Code Providing for Bifurcated Trials on Issue of Insanity.

[31] At the inception of the trial, the deputy district attorney, while in chambers with the trial judge, the defendant, and defendant's counsel, announced his intention to question the prospective jurors on their attitudes toward pleas of not guilty by reason of insanity. Defendant claimed the right to have a separate panel try the insanity issue and urged that defendant would be prejudiced by such *voir dire* examination. The trial court said that this was the only time that the jury could be so interrogated. Defendant then withdrew his plea of not guilty by reason of insanity. Defendant contends that he was forced to make this election because the jury, if so questioned, could only have gained the impression that he was guilty. He sees a denial of due process and of a fair trial because a defendant is required, in the discretion of the court, to submit the issue of insanity to the same jury which passed on the question of guilt (Pen.Code, §§ 1016, 1026) and which might not be impartial.

However, it has long been held that the proper time for the examination of the prospective jurors on the issue of insanity is during their selection at the beginning of the trial. People v. Woods, 19 Cal.App.2d 556, 558, 65 P.2d 940; People v. Foster, 3 Cal.App.2d 35, 39, 39 P.2d 271; People v. Davis, 94 Cal.App. 192, 197, 270 P. 715. With regard to his assertion that the same jury could not approach the insanity issue objectively, the following language employed by this court in People v. Leong Fook, 206 Cal. 64, 78, 273 P. 779, 785, is significant: "We must assume that a fair and impartial jury of intelligent men and women would obey [their] instructions and would therefore hold in reserve their ultimate finding upon the issue of the defendant's sanity until that separate issue and the evidence supporting it had, in the prescribed order of the trial, been committed to it for determination. We are not to assume that such a jury will cease to be fair and impartial as the cause progresses upon its successive issues, but, on the contrary, we must assume, in the absence of any other showing, that the jury has retained its attitude of fairness and impartiality under the changed procedure as before until the whole cause * * * has been determined." This answers defendant's basic premise that he would not have received an impartial trial on the insanity issue.

Also, the same reasoning equally refutes defendant's supposition that the jury could only believe that he admitted guilt by offering the plea of insanity. While these precise fair trial and due process arguments have apparently not been advanced before, it is important to note that sections 1016 and 1026 of the Penal Code have long been held constitutional despite many similar objections. See People v. Daugherty, supra, 40 Cal.2d 876, 893, 256 P.2d 911, and the cases therein cited.

[32] Again we cannot say that the withdrawal of the insanity plea was "forced" upon defendant or that he was not sufficiently advised of the consequences of his decision. He was present in chambers when his attorney, the prosecutor, and the trial judge discussed the possible prejudicial effect of the challenged *voir dire* examination. In response to questions posed by his own counsel, he expressed his desire to withdraw his insanity plea and stated that he understood what had transpired. He was also informed that he could not reinstate the plea as a matter of right during the course of the trial. He might well have been additionally advised on other matters such as the nonbinding effect of the reports of the court-appointed alienists, defendant's right to examine these experts and to produce his own witnesses to controvert their reports, and the jury's power to make an independent determination. However, defendant was represented by counsel who initially entered this plea over his client's objections. Surely, he must have explained to defendant the reasons for his actions. They must have weighed the probabilities of success on this defense in the light of the unanimous opinions of the three alienists to the effect that he was sane. Defendant and his counsel evidently decided that his cause would be better served by avoiding what they conceived to be the harmful effects of the proposed examination of the prospective jurors than by actually pursuing the insanity plea. This was a "free and voluntary" choice made by defendant with full advice of counsel. See People v. Mendez, 27 Cal.2d 20, 22, 161 P.2d 929.

Double Punishment.

[33] Defendant asserts that he suffered double punishment since he was sentenced for the kidnaping for the purpose of robbery and also for the robbery. However, it is not necessary to give extended consideration to this question. As we said in People v. Chessman, supra, 38 Cal.2d 166, 193, 238 P.2d 1001, 1017: "Defendant is correct in his contention that punishing him separately for the violations of section 209 of the Penal Code (kidnaping) and for the robberies and sex crimes which, under the circumstances here, are essential parts of those violations, would amount to double punishment, which is forbidden by section 654 of the Penal Code. [Citing cases.] However, since defendant is subject to two [here five] validly imposed death sentences, no purpose would be served by reversal of other judgments of conviction. [Citing case.]"

Adequacy of Defendant's Representation by Counsel.

The only entirely new point raised in the amicus curiae brief concerns the adequacy of the representation afforded defendant by the attorney whom he selected to conduct his defense in the trial court. Two aspects of his trial counsel's actions are specified as showing his lack of competence: His handling of the *voir dire* examination and his failure to object to some of the prosecutor's conduct. His courteous deportment toward the deputy district attorney is said to have prevented him from protecting defendant's rights. In handling the *voir dire* examination, he is said to have persistently emphasized that the prosecution's witnesses were all honest and positive in their identifications, and that the burden of proof was cast upon defendant to show his innocence beyond a reasonable doubt. Actually, he primarily stated that his client acknowledged that the acts were perpetrated and only contended that he did not commit them. His remarks could not possibly have had the untoward impact upon the jury attributed to them.

[34, 35] But even if we concede that defendant's attorney may not have used the best of strategy in handling the *voir dire* examination and in failing to challenge some of the prosecutor's remarks, defendant still has not made that type of showing which alone would compel us to conclude that he was deprived of due process within the meaning of the constitutional guarantees. U.S.Const. 14th Amend. § 1. The handling of the defense by counsel of the accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a "farce or a sham." Lunce v. Overlade, 7 Cir., 244 F.2d 108, 110; see also Taylor v. United States, 9 Cir., 238 F.2d 409, 413–414, certiorari denied 353 U.S. 938, 77 S.Ct. 817, 1 L.Ed.2d 761; United States ex rel. Feeley v. Ragen, 7 Cir., 166 F.2d 976, 980–981; Hendrickson v. Overlade, D.C.N.D.Ind., 131 F.Supp. 561, 562–564. The record in this case does not even remotely approach such a situation. Defendant's sole defense lay in his claim that his identification by the victims was incorrect. His counsel vigorously cross-examined the prosecution's witnesses to test their memories, and assiduously attempted to establish an alibi and to show defendant's good character. He at most committed what in retrospect may be claimed to be mistakes in judgment by following certain strategy employed. Such mistakes, if any, do not constitute a denial of due process. United States ex rel. Darcy v. Handy, 3 Cir., 203 F.2d 407, 426, certiorari denied sub nom. Maroney v. United States ex rel. Darcy, 346 U.S. 865, 74 S.Ct. 103, 98 L.Ed. 375.

Motion to Augment Record.

[36, 37] Defendant moves to augment the record pursuant to rule 12(a) of the Rules on Appeal by including a certified copy of the minutes of the municipal court before which the preliminary examination was conducted. That record is offered to show that defendant was not taken before the municipal court until nearly five days after his arrest. He claims that there was "unnecessary delay" (Pen.Code, § 849) and that his constitutional rights were thus violated, citing Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479. However, rule 12(a) on which defendant relies, by its own terms, provides for augmentation only where the record was "offered at or used on the trial or hearing below and [was] on file in or lodged with the superior court." Rules on Appeal, rule 12(a). Here, defendant makes no showing that the minutes were ever used in the proceedings in the superior court or that they ever became a part of that court's records. See In re Estate of Hobart, 82 Cal.App.2d 502, 510, 187 P.2d 105. Further, it would serve no useful purpose to add the requested document to the record since defendant cannot claim for the first time on appeal, as he attempts here, that he was not seasonably brought before a magistrate. People v. Newell, 192 Cal. 659, 669, 221 P. 622; People v. Tennyson, 127 Cal.App.2d 243, 246, 273 P.2d 593. The motion must therefore be denied.

In conclusion, it should be stated that the voluminous record and briefs have been carefully examined because of the seriousness of the charges made against defendant and because of the nature of the penalty that has been imposed upon him. Such examination leads us to the conclusion that the evidence overwhelmingly showed that he was guilty of the long series of despicable crimes with which he was charged. We further conclude that defendant was accorded a fair trial, and that there were no errors or other irregularities in the proceedings which would warrant a reversal.

The motion to augment the record is denied. The judgments and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

CARTER, Justice.

I dissent on four grounds:

(1) The majority has misconstrued the meaning of the word "kidnaps" as it is used in Penal Code section 209;

(2) The term "carries away" is so ambiguous within the context of section 209 as to be meaningless;

(3) The misconduct of the prosecutor in his summation was prejudicial to defendant in the matter of the sentence determined by the jury;

(4) The majority has affirmed the infliction of a penalty so excessive in relation to the defendant's acts as to transgress the constitutional provision condemning punishments which are cruel or unusual. Cal. Const. art. I, § 6.

The jury found the defendant had done these acts:

(1) He seized M. M. and tied her hands behind her with wire. He held a knife in her back while she searched for her billfold. Then he ordered her to crawl through her house to the bedroom. There he robbed her of $17 or $18, raped her, and forced her to an act of fellation. He forced her to move altogether about 75 feet under duress.

(2) He seized L. S. and bound her hands with wire. He dragged her by the hair three or four feet into a bedroom, then threw her two or three feet onto the bed. He raped her, forced her to an act of fellation and cut her with his knife. He then dragged her into a second bedroom an unstated distance away and locked her in a closet. He stole $200 in cash and a $4,000 money order.

(3) He seized C. F. in her bedroom and bound her hands with wire. He asked her for her money. She said she had $10 in the kitchen but he did not look for it. He did not take the $1 he found in her billfold. Then, to quote the victim, "* * * he helped me up on the bed." The distance was four or five feet. He then raped her and forced her into perversion.

(4) He seized L. B. in her bedroom and bound her hands with wire. He took valuable jewelry and $30 to $40 in cash. He forced her to walk back about 12 feet to a daybed, and, when she complained of discomfort, he told her to get up and pushed her four and one-half or five feet to a chair. Then he raped her.

(5) He seized and bound the hands of U. H. in her living room. He said he was going to rob her and she said, "'Here is everything I have, go ahead and take it.'" She wore jewelry and her purse was on a sofa in the same room. But he took nothing. He pushed her to the floor five feet away in the center of the room and forced her into perversion.

For these acts defendant was convicted on three counts of first degree robbery (Pen.Code, § 211a), four counts of rape (Pen.Code, § 261, subd. 3), four counts of sex perversion (Pen.Code, § 288a, and five counts of kidnaping with intent to rob and causing bodily harm (Pen.Code, § 209).[1] The penalty for first degree robbery is not less than five years in the state prison; for rape it is not less than three years in the state prison; for perversion it is not more than fifteen years in state prison or not more than one year in the county jail. The judgment was for the term prescribed by law, the terms to run consecutively. The penalty for kidnaping with intent to rob where bodily harm is done to the victim is life imprisonment without the possibility of parole or death. The choice is discretionary with the jury. The jury decided that Wein should die.

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[1] "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole." Pen.Code, § 209.

The jury also found that defendant did these acts:

(6) He seized and bound K. S., aged 15, shoved her two feet into a bedroom, raped her and violated Penal Code section 288a. Afterwards she walked eight feet at his command.

(7) He seized and severely beat A. C. He moved her 13 feet into a closet and fled.

(8) He and an accomplice seized A. H. and "dragged her out onto the floor," a distance of about three feet. Defendant raped her and committed the perverse act.

For these acts defendant was convicted on two counts of rape, two counts of sex perversion, and two counts of kidnaping as defined by Penal Code section 207.[2]

Assuming the jury was correct in its factual findings, the defendant is guilty of the most perverse and outrageous crimes and should be punished severely and with little mercy.

However, it is my conclusion that the defendant did not violate Penal Code sections 209 or 207 and, assuming arguendo that he did, the penalty of death is excessive to the point of barbarity.

There was no Violation of Penal Code Sections 209 or 207:

Since 1901 there have been two kinds of kidnaping in California. Section 207 was enacted in 1872 and codified the common law definition. The section originally required that the victim be carried across a county or state line to constitute kidnaping. In 1905 the Legislature inserted the words "* * * or into another part of the same county * * *" making it possible to kidnap a victim without crossing a county line. Stats.1905, chap. 493, p. 653.

The Legislature enacted section 209 in 1901. It then provided: "Every person who maliciously, forcibly, or fraudulently takes or entices away any person with intent to restrain such person and thereby to commit extortion or robbery, or exact from the relatives or friends of such person any money or valuable thing, is guilty of a felony, and shall be punished therefor by imprisonment in the state's prison for life, or any number of years not less than ten."

There was no use of the word "kidnaping" in the enacting legislation (Stats.1901, chap. 83, p. 98, § 1). This section was not meant to redefine kidnaping. The word first appears in Deering's Penal Code, 1906 edition, in the heading of the section. The Legislature first referred to violations of section 209 as kidnaping in 1933 in the descriptive heading to an amendment to that section (Stats. 1933, chap. 685, p.

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[2] "Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person; and every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where such act is committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnaping." Pen. Code, § 207.

1757). These headings are not enacted into law. That amendment read: "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by life imprisonment without possibility of parole in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm inflicted by such kidnapers; or by life imprisonment with possibility of parole in cases where there is no violence and upon the recommendation of the trial jury or in the discretion of the trial judge."

The verb "kidnaps" was included in the definition of the crime defined by section 209. It cannot be assumed the Legislature meant to define the section 209 crime by itself by using this word. The word must be construed to have a meaning apart from and narrower than the crime defined by section 209. There are two possibilities: (1) It meant common law kidnaping; or (2) it meant kidnaping as defined in section 207. Since the Legislature had already rejected the common law definition of kidnaping and redefined it, the clear implication is that the word "kidnaps" in section 209 means kidnaping as defined in section 207. This is the contention of the attorney general in his brief in this case.

Section 209 was interpreted from 1933 to 1951 to encompass the act of robbery (for example, People v. Knowles, 35 Cal.2d 175, 217 P.2d 1; People v. Brown, 29 Cal.2d 555, 176 P.2d 929). This permitted prosecutors to demand the death sentence successfully for second degree robbery in cases where accompanying crimes outraged the jury. In 1951, the Legislature amended section 209 to its present form. Stats.1951, chap. 1749, p. 4167. See, Penal Code section 209 quoted in this opinion on page 474 of 326 P.2d. The 1951 amendment declared that section 209 was violated to commit robbery only where the perpetrator "kidnaps or carries away" his victim. These facts point to the conclusion that defendant in this case is not guilty of violating section 209 unless he either kidnaped a victim as defined by section 207 or "carried her away."

Kidnaping under section 207. Before 1905 Penal Code section 207 required the victim to be carried outside the county before there was a kidnaping. In Ex parte Keil, 85 Cal. 309, 24 P. 742, defendants forced two victims from their boat in San Pedro harbor and took them under duress to Santa Catalina Island. Defendants were held not guilty of kidnaping because both the island and San Pedro are in Los Angeles County. According to the Code Commissioner's notes ctied in West's Annotated Penal Code, sections 1–260, page 622, the 1905 amendment was advisable because of the Keil decision. No other reason is advanced for the amendment than to remove the Keil aberration. This history of section 207 implies that the Legislature was still contemplating kidnaping in terms of movements over considerable distances. The words themselves clearly imply this. If the amendment were intended to include movements of three feet the Legislature would have amended the section by using words designating such minute movements. This is what it did in 1933 when it added such words as "seize" and "confine" to section 209. Significantly, it did not alter the section 207 definition of kidnaping at the 1933 session. It meant only to make more inclusive the false imprisonment of persons for extortion, ransom, and robbery, and therefore amended section 209 only. It is also significant that when the Legislature amended section 207 in 1905 it did not alter or abolish section 236 which defines the crime of false imprisonment as "the unlawful violation of the personal liberty of another." It appears that section 236 was aimed to punish violations of liberty not gross enough to be described as a carrying into another part of the same county.

Almost all of the California cases which review convictions under section 207 concerned asportations over considerable distances, usually many miles. All of them involved greater distances than are represented by the kidnaping of which Wein was convicted. None of them involved asportations entirely within one enclosed place. In all of them the asportation was from a place where the intended ancillary crime was difficult of consummation to a place where it was more easily done. This was not so in Wein.

Three cases affirmed convictions under section 207 in which the asportation was not great. In none of them was the issue of distance discussed by the court. All of them were decided after People v. Tanner, 3 Cal.2d 279, 44 P.2d 324, which associated the term "kidnaping" with the short-haul abduction in that case. Tanner was convicted under section 209.

In People v. Hunter, 1942, 49 Cal.App.2d 243, 121 P.2d 529, defendant dragged one victim 60 yards and another across a railroad track to a pile of ties to rape them. In People v. Cook, 1937, 18 Cal.App.2d 625, 64 P.2d 449, defendant grabbed his victim as she walked in front of his house and dragged her inside to rape her. In People v. Thompson, 1955, 133 Cal.App.2d 4, 284 P.2d 39, defendants forced their victim into their car and drove him about one and one-half blocks to rob him. The court relied on People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001, for this holding.

A consideration of People v. Tanner, supra, 3 Cal.2d 279, 44 P.2d 324, and People v. Knowles, supra, 35 Cal.2d 175, 217 P.2d 1, is important at this point. Both were decided on the basis of the 1933 amendment to section 209. In Tanner, defendants seized several members of a household and forced them to move about the house for some hours. In Knowles, defendants forced two store clerks to walk to a storeroom and one of them to return to the front of the store, then return to the rear. An examination of the language in these cases reveals that neither Mr. Justice Seawell in Tanner nor Mr. Justice Traynor in Knowles relied on the terms "kidnaps or carries away" to describe defendants' acts. In Tanner Mr. Justice Seawell makes it clear that section 209 is not the same crime as kidnaping in section 207. At page 293 of 3 Cal.2d, at page 331 of 44 P.2d he says, regarding the 1901 act: "It will be noted that the *forcible taking* of any person with intent to commit extortion or robbery, the *exact offense* of which the defendants were convicted, is made a felony. The only change made by the amendments of 1933 [adding *inter alia* "kidnaps or carries away"], *so far as they affect the instant case* was to increase the penalty if the person forcibly taken suffers bodily harm." (Emphasis added.) This means that defendants could have been convicted under the 1901 act *before* the words "kidnaps or carries away" were added.

Defendants in Tanner attacked the great departure section 209 made from the common law definition of kidnaping. At page 296 of 3 Cal.2d, at page 332 of 44 P.2d Mr. Justice Seawell says: "No reason has been given why it is not within the purview of the sovereign power of the state to pronounce or classify as an act of kidnaping (following closely the language of the statute) the act of seizing and *confining* a person by *any means whatever* * * *." (Emphasis that of the court.) The Tanner case therefore does not bear on the meaning of kidnaping as defined by section 207.

The Knowles decision is even clearer in its reliance on terms other than "kidnaps or carries away." Mr. Justice Traynor cites Tanner at page 184 of 35 Cal.2d, at page 6 of 217 P.2d: "On appeal from their conviction under section 209, they [Tanner, et al.] contended that their offense was only armed robbery and that the Legislature did not intend to punish it under a kidnapping statute. The court affirmed the conviction, holding that the Legislature is empowered to define criminal offenses as it sees fit and that the statute clearly indicates an intention to punish *standstill* kidnapping under its provisions. It is suggested that under the statute there must be movement of the victim, under a preconceived plan for protracted detention to obtain property that would not be available in the course of ordinary armed robbery. Defendant seeks to read into the statute a condition that the victim be moved a substantial distance. The statute itself is a refutation of that contention. Movement of the victim is only one of several methods by which the statutory offense may be committed. The statute provides that 'Every person who *seizes, confines* * * * or who *holds* or *detains* [any] individual * * * to commit extortion or robbery * * * is guilty of a felony.'" (Emphasis added.)

These cases left the terms "kidnaps" and "carries away" unconstrued within the context of section 209. In determining the movement necessary to constitute a violation of section 209, all cases relied on Tanner or Knowles.

After the 1951 amendment here under consideration, this court held in People v. Chessman, 38 Cal.2d 166 (see page 192) 238 P.2d 1001, at page 1017 that defendant's act of transporting a victim 22 feet was within the compass of "kidnaping or carrying away" in section 209. The majority did not analyze the meaning of the terms in that opinion but rather relied on these authorities:

(1) People v. Raucho, 8 Cal.App.2d 655, 47 P.2d 1108. This case was decided in 1935 under the broad 1933 amendment to section 209 and the court cited Tanner as its authority that there is no distance requirement under section 209.

(2) People v. Cook, 18 Cal.App.2d 625, 64 P.2d 449, decided in 1937, raised no issue of distance.

(3) People v. Melendrez, 25 Cal.App.2d 490, 77 P.2d 870, was a case strictly within the confines of section 209 before 1951.

(4) People v. Shields, 70 Cal.App.2d 628, 161 P.2d 475, decided in 1945, involved a defendant who carried a child an unstated distance to the roof of an apartment from a point in the neighborhood. The issue of distance was not raised.

(5) People v. Oganesoff, 1947, 81 Cal.App.2d 709, 184 P.2d 953, in which defendants forced a woman into their car, drove her from Compton to Torrance, and forced her into a house.

(6) Cox v. State, 203 Ind. 544, 177 N.E. 898, 181 N.E. 469 determined an asportation of 90 feet was sufficient under a statute not similar to Penal Code section 207. Asportation "*from* any place within this state" was made punishable (section 2426, Burns' 1929 Supp.). This patently refers to shorter distances than the terms "into another part of the same county" in section 207. The Indiana statute relates the taking to the place where the taking *begins*; section 207 refers to the place where it *ends*.

(7) State v. Taylor, 70 N.D. 201, 293 N.W. 219, 223, held a short-haul asportation to be within a kidnaping statute substantially similar to section 209, in that it employs the words "seizes, confines, inveigles or kidnaps" Comp.Laws 1913, § 9514 to describe the crime. The term "kidnap" is not elsewhere described in North Dakota statutes. This case cites People v. Melendrez, supra, 25 Cal.App.2d 490, 77 P.2d 870, as authority for its own holding.

Therefore only two of these cases, Cook and possibly Shields, furnish authority for the proposition that short-haul asportation satisfies section 207. And the issue of whether or not the asportations were sufficient under the section was never before the courts.

It is therefore my opinion that this court should re-examine its construction of the word "kidnaps" as used in section 209 and define it as it was meant to be defined by section 207.

Another consideration ignored by the majority is this: The patent intent of the Legislature in amending section 209 in 1951 was to remove simple robbery from the bounds of section 209. Previously, simple robbery invariably constituted short-haul kidnaping (see, "Robbery Becomes

Kidnaping," 3 Stanford L.Rev. 156, a note on People v. Knowles, supra, 35 Cal. 2d 175, 217 P.2d 1). This legislative intent was followed by Mr. Justice Vallee in reversing a conviction in People v. Taylor, 135 Cal.App.2d 201, 286 P.2d 952. The case which stimulated the Legislature to action was People v. Knowles, supra, 35 Cal.2d 175, 217 P.2d 1. It is important to note that victims were forced to move in that case and this constituted short-haul kidnaping. In People v. Chessman, 38 Cal. 2d 166 (see page 192), 238 P.2d 1001, at page 1017, this court held the Knowles problem was not solved by the 1951 amendment. As a result of Chessman and the instant decision, while robbery is not *per se* a violation of section 209, if the robber moves his victim *one inch* he is subject to the death penalty. This can hardly be described as giving force to the legislative act.

Lastly, if it is possible without doing violence to its words, a statute is to be construed to have a constitutional application. The majority have construed it to provide the death penalty for *de minimus*. This is within the compass of cruel and unusual punishment and such a construction should be avoided. Section 4 of the Penal Code directs the courts to construe its provisions according to the *fair* import of their terms, with a view to effect its *objects* and to promote *justice*.

I conclude that defendant has not been guilty of kidnaping within the purview of either section 207 or section 209 and the convictions and judgments thereof must be reversed and the counts of the information alleging them stricken.

The Phrase "Carries Away" Is Ambiguous:

Even if defendant did not "kidnap" his victims, he would still be guilty of violating section 209 if he "carried away" any one of them. We must therefore scrutinize the phrase "carries away" in section 209.

If we were to say that to "carry away" meant no more than to cause a victim to move one foot we should necessarily include the more rigidly defined term "kidnap," since any act constituting "kidnaping" would also constitute "carrying away." This would make "kidnaps" redundant in section 209. "To carry away" must therefore differ from "to kidnap" in some way other than in the distance required to consummate the crime. But the statutes and cases of California establish no clue as to the acts which deserve this label. The brief of the attorney general does not attempt to assist us.

Penal Code section 7(16) states: "Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning * * *."

Webster's Unabridged Dictionary defines "carry away" thusly: "a To remove from life [refers to death]; * * * c To take possession of the mind; to move, sway, or charm; to delude; as, to be *carried away* by music, or by temptation * * * d To succeed in obtaining; to be victorious in or over; to win; also, *Obs.*, with *it*, to gain the victory; carry the day."

These definitions do not fit the factual context of the instant case, nor do they appear to have any meaning relative to any forced movement of a person.

The word "away" is defined thusly by Webster: "1. On the way; onward; along. 2. From a place; hence; thence; —of motion; as, go *away;* * * * 4. a From contact or close association; aside; off * * * 5. From one's possession; —with a sense of parting or loss; as, to give one's heart *away* * * *."

Meaning 2. of away, "From a place" may be relevant. Still, the term "place" is unclear since it may be used in such contexts as "To move away from the window," or "to move away from home." Its meaning as to distance is entirely contextual. To give it a meaning outside a context, as the Legislature has attempted to do, is meaningless. "Away" begs us to answer the query "from what?"

Blackstone says that larceny required a "carrying away." Jones, Blackstone, p. 2440. This element was satisfied by the slightest movement of the item to be taken. The essence of this common law crime was disturbance of possession and the movement of the property had to be accompanied by an intent to terminate the possession permanently. To rip a phrase from a finely woven context would make a crude patchwork of the statute. The disturbance of possession of personalty bears little resemblance to the deprivation of human freedom. They are different social menaces and terms used to describe them necessarily find themselves in dissimilar contexts playing semantical tricks on the unwary. I conclude that the technical meaning of "carries away" is relevant only to the context of personal property law and has no commonly recognized technical application to the realm of crimes against liberty.

The vernacular usage of the term may provide help. Suppose one says, "X carried Y away." What image arises in the mind of the hearer: Certainly not a picture of X forcing Y to move about a few feet in his own home. Or suppose one wished to describe X's forcing Y to move from one room to another. Many descriptive words and phrases come to mind before "X carried Y away." For example, "X forced Y to move against his will." The word "away" just does not fit the facts. If the Legislature intended to include all forced movements within its definition of section 209 kidnaping for robbery, a simpler and clearer term would have been used. This is particularly true in view of the consternation raised by the decision in People v. Knowles, supra. The allusion to the command of Penal Code section 4 is also pertinent here.

It is apparent that the 1951 amendment was enacted to assuage the mischief of the Knowles holding. In this context, this intent should not be construed into oblivion. And it certainly does not promote justice to hold that the movement of a person four feet is an offense sufficient to warrant the death penalty when the statute is open to another less strict interpretation.

I conclude that the phrase "carries away," as used in section 209, is undefined and meaningless; and that to hold that it encompasses defendant's acts is to misconstrue it violently.

The Prejudicial Misconduct of the Deputy District Attorney:

While the weight of the evidence is so massive against the defendant that I cannot say the prejudicial misconduct of the deputy district attorney was instrumental in the jury's finding defendant guilty, I am of the opinion that this misconduct was probably a major influence in the jury's decision to fix the penalty at death. In other words, this misconduct prejudiced defendant's chances to receive a life sentence rather than death:

(1) He identified defendant with Caryl Chessman and reminded the jury repeatedly that unless defendant were executed he might be released to commit other sex crimes. He stated that Chessman had been paroled before committing the more publicized crimes of which he was accused. This must have carried considerable weight in the jury's consideration of the penalty. Yet, defendant and not Chessman was on trial, and defendant was entitled to have his case determined on the record of his own trial.

(2) The inflammatory ephithets used to describe defendant must have had an emotional effect on the minds of the jurors. Powerful words, portraying the images and associations they conjure, participate actively in forming human judgments. In a trial as emotionally conceived as this one was, they are particularly decisive. No objection or admonition could cure this psychological onslaught: Once spoken, the emotional impact of the words was locked in the minds of its hearers. The cases cited by the majority to justify requiring an objection, involve the failure to object to evidence. An admonition to ignore certain

testimony in reaching a factual conclusion in a logical manner may be effective. But it is far harder to blot out an emotion or a vivid image from the mind of a juror. In this case I do not think it would have been possible. It has been truly said: "You can't unring a bell."

The Penalties Inflicted In This Case Constitute Punishments Which Are Cruel Or Unusual:

Consider the precise acts for which this court is affirming the death penalty. Defendant seized and bound the hands of C. F. She told him where her money was but he took none. He helped her onto a bed four or five feet away and forced her to perform sex acts. He was clearly guilty of rape and perversion. The penalty for rape is not less than three years in the state prison. For perversion it is not more than 15 years in the state prison or less than one year in the county jail. These were brutal and revolting acts. But for moving C. F. four or five feet, "helping" her to the bed, he is to be executed. But for this movement he would not have received the death penalty! The case involving U. H. is similar except that he did not rape her. Defendant committed the same atrocities on A. H. as he did on C. F. and in fact did more harm to her than to U. H. But in attacking A. H. he merely threw her to the floor and raped her and committed perversion. But his penalty for this was not death, but two prison terms! Why? Because he did not move her the necessary *one inch* nor incidentally ask for her money! Of the condemned movements one must ask: What difference did they make? The answer: None.

The above comparisons reflect the absurd position into which this court has backed by following the Tanner, Knowles and Chessman cases to the consistent but irrational ultimate. Holmes' epigrammatic "A page of history is worth a volume of logic" has found its supreme justification.

In each of the other three situations involving the death penalty, if the victim had not been moved a few feet there would be no death penalty possible. Under the rule of this case a robber who shoves his victim against a wall is eligible for the gas chamber if a prosecutor arbitrarily chooses to ask for that penalty. Essentially section 209 may be used by a zealous prosecutor to kill one who has committed other more socially condemned crimes which carry less severe penalties. The instant case is the archetype. The deputy district attorney prosecuting Wein did this overtly. In his summation he demanded the death penalty not for defendant's moving his victims but for the sexual assaults he made upon them. He cited the military law which inflicts the death penalty for rape. He belabored the lecherous acts allegedly done to L. S., then said: "If this is not treatment which earns this defendant the extreme penalty of death, I never saw any. There is not a red blooded man on this jury, there isn't a respectable woman on this jury who in my opinion would say otherwise." His only reference to the movement of L. S. was: "He moves her; that is kidnapping for the purpose of robbery, as I explained it to you here * * *." He also said: "I have only one regret in arguing this case to you, and that is that under the law of this state, for the reason that the defendant did not announce as his purpose robbery at any time to K. S., that I cannot charge him with kidnapping for the purpose of robbery with bodily harm and ask you to return a sixth verdict of death."

I conclude that the defendant is in effect, being condemned to death for *de minimus* acts. Were the case before me, I should also say imprisonment for life or a long term of years would also fall within the scope of cruel or unusual punishment.

This court properly refuses to "draw lines" delineating what distance is sufficient to constitute kidnaping. It is the task of the Legislature. The Legislature attempted by its 1951 amendment to do this and failed to communicate its intent to this court. The court has chosen to label all short-haul asportations "kidnaping." The holding in this case that an asportation of four feet is sufficient to send a man to the gas chamber illustrates in unshaded tones that *all* short-haul asportations must be declared without sections 207 and 209 or not punished by the courts.

This does not mean that no violation of section 207 or section 209 should be punished in the degree determined by the Legislature. It means that the penalties assessed *in this particular case* are too severe because the statute, as construed by the majority, is overly broad. While precise lines must be drawn by the Legislature, the penalties assessed for the alleged offenses in this case are blatantly on the forbidden side of it. The judiciary may not abdicate its responsibility to condemn a violation of constitutional powers with a question-begging cliche about separation of powers.

Mr. Justice McKenna, writing for the Supreme Court in Weems v. United States, 217 U.S. 349, at page 378, 30 S.Ct. 544, at page 553, 54 L.Ed. 793, faced this problem squarely:

> "We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case, not our discretion, but our legal duty, strictly defined and imperative in its direction is involved. Then the legislative power is brought to the judgment of a power superior to it for the instant. * * They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge."

Mr. Chief Justice Warren described clearly the problem of definition: "This Court has had little occasion to give precise content to the Eighth Amendment, and in an enlightened democracy such as ours, this is not surprising." Trop v. Dulles, 78 S.Ct. 590, at page 598.

The cases facing this problem of definition may be divided into four groups:

(1) Those in which the penalty was found not excessive in relation to the offense;

(2) Those in which the court held the Legislature free to prescribe even outrageous penalties;

(3) Those holding the phrase "cruel and unusual punishments" refers only to uncivilized forms of punishment such as quartering;

(4) Those holding punishment clearly disproportionate to the offense to be unconstitutionally cruel, unusual, or both.

The problem in California is simpler than that faced by the federal courts, since our guarantee is stated disjunctively: "Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel *or* unusual punishments be inflicted." Cal. Const. art. I, § 6.

I believe the most persuasive authority supports my judgment that clearly excessive punishments are unconstitutional.

The defendant in Weems v. United States, supra, 217 U.S. 349, 30 S.Ct. 544, received a statutorily mandatory sentence of twelve years at hard labor in irons plus the permanent loss of many civil rights for falsifying two entries in an official cash book. Mr. Justice McKenna says of this sentence at page 377 of 217 U.S., at page 553 of 30 S.Ct.:

> "It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind."

Chief Justice Warren continued in Trop v. Dulles, supra, 78 S.Ct. 590, at page 598, concerning the Weems decision:

> "The Court recognized in that case that the words of the Amendment are not pre-

cise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In O'Neil v. State of Vermont, 144 U.S. 323, 12 S.Ct. 693, 36 L.Ed. 450, the court held the Eighth Amendment does not inhibit state action. The defendant was sentenced to 54 years in prison for sales of liquor during a single day. Justices Field, Harlan and Brewer dissented on the ground that the Fourteenth Amendment gave the Eighth Amendment protection against the states. They agreed that the inhumane sentence in this case contravened the Eighth Amendment.

Two compelling reasons for condemning excessive sentences are stated in Cox v. State, 203 Ind. 544, 177 N.E. 898, 181 N.E. 469, at page 471. The court quotes United States v. Borromeo, 23 Philippine 279 at page 289:

"A contrary view leads to the astounding result that it is impossible to impose a cruel and unusual punishment so long as none of the old and discarded *modes* of punishment are used; and that there is no restriction upon the power of the legislative department, for example, to prescribe the death penalty by hanging for a misdemeanor, and that the courts would be compelled to impose the penalty. Yet such a punishment for such a crime would be considered extremely cruel and unusual by all right-minded people."

The Indiana court in Cox v. State, 203 Ind. 544, 177 N.E. 898, 181 N.E. 469, at page 472, suggests that the reason the issue of a punishment's cruelty and unusualness is not often before the appellate courts is that juries are so constituted as to find persons innocent when the punishment for an alleged offense offends their sense of justice. Obviously this element could not sway the jury so to favor a defendant whose sex crimes cried for vengeance.

The finest exposition of the doctrine of unconstitutional excessiveness is State v. Ross, 55 Or. 450, 104 P. 596, 106 P. 1022, 42 L.R.A.,N.S., 601. Defendant was sentenced to five years in the state prison and fined $576,853.74 for embezzling $288,426.87 in state funds. He was to be imprisoned in the county jail until the fine was paid, but not longer than 288,426 days or approximately 790 years. The court reversed the sentence of imprisonment for nonpayment of the fine on the ground that it was cruel and unusual punishment.

There is language in California cases upholding this position. Ex parte Karlson, 160 Cal. 378, at page 383, 117 P. 447, at page 449, said the danger that persons imprisoned for contempt were protected against excessive restraint by the constitutional rule against cruel or unusual punishments.

In In re Finley, 1 Cal.App. 198, 81 P. 1041, the court rejected arguments that excessive sentences were not unconstitutional, but held the death penalty for an assault by a life convict was justified. The court said at pages 201–202 of 1 Cal.App., at page 1042 of 81 P.:

"It is only when the punishment is out of all proportion to the offense, and is beyond question an *extraordinary penalty* for a crime of *ordinary gravity, committed under ordinary circumstances,* that courts may denounce it as *unusual.*"

Contra this position is In re O'Shea, 11 Cal.App. 568, at page 575, 105 P. 776, at page 779, which contains a dictum, that only punishments of a barbarous character, like quartering, are cruel and unusual. (The court used the conjunctive.)

There is language in People v. Tanner, supra, 3 Cal.2d 279, at page 298, 44 P.2d 324, at page 333, which may be read to mean that the death penalty for kidnaping is not excessive. But it is insufficient to paste a label to an act and justify enormities by it. This illustrates the profundity of the insight: "What's in a name?" It is tantamount to playing categories with human life. Moving a person four feet does not justify taking life no matter what words describe the act.

Other cases which uphold the proposition that excessiveness is fatal to a sentence are: Application of Cannon, 203 Or. 629, 281 P.2d 233 (life imprisonment for assault to commit rape held cruel and unusual); State v. Devore, 225 Iowa 815, 281 N.W. 740 (imprisonment until fine paid held cruel and unusual); Williams v. State, 125 Ark. 287, 188 S.W. 826, L.R.A.1917B, 586 (sentence to solitary confinement for a misdemeanor held cruel and unusual); State ex rel. Garvey v. Whitaker, 48 La.Ann. 527, 19 So. 457, 35 L.R.A. 561 (sentence of six years for destroying plants held cruel and unusual); State v. Driver, 78 N.C. 423 [Reprint p. 366] (imprisonment in county jail for five years and recognizance of $500 to keep the peace for five years thereafter for assault and battery held cruel and unusual); Sinclair v. State, 161 Miss. 142, 132 So. 581 at page 582, 74 A.L.R. 241 (two justices' concurring opinion said sentencing an insane person to life imprisonment is cruel and unusual); State v. Moilen, 140 Minn. 112, 167 N.W. 345, 347, 1 A.L.R. 331 (a prison term flagrantly excessive would be cruel and unusual); McDonald v. Commonwealth, 173 Mass. 322, 53 N.E. 874, 875 (imprisonment may be so long as to be cruel and unusual).

I conclude that the death penalties inflicted on this defendant for moving five victims from four to 75 feet cannot stand in the face of the constitutional mandate that cruel or unusual punishments may not be inflicted. The judgments must therefore be reversed. The acts of moving K. S. 10 feet and A. C. 13 feet are serious enough to warrant punishment. The minimum punishment prescribed for these acts, one year in the state prison, may not be excessive for them.

Rehearing denied: CARTER, J., dissenting.

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50 Cal.2d 438

Ruth ABBOTT et al., Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES, a municipal corporation, et al., Defendants and Respondents.

Eva A. ADAMS et al., Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES, a municipal corporation, et al., Defendants and Respondents.

Margaret ABNEY, as Special Administratrix of the Estate of Glen M. Abney, Deceased, et al., Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES, a municipal corporation, et al., Defendants and Respondents.

Fred H. BEHRNS et al., Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES, a municipal corporation, et al., Defendants and Respondents.

Elizabeth M. MASON et al., Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES, a municipal corporation, et al., Defendants and Respondents.

L. A. 24354–L. A. 24358.

Supreme Court of California.
In Bank.
June 6, 1958.

Rehearing Denied July 2, 1958.

Action by retired policemen and firemen who had been employed as such by city of Los Angeles before 1925 and widows of deceased firemen and policemen who had also been so employed, to recover difference between fixed pension payments received under 1925 and 1927 amendments of city charter and amounts they would have received under fluctuating payment system prevailing before such amendments. The Superior Court, Los Angeles County, A. A. Scott, J., entered judgment for city, from which plaintiffs appealed. The Supreme Court, Schauer, J., held, inter alia, that by reason of employment firemen and policemen had vested rights in pension system prevailing and the 1925 and 1927 amendments establishing fixed pension payment system without corresponding advantages were unreasonable and invalid as applied to plaintiffs.

Reversed and remanded with directions.

Opinion, 316 P.2d 357, vacated.

1. Constitutional Law 🔑102(2)
Municipal Corporations 🔑187(7), 200(7)

Retired city policemen and firemen who had rendered services to city after establishment of pension system and prior to amendments had earned vested rights in retirement benefits already provided by city charter during that period of time, so that advantages previously added during year in which pension benefits were increased had no bearing on reasonableness of detriments resulting from subsequent amendments thereto. St.1889, p. 455, art. XI, §§ 2, 3, 4 as amended by St.1923, pp. 1412–1414; St.1925, p. 1085, §§ 181–184 as amended by St.1927, pp. 2023, 2024.

2. Municipal Corporations 🔑187(7), 200(7)

Where Los Angeles policemen and firemen were employed while there was in effect a pension system providing for fluctuating pension payments and subsequently by amendment to city charter a fixed payment pension system was established without any corresponding advantages to offset such detriment, amendments were unreasonable and invalid as applied to such firemen and policemen and to the widows of deceased firemen and policemen who were employed before passage of amendments. St.1927, pp. 2020–2026.

3. Constitutional Law 🔑102(2)

Substitution of a fixed for a fluctuating pension payment is not permissible as to employees having vested rights under fluctuating pension system, unless accompanied by offsetting pension benefits.

4. Municipal Corporations 🔑187(1), 200(1)

Pension provisions in city charter for firemen's and policemen's widows and children which were in effect during period of their employment were considered to be an element of contractual compensation which were earned by them, rendering any unfavorable amendment invalid as to firemen and policemen having vested rights under pension system and equally invalid as to their widows and children.

5. Courts 🔑93(1)

Where judicial decisions may be fairly presumed to have entered into business transactions and become established as rules of property, it is duty of court on the principles of stare decisis to adhere to such decisions without regard to how it might be inclined to decide if question were new.

6. Courts 🔑93(1)

In California, principle of rule of property is applied to avoid injustice that would result from overruling of judicial decision upon which parties have relied in investing money or acquiring property interests.

7. Municipal Corporations 🔑187(8), 200(8)

Where retired policemen and firemen who had been employed by city of Los Angeles before 1925 and widows of deceased firemen and policemen so employed brought action to recover difference between fixed pension payments received under the 1925 and 1927 amendments to city charter and amount they would have received under fluctuating pension payments prevailing before amendments, even though no action had been brought for many years, principle of rule of property could not be invoked, since failure of city to pay fluctuating pensions allegedly due rather than fixed pensions did not constitute a reliance upon anything except its own charter provisions in failing to live up to its obligations.

8. Equity 🔑72(1)

"Laches" is dependent not only upon delay but also upon injury caused by delay.

See publication Words and Phrases, for other judicial constructions and definitions of "Laches".

9. Municipal Corporations ⚷187(8), 200(8)

Where retired policemen and firemen who were employed by city of Los Angeles before 1925 as well as widows of deceased firemen and policemen who were so employed brought action to recover difference between fixed pension payments received under 1925 and 1927 amendments to city charter and amount they would have received under fluctuating pension system prevailing before such amendments, notwithstanding fact that many of the plaintiffs had not asserted rights for many years, since no injury could be shown to city by reason of failure to pay fluctuating pension, defense of laches was not available. West's Ann.Code Civ.Proc. §§ 312, 338, subd. 1; St.1927, p. 2014, § 376; St.1937, p. 2943.

10. Action ⚷63

Cause of action for money judgment constitutes an action at law and is not subject to equitable defense of laches. St. 1925, p. 1150, § 425; West's Ann.Code Civ. Proc. § 592.

11. Municipal Corporations ⚷220(9)

Where action was brought by certain retired city employees as well as widows of deceased city employees for increased pension allegedly due as well as for declaratory relief as to their rights, cause of action seeking to recover money due as a vested contractual right was a cause of action at law and defense of laches was not available to city.

12. Jury ⚷13(14)

Fact that both equitable and legal relief were requested in the same action does not deprive plaintiff of right to jury trial on legal issues or render all issues and relief sought equitable in nature. West's Ann.Code Civ.Proc. § 1062.

13. Declaratory Judgment ⚷255

Laches is not available as a defense to an action at law even though it is combined with cumulative remedy of declaratory relief. West's Ann.Code Civ.Proc. § 1062.

14. Limitation of Actions ⚷58(1)

Right to receive periodic payments under pension is a continuing one and any limitation upon right to sue for each installment necessarily commences to run from time when installment actually falls due.

15. Limitation of Actions ⚷43

Availability of action for declaratory relief in no way affects period of limitations on action to collect money.

16. Limitation of Actions ⚷18

Period of limitations applicable to ordinary actions at law and suits in equity should likewise be applicable to actions for declaratory relief, and if declaratory relief is sought with reference to obligations which have been breached and the right to commence action for coercive relief arising on that cause of action is barred by statute of limitations right to declaratory relief is likewise barred, but if declaratory relief is sought before there has been a breach of obligation in respect to which declaration is sought or within statutory period after breach, right to declaratory relief is not barred by lapse of time.

17. Limitation of Actions ⚷64

Where actions were brought by retired city of Los Angeles firemen and policemen and widows of deceased firemen and policemen to recover difference in pension payments received and payments which were allegedly due to them under pension system in which they had vested rights, even though plaintiffs might have earlier brought suit for declaratory relief, failure to do so did not bar right to declaratory relief with respect to future pension payments as well as monetary judgment for difference for three years prior to filing of actions. West's Ann.Code Civ.Proc. §§ 312, 338, subd. 1; St.1925, p. 1085, §§ 181–184 as amended by St.1927, pp. 2023, 2024.

18. Municipal Corporations ⚷187(8), 200(8)

Where retired firemen and policemen in city of Los Angeles as well as widows of deceased firemen and policemen brought action to recover difference between pension payments actually received and payments they were allegedly entitled to receive under more generous system in which they claimed to have a vested right, recovery for past-due pension payments, under six months' claim provision of city charter, were limited to those payments which had accrued within six months prior to time plaintiffs had presented claims therefor. St.1927, p. 2014, § 376.

19. Municipal Corporations ⚷1002

Under statute providing for recovery of interest on damages and making the same applicable to recovery of damages and interest from any debtor, including any "political subdivision" of the state, a municipal corporation is not a political subdivision. West's Ann.Civ.Code, § 3287.

See publication Words and Phrases, for other judicial constructions and definitions of "Political Subdivision".

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Kenneth Sperry, Long Beach, for appellants.

Ball, Hunt & Hart and Joseph A. Ball, Long Beach, as amici curiae on behalf of appellants.

Roger Arnebergh, City Atty., Bourke Jones and John J. Tully, Jr., Asst. City Attys., Weldon L. Weber and John F. Feldmeier, Deputy City Attys., Los Angeles, for respondents.

SCHAUER, Justice.

In these five cases, consolidated for trial, plaintiffs appeal from adverse judgments in their actions seeking to enforce pension payments upon a fluctuating basis (i. e., based upon salaries currently being paid from time to time) rather than in fixed amounts determined at the time the pension is granted. Defendants are the City of Los Angeles and its Board of Pension Commissioners. We have concluded that charter amendments by which fixed payment pensions were substituted for fluctuating may not properly be applied to plaintiffs, and that the judgments should be reversed.

The 673 plaintiffs in the Abney and the 30 plaintiffs in the Behrns cases were appointed as members of the fire or the police department of defendant city prior to July 1, 1925, and retired therefrom subsequent to that date upon pensions which have been paid in fixed amounts. In the Abbott, Adams and Mason cases the 79 plaintiffs are widows who were granted fixed-payment pensions upon the deaths of their respective husbands who had been employed in the fire or police department prior to, and died after, January 17, 1927. (In the Abbott case the husbands of the 17 plaintiffs, with one exception, had retired prior to January 17, 1827.) In each of the five actions the first count of the complaint is for a declaratory judgment to the effect that each of such plaintiffs is entitled to a fluctuating pension upon the ground that certain city charter amendments of July 1, 1925, and January 17, 1927, substituting fixed pensions for previously provided fluctuating pensions, are as to them unconstitutional and invalid; the second count seeks a money judgment for the difference, commencing three years prior to the date each plaintiff filed a claim therefor with defendants, between the amount of the fixed pension paid and the amount of the fluctuating pension to which plaintiffs claim to be entitled. It appears that in addition to the present plaintiffs (some 782 in number), another 2,000 persons occupy a similar legal relationship to defendant city.

Following findings of the court more fully discussed hereinafter, judgments were entered declaring that the pertinent charter amendments constituted reasonable and valid changes in the pension system with respect to plaintiffs and that the only pensions to which plaintiffs are entitled are the substituted fixed amount ones the city has been paying; that the rights and duties of the respective parties have ripened into a "rule of property" which should not now be disturbed; and that plaintiffs are barred by laches and the statute of limitations. These appeals followed.

For more than 20 years prior to July, 1925, pertinent statutes, ordinances, and provisions of the city charter of Los Angeles, provided a fluctuating retirement pension after 20 or more years of service for members of the police and fire departments, of 50 per cent of the salary that might be fixed *from time to time,* even after a member's retirement, for the position held one year prior to retirement. (Effective in January, 1923, a further 1⅔ per cent of such salary was added for each year of service in excess of 20 years and less than 30 years.) A like fluctuating pension was also provided in case of service-connected disability. If a member died as a result of such disability or after retirement, a fluctuating pension was payable to his widow, children or dependent parents; this pension amounted to one half the salary fixed *from time to time* for the position held by the member at the time of his death or one year prior to the date of retirement. (See e. g., Charter of 1889, art. XI ½, §§ 2, 3, 4, as amended; Stats.1923, p. 1412–1414.)

In article XVII of the Charter of 1925 (Stats.1925, p. 1085), sections 181, 182, and 183 were substituted for sections 2, 3, and 4 of the Charter of 1889, above referred to, and section 184 was added. (For convenience, changes effected by the Charter of 1925 will be termed charter amendments.) So far as here material, sections 181, 182, and 183 were substantially the same as those they replaced. However, the new section 184 provided that "any increase or decrease of salaries of active members of the Fire and Police Departments shall not in anywise affect the amount of the pensions paid to retired members of such departments, nor shall the amount of such pensions be changed for any other reason." In other words, pensions thereafter granted to retired members would be upon a fixed rather than a fluctuating basis. Widows' pension rights were unaffected by section 184, and continued upon a fluctuating basis until January, 1927, when, by amendment, the section was in terms made applicable to the pensions of widows and other members of families. (Stats.1927, pp. 2023–2024.) Widows' pensions granted thereafter have been paid upon a fixed basis. Also by 1927 amendment, the basis of the fixed retirement and widows' pensions became average salary received by the members over the three-year period immediately preceding retirement, rather than being related to the preceding one-year period only.

Defendant city has been and is presently paying pensions upon a fluctuating basis to all police and fire department members whose pensions matured prior to the 1925 amendment and to all widows upon whose pensions payment became due prior to the 1927 amendment. Members' pensions becoming due for initial payments subsequent to the 1925 amendment, and widows' pensions maturing for payments after the amendment of 1927 (even though the husband had retired previously), have been honored upon a fixed rather than a fluctuating basis. Meantime salaries attached to the positions involved have been increased from time to time, and plaintiffs claim the right to proportionately increased pension payments.

Validity of the Amendments as Applied to These Plaintiffs

Plaintiffs first contend that under the principles enunciated by this court in Allen v. City of Long Beach (1955), 45 Cal.2d 128, 287 P.2d 765, the trial court erred in determining that as to them the change from a fluctuating to a fixed pension was reasonable and therefore constitutional and valid. In that case defendant city attempted by charter amendment to substitute a fixed for the previously provided fluctuating pension, and it was held that as to employes whose employment had commenced while the fluctuating pension provisions were a part of the charter the alteration was unreasonable and invalid. We there declared that (at page 131 of 45 Cal.2d at page 767 of 287 P.2d) "An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments *in accord with changing conditions and at the same time maintain the integrity of the system.* [Citations.] Such modifications must be reasonable, and it is *for the courts to determine upon the facts* of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. [Citations.] In the present case it appears that section 187.2 [the amendment] substantially decreases plaintiffs' pension rights without offering any commensurate advantages, and there is no evidence or claim that the changes enacted bear any material relation to the integrity or successful operation of the pension system established by section 187 of the charter * * *.

"* * * [At page 132 of 45 Cal.2d, at page 767 of 287 P.2d] Payment of a fixed [pension] amount freezes the benefit at a figure which is based on salary scales preceding retirement, thus the longer an employee is retired on a fixed pension the more likely it is that the amount of *his* pension will not accurately reflect existing economic conditions, whereas a retired employee receiving a fluctuating pension based on the salaries that active employees are currently receiving can maintain a fairly constant standard of living despite changes in our economy. We are at present in an era of rising salaries and high cost of living. * * * This court pointed out in Casserly v. City of Oakland [1936], 6 Cal.2d 64, 69, 56 P.2d 237, that a 'pension measured by the pay of officers of similar rank inures to the benefit of pensioners, when the value of money is low and the pay increased.' (Cf. Terry v. City of Berkeley [1953], 41 Cal.2d 698, 703, 263 P.2d 833, involving applicability of a similar charter amendment to persons already retired, where it was stated that the change from a fluctuating to a fixed pension was detrimental to pensioners.) It is, of course, impossible to predict with certainty whether, at the time of retirement of each of the employees here involved, the amount paid *him* under a provision for a fixed benefit would be greater or less than that paid *him* under a fluctuating benefit system, but that very uncertainty indicates the advantage of a plan for fluctuating benefits which attempts, however roughly, to reflect the actual purchasing power of the dollar. Under all the circumstances, it appears that *plaintiffs' rights* would be adversely affected by the change to the fixed benefit plan. * * *

"[At page 133 of 45 Cal.2d, at page 768 of 287 P.2d] The city does not claim that any of the provisions contained in section 187.2 [amendment] was necessary to preserve or protect the pension program *applicable to persons employed before March 29, 1945* [i. e., *while fluctuating pensions were provided* by section 187 of the city charter], and there is no indication that the city would have difficulty in meeting its obligations *to those employees* under the provisions of section 187." (Italics added.) (See, also, Cochran v. City of Long Beach (1956), 139 Cal.App.2d 282, 293 P.2d 839, reaching same result, in reliance upon the Allen case.)

Following the Allen case, it was held in Chapin v. City Commission (1957), 149 Cal.App.2d 40, 44–45, 307 P.2d 657, that a change made by the city of Fresno in the method of computing pension benefits, from a fluctuating amount equal to two-thirds of the salary currently attached to the rank held by the employe, to a limited maximum amount—a change made after the employment had commenced but prior to retirement—resulted in a substantial disadvantage and detriment *to him* which were not accompanied by comparable new advantages, and "therefore constituted an attempted unreasonable, ineffective and illegal modification of *his* vested contractual rights." (Italics added.) (See, also, Glaeser v. City of Berkeley (1957), 148 Cal.App.2d 614, 307 P.2d 61.)

Despite the language of the above cases which clearly shows that it is advantage or disadvantage to the particular employes whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured, defendants urge that new overall advantages or benefits gradually added to the city's pension system, including benefits added by amendment in January, 1923, as well as certain advantages added by amendments concurrent with or subsequent to those of 1925 and 1927, were sufficient to offset the disadvantage brought about by substituting a fixed for a fluctuating pension by the 1925 and 1927 amendments, and that such amendments therefore were properly held by the trial court to bear a material relation to the past and present integrity and successful operation of the pension system and to be reasonable.

[1] In the first place, however, the member plaintiffs and the husbands of the widow plaintiffs rendered services to the city after January of 1923 and prior to the amendments of 1925 and 1927, and therefore under the holdings of the above cited cases had earned and vested rights in the retirement benefits already provided by the city charter during that period of time. (See, also, Kern v. City of Long Beach (1947), 29 Cal.2d 848, 851–852, 179 P.2d 799, and cases there cited.) It follows that advantages added prior to or during 1923 have no bearing upon the reasonableness of the detriments resulting from the 1925 and 1927 amendments. In this connection it is not to be forgotten that, as already mentioned, fluctuating pensions had been provided for more than 20 years prior to the 1925 and 1927 amendments by which fixed pensions were substituted.

[2] In the second place, under the 1925 amendment substituting a fixed pension for police and fire department members, two other modifications were made: A member was made ineligible for a service-connected *disability* pension if eligible for a *service* pension (an apparent disadvantage), and the requirement was eliminated in case of a member who died in line of duty that his widow must have been married to him for one year. This latter modification, while undoubtedly an advantage for certain widows of members, cannot seriously be considered as commensurate to the detriments imposed, particularly by the change from a fluctuating to a fixed pension. And although the 1927 amendment changing widows' pensions from a fluctuating to a fixed basis also added certain benefits,[1] they were limited in scope and the

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[1] As summarized by defendants, the 1927 amendment (Stats.1927, pp. 2020–2026) modified the pension benefits and burdens in the following respects:

(1) By changing the base for calculating a service pension from the salary attached to the rank held one year prior to the date of retirement to the average monthly rate of salary received during the three years immediately preceding that date;

(2) By providing, for members appointed subsequent to January 17, 1927, a service pension, for 25 years of service, of 50% of the average monthly rate of salary received during the three years immediately preceding the date of retirement plus an additional 1⅔% thereof for each additional year of service up to 66⅔% thereof but not in excess of $1,800 per year plus 1⅔% of such salary for each such additional year over 25 and less than 35;

(3) By changing the service-connected *disability* pension of ½ of the salary attached to the rank held at the date of retirement to a pension of not less than 10% nor more than 90% of such salary at such time;

(4) By eliminating the provision that a member who was eligible for a service pension was ineligible for a service-connected disability pension;

(5) By changing the widow's pension, in the case of a member who died after retirement upon a service pension, from ½ of the salary attached to the rank held one year prior to the date of retirement to ½ of the average monthly rate of salary received during the three years immediately preceding the date of retirement, plus 25% of such pension for one child under age 18, 40% for two such children and 50% for three or more such children;

(6) By changing the widow's pension, in the case of a member who died while eligible to a service pension, to the same extent and by the same additional percentages thereof as stated in (5) hereof;

(7) By changing the widow's pension, in the case of a member who died after retirement upon a service-connected disability pension, to the same extent and

record does not show that any of the plaintiffs received any actual benefit. As pointed out by plaintiffs, the principal benefit was an increase in the fixed pension to be paid to the unmarried widow of a deceased member during the time that she had unmarried minor children under 18 years of age, and a credit for time spent by a member in the armed services in time of war toward the aggregate service required for a retirement pension. In the normal course of events these contingent benefits would result in an advantage to only a limited number of members—those who were young enough to have children under 18 following their death after a length-of-service retirement, or in the event of a service-connected death, or to those who had served in the armed forces during war. They clearly were not advantages which would offset (in an economy as predominantly inflationary as ours has been during the past half-century) the detriment resulting from the substitution of a fixed pension for a fluctuating one designed to keep future pension payments adjusted to current living costs. Moreover, as is disclosed by the changes summarized in footnote 1, various other detriments were imposed by the 1927 amendment which in themselves appear to have substantially cancelled, if not entirely offset, any contingent benefits resulting from the amendment. For example, that amendment required each member of the police and fire departments to contribute four per cent of his salary to the pension fund, whereas under the terms of the 1923 and 1925 charter provisions defendant city alone was required to appropriate and allocate to the pension fund from general taxes sufficient monies to defray the pension benefits provided by the charter. It is thus apparent that no net benefit was bestowed in 1925 or 1927 which is commensurate with the detriment imposed by the change from a fluctuating to a fixed pension.

In 1947 various benefits were added, most of which were specifically limited to members who were first employed subsequent to the effective date of the 1927 amendment and are therefore immaterial here. Any other net benefits resulting from the 1947 amendment[2] are, as in the case of the

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by the same additional percentages thereof as stated in (5) hereof;

(8) By changing the widow's pension, in the case of a member who died in line of duty, to the same extent and by the same additional percentages thereof as stated in (5) hereof;

(9) By increasing four pension benefits for children under 18 by continuing the payment to them of each of the pensions mentioned in (5), (6), (7) and (8) hereof when payment thereof to the widow ceased upon her remarriage;

(10) By making a fixed pension of any pension thereafter granted to a widow, minor child or dependent parent;

(11) By giving a member new credit toward retirement by counting as a part of his aggregate service the time served by him, in time of war, in the United States Army, Navy, Marine Corps, or any division thereof;

(12) By providing for contributions by members of 4% of salary.

[2] As summarized by defendants, the other changes made in 1947 were as follows (Stats.1947, pp. 3679–3687):

1. By changing the base for calculating a service pension from the average monthly rate of salary received during the three years immediately preceding the date of retirement to the average monthly rate of salary assigned to the ranks held during such period;

2. By changing the service-connected disability pension from a range of from 10% to 90% to a range of from 50% to 90% of the salary attached to the rank held at the date of retirement;

3. By adding a new fixed pension, for a non-service-connected disability after five years of service, of 40% of the highest salary attached to the rank of policeman or fireman at the date of retirement;

4. By changing the base for calculating a pension, in the case of a member who died after retirement upon a service pension or upon a service-connected disability pension or in line of duty, from the average monthly rate of salary received during the three years immediately preceding the date of the member's retirement or death to the average monthly rate of salary assigned to the ranks held by him during such period;

5. By, in the case of a member who, after five years of service, died in active

1927 amendment, clearly insufficient to compensate for the change from a fluctuating to a fixed pension. The same may be said of the effect of section 17 of the city charter (effective April, 1941, and amended in 1945 and 1951, Stats.1941, pp. 3407–3408, Stats.1945, pp. 3019–3020, Stats.1951, pp. 4396–4397) giving certain new retirement credits for service in the armed forces in time of war and granting to members in the armed forces the right to exercise, without first returning to city service, their accrued pension rights. And of course, contrary to defendants' contention, salary increases to members of the police and fire departments which became effective in 1926 could not compensate for the detriment flowing from the change to a fixed from a fluctuating pension, even though the monetary basis for calculation of the dollar amount of the pension was thereby increased by whichever of the two methods was used. The same is true of salary increases thereafter granted. Thus, despite the plea of defendants that the city's policy has been one of continual expansion of pension benefits for all of its employes, it is plain that no new advantage has been granted to plaintiffs which would be substantially commensurate with the disadvantage resulting from the 1925 and 1927 amendments here under attack. As made clear by the cases already cited, it is by advantage or disadvantage to the individual employes whose already earned and vested pension rights are involved that the validity of attempted changes in those rights depends, and benefits subsequently obtained by other employes cannot operate to offset detriments imposed on those whose pension rights have theretofore accrued.

In the Allen case the discussion of whether the substitution of a fixed for a fluctuating pension was permissible was specifically related to whether the rights of the particular plaintiffs would be affected adversely, and to whether the amendment was "necessary to preserve or protect the pension program applicable to persons *employed before*" (italics added) the effective date of the amendment. (Allen v. City of Long Beach (1955), supra, 45 Cal.2d 128, 133, 287 P.2d 765.) The same is true of the language used in Chapin v. City Commission (1957), supra, 149 Cal.App.2d 40, 44–45 [2], 307 P.2d 657; and Glaeser v. City of Berkeley (1957), supra, 148 Cal.App.2d 614, 616–617, 307 P.2d 61. Thus there is no merit in defendants' further contention that because the average as well as the cumulative total dollar amounts of pensions paid have greatly increased during the present *century* plaintiffs here should be content, and that "It is of no importance in determining the reasonableness of the modifications complained of herein that appellants [plaintiffs], because of the position in which their respective ages and the uncertainties of life have placed them * * * may have been adversely affected thereby in view of the fact that * * * the members of the system as a whole, their widows, children and parents have been and still are being benefited tremendously." Carey v. Retirement Board (1955), 131 Cal.App.2d 739, 281 P.2d 25, is relied upon by defendants. The matter of reasonableness of the change in pension benefits which was there involved was not discussed. That case was decided before the Allen case and any implications in the former which are inconsistent with

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service but not in line of duty or after retirement upon a non-service-connected disability pension:

(a) Adding a new fixed pension of 40% of the highest salary attached to the rank of policeman or fireman at the date of his death;

(b) Making such pension payable to his widow, children, or dependent parents.

6. By increasing contributions by members from 4% to 6% of salary;

7. By giving a member new credit toward retirement for all the time upon which he was upon either a service-connected disability pension or a non-service-connected disability pension upon his return to active service;

8. By eliminating certain classes of persons, other than firemen and policemen, from their former eligibility to the pension benefits provided for in said article XVII.

our decision in the latter must be deemed disapproved.

[3] Defendants urge, nevertheless, that the change from fluctuating to fixed pensions must be considered as of the dates made (in 1925 and 1927) and not in the light of present inflationary trends. In the Allen case (Allen v. City of Long Beach (1955), supra, 45 Cal.2d 128, 287 P.2d 765), however, none of the plaintiffs had yet retired and, as pointed out by the court (45 Cal.2d at page 132, 287 P.2d at page 767), it was therefore impossible to determine with certainty whether or not the change from a fluctuating to a fixed pension would actually result in the payment of a greater or a smaller pension following the retirement of any particular employe. The change was nevertheless held to be unreasonable because it would subject the employe to the hazards of future economic developments, an evil which the fluctuating pension was especially designed to avoid, rather than enabling him to "maintain a fairly constant standard of living despite changes in our economy" (at page 132 of 45 Cal.2d at page 767 of 287 P.2d). And in Glaeser v. City of Berkeley (1957), supra, 148 Cal.App.2d 614, 307 P.2d 61, the same principle was followed and a similar result was reached. (See, also, English v. City of Long Beach (1954), 126 Cal.App.2d 414, 418 [2], 272 P.2d 875.) In the Glaeser case defendant city by 1944 amendments substituted a fixed fire and police pension for one that fluctuated upward with salary increases but not downward with decreases, and it was held, in reliance upon the Allen case, that the change did not apply to those who were in the city's employ at the time of the amendments. The city's argument that the amendments must be considered as of the time they were made, that "the common thinking of the time was that there would be widespread unemployment after the war, and an accompanying economic tapering off from the high wartime levels," whereas the Long Beach amendment involved in the Allen case was made in 1951 after the inflation spiral had started, was dismissed by the court as being "highly speculative. We find no basis for it in the record upon this appeal." (At page 617 of 148 Cal.App.2d, at page 63 of 307 P.2d.) Regardless of the "thinking of the time," however, under the holding of the Allen case the substitution of a fixed for a fluctuating pension is not permissible unless accompanied by commensurate benefits—benefits which are not shown to have been granted in the present case.

[4] On behalf of plaintiff widows in the Abbott case, whose husbands had retired prior to the effective date of the 1927 amendment (by which widows' pensions were changed from a fluctuating to a fixed basis) but who died thereafter, it is argued that the 1927 amendment was not intended to apply to such widows. Inasmuch as the pension provisions for widows and children which are in effect during the period of the husband's employment are considered to be an element of his contractual compensation and earned by him (see Packer v. Board of Retirement (1950), 35 Cal.2d 212, 215–216, 217 P.2d 660; English v. City of Long Beach (1954), supra, 126 Cal.App.2d 414, 416–420, 272 P.2d 875; Combs v. City of Long Beach (1954), 126 Cal.App.2d 841, 272 P.2d 880; Malone v. City of Los Angeles (1954), 126 Cal.App.2d 447, 451 [6], 272 P.2d 796), it is apparent from what has already been said that such amendment cannot validly be applied to this group of widows any more than it can to those whose husbands retired after the 1927 amendment.

Finally, as in the Allen case (at page 133 of 45 Cal.2d, at page 768 of 287 P.2d), there is no showing that the 1925 and 1927 amendments bear any material relation to the integrity or successful operation or to the preservation or protection of the pension program applicable to these plaintiffs. Defendants' only plea in this respect appears to be that if the amendments had not been made "the cost to the City and its taxpayers would have reached such staggering proportions that, in all probability, the system would have ceased to exist." This plea, based on speculation only, is without merit. Rising costs alone will not excuse the city from meeting its contractual obligations, the consideration for which has already been received by it. Moreover, it is not to be assumed that the city would have attempted to abolish its pension system by reason thereof, especially since such systems are almost universally essential in order to attract qualified employes to police and fire departments. As commented in Kern v. City of Long Beach (1947), supra, 29 Cal.2d 848, 856, 179 P.2d 799, "one of the primary objectives in providing pensions for government employees * * * is to induce competent persons to enter and remain in public employment." (See, also, Packer v. Board of Retirement (1950), supra, 35 Cal.2d 212, 217, 217 P.2d 660.)

In summary as to this phase of the case, we conclude that the amendments of 1925 and 1927 are unreasonable and invalid as applied to these plaintiffs.

The "Rule of Property" Theory

Included in the trial court's conclusions of law and judgments in these cases is the declaration "That the rights and duties of the deceased husband of each party plaintiff and of each party plaintiff and of the parties defendant, having reached the importance of a rule of property, are not to be disturbed or impaired but are to remain as they have been fixed for many years." This determination appears to have been based upon "findings of fact" made in each case as set forth in the margin.[3]

[5, 6] A "rule of property" is defined as follows in Black's Law Dictionary, Fourth Edition: "A settled rule or principle, resting usually on precedents or a course of decisions, regulating the ownership or devolution of property. Yazoo & M. V. Railroad Company v. Adams [1902], 81 Miss. 90, 32 So. 937; Brekke v. Crew [1920], 43 S.D. 106, 178 N.W. 146, 154." The principle appears to be an extension of the "stare decisis" rule, which it is said "seems to apply with peculiar force and strictness to decisions which have determined questions respecting real property and vested rights, although it embraces as well those matters of general commercial importance which tend to influence future business transactions. It has often been held that decisions long acquiesced in, which constitute rules of property or trade or upon which important rights are based, should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one, inasmuch as uniformity and certainty in rules of property are often more important and desirable than technical correctness.

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[3] As summarized by plaintiffs the pertinent "finding of fact" embodies the following elements:

(1) That both plaintiffs and defendants accepted the validity and constitutionality of the amendments in question until on or about December of 1954, at which time each party plaintiff was advised that he or she may be entitled to a pension other than the one that he had been receiving since the date the pension was granted; (2) that the Supreme Court of this state and the District Court of Appeal determined "during the period from 1930 to 1953 and in at least twelve separate actions, that the plaintiff in each such action, contrary to the contentions now made by the parties plaintiff herein, was entitled to only a fixed pension under the pension provisions of the Fire and Police Pension System;" (3) that a determination at this late date that the provisions complained of were invalid and unconstitutional would result in the parties defendant having to pay a fluctuating pension instead of a fixed pension to each party plaintiff and to numerous other persons who were appointed to the Fire and Police Department prior to July 1, 1925, "all of whom as of June 30, 1954, numbered almost 2700 persons, and would thereby result in an unconscionable burden being placed upon said parties defendant and the taxpayers of the City of Los Angeles"; and (4) that "no compelling or cogent reasons have been advanced or proven to exist by the parties plaintiff upon which this court should permit such long-standing rights and duties to be disturbed, that such long-standing rights and duties have become so fixed for almost thirty years as to now constitute a rule of property and that such rights and duties are entitled to be protected against impairment."

Thus, judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, as where the evils of the principle laid down will be more injurious to the community than can possibly result from a change, or upon the clearest grounds of error." (14 Am.Jur. 286, § 65; id. p. 343, § 126.) And in 21 C.J.S. Courts § 216, pp. 396–400, it is stated that "Where judicial decisions may be fairly presumed to have entered into the business transactions of a country, and have become established as rules of property, it is the duty of the court, on the principle of stare decisis, to adhere to such decisions without regard to how it might be inclined to decide if the question were new." The same principle is applied in California to avoid injustice which would result from the overruling of a judicial decision upon which parties have relied in investing money or acquiring property interests. (See County of Los Angeles v. Southern Cal. Tel. Co. (1948), 32 Cal.2d 378, 392–393, 196 P.2d 773; Sorensen v. Hall (1934), 219 Cal. 680, 683, 28 P.2d 667; Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley (1933), 217 Cal. 644, 655, 20 P.2d 940; Sacramento Bank v. Alcorn (1898), 121 Cal. 379, 382, 53 P. 813; 13 Cal.Jur.2d 648–651.)

[7] In the present case, however, there appear to be neither guiding judicial decisions nor reliance thereon by the city in adopting the amendments here under attack. The fact that the city failed to pay to these plaintiffs a fluctuating rather than a fixed pension obviously does not constitute reliance by it upon anything except its own charter provisions in failing to live up to its obligations to plaintiffs, obligations in return for which, as already mentioned, it has received the full contractual consideration from its employes. It has neither invested money nor acquired any property interests which would be jeopardized by holding it liable for the fluctuating pensions which the employes earned.

Defendants refer to what they designate as a "long line of cases adjudicated through the years, in which members of this pension system (or widows of such members) who were appointed prior to July 1, 1925 and retired or died thereafter, sought payment of pensions."[4] However, not only was the earliest of such cases not finally decided until 1933, but in none of them was the issue of the reasonableness and constitutionality of the change from fluctuating to fixed pension discussed or considered. Although there is language in Rustad v. City of Long Beach (1953), 122 Cal. App.2d 106, 264 P.2d 955, and Carey v. Retirement Board (1955), supra, 131 Cal.App. 2d 739, 746 [6], 281 P.2d 25, which suggests that such a change might be upheld, those cases were decided within the last five years and are controlled by the later case of Allen v. City of Long Beach (1955), supra, 45 Cal.2d 128, 287 P.2d 765, in which the invalidity of the change was unequivocally established. It is therefore obvious that defendants have not relied upon any "long line of cases" in either adopting the charter amendments here under attack, in failing to pay fluctuating rather than fixed pensions to plaintiffs, or in adding to its pension system certain benefits subsequent to the amendments of 1925 and 1927—benefits in which for the most part, as already noted, these plaintiffs were not eligible to participate and which were partially, if not largely, offset by the contributions of four per cent (later increased to six per cent) of salary exacted from the employes. And, contrary to what defendants seemingly intend to suggest, certainly the city has not acquired any "vested property and contract rights," to be protected by the courts, through its own failure to live up to its contractual obligations to plaintiffs.

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[4] Defendants cite the following cases: Skaggs v. City of Los Angeles (1954), 43 Cal.2d 497, 275 P.2d 9; Dierkes v. City of Los Angeles (1945), 25 Cal.2d 938, 156 P.2d 741; Knoll v. City of Los Angeles (1942), 21 Cal.2d 396, 132 P.2d 203; McKeag v. Board of Pension Com'rs (1942), 21 Cal.2d 386, 132 P.2d 198; Haas v. City of Los Angeles (1942), 21 Cal.2d 393, 132 P.2d 201; Dillard v. City of Los Angeles (1942), 20 Cal.2d 599, 127 P.2d 917, 128 P.2d 537; Dryden v. Board of Pension Com'rs (1936), 6 Cal.2d 575, 59 P.2d 104; Hermanson v. Board of Pension Com'rs (1933), 219 Cal. 622, 28 P.2d 21; Stamper v. City of Los Angeles, (1947), 80 Cal.App.2d 242, 181 P.2d 687; Cordell v. City of Los Angeles (1944), 67 Cal.App.2d 257, 154 P.2d 31; Jenkins v. City of Los Angeles (1943), 60 Cal. App.2d 50, 140 P.2d 45; Faber v. Board of Pension Com'rs (1943), 56 Cal.App. 2d 825, 133 P.2d 404.

It follows that defendants' reliance upon the "rule of property" theory to sustain their refusal to pay fluctuating pensions to plaintiffs is untenable and cannot be upheld.

The Defense of Laches

As already noted, in each of these five cases plaintiffs seek by the first cause of action a declaratory judgment ruling invalid the change from a fluctuating to a fixed pension, and by the second cause of action a money judgment for the difference between accruals under the two systems for the three-year period prior to the date claims therefore were filed with defendants. Defendants as one of their defenses allege among other things "that plaintiffs and each of them have been guilty of laches and unreasonable delay in bringing both [causes of action] * * * and that both * * * are barred." The trial court found that "the allegations contained in [the above defense] * * * are true and correct and, in addition thereto and in connection therewith, it is also true * * * that, on at least four different occasions subsequent to the amendments to the pension provisions herein complained of by the parties plaintiff, the position of the parties defendant was changed with relation to the members and the other beneficiaries of the Fire and Police Pension System in that new and additional pension benefits were provided for such members and for such other beneficiaries and new and additional duties and burdens in connection therewith were placed upon the parties defendant and the taxpayers of the City of Los Angeles." Also included in both the "conclusions of law" and the judgments is the declaration "That both causes of action of each party plaintiff are barred by laches."

Plaintiffs contend (1) that the evidence does not support the defense of laches, and (2) that in any event their second causes of action, for money judgments, constitute actions at law and therefore are not subject to the equitable defense of laches.

[8] As commented in Gibson v. Mitchell (1937), 9 Cal.2d 718, 725–726 [5], 72 P.2d 740, "Laches is dependent not only upon delay, but also upon injury occasioned by the delay." (See also, In re Estate of Harootenian (1951), 38 Cal.2d 242, 247 [5], 238 P.2d 992; Phoenix Mutual L. Ins. Co. v. Birkelund (1946), 29 Cal.2d 352, 363 [4], 175 P.2d 5; Allen v. California Mutual Bldg. & Loan Ass'n (1943), 22 Cal.2d 474, 488 [13], 139 P.2d 321; Brownrigg v. DeFrees (1925), 196 Cal. 534, 538–539 [1], 238 P. 714; Kirkpatrick v. Tapo Oil Co. (1956), 144 Cal.App.2d 404, 412 [7, 8], 301 P.2d 274; Wilkerson v. Thomas (1953), 121 Cal.App.2d 479, 490 [18], 263 P.2d 678.) Although the charter amendments here under attack were adopted in 1925 and 1927, and some of the plaintiffs have been receiving pensions for many years, others were retired or widowed only recently. These cases were filed in 1955. Thus the same period of delay is not chargeable to all plaintiffs. It further appears that no injury is shown to have been occasioned to defendant city and that the defense of laches is therefore not supported. In this connection it is also noted that injury is neither specifically pleaded by defendants nor found by the trial court. Although the court did find that subsequent to the amendments the position of defendants "was changed * * in that new and additional pension benefits were provided * * * and new and additional duties and burdens * * * placed upon the parties defendant and the taxpayers of the City," there is neither allegation, showing not finding that such benefits

or burdens were induced by reason of the failure of any of these plaintiffs to claim fluctuating rather than fixed pensions.

In the first place, there were no salary increases in the fire or police departments from 1926 until 1943, and thus no occasion for any claim for a fluctuating pension by those whose pensions matured in the interim.[5] Until a salary change occurred and a pension was thereafter granted there would be no way of knowing whether the city's pension obligations would be greater or less dollarwise by payment on a fixed rather than a fluctuating basis; if deflation rather than inflation had set in and salaries had dropped, then the fixed pension, conceivably, could have been more costly to the city than the fluctuating.

In the second place, defendant city instead of sustaining injury by reason of delay upon the part of any plaintiff in claiming a fluctuating rather than fixed pension has actually gained to the extent that any past due payments have become barred either by the three-year statute of limitations which applies to statutory obligations (see Code Civ.Proc. § 338, subd. 1; id., § 312; Skaggs v. City of Los Angeles (1954), supra, 43 Cal.2d 497, 500, 275 P.2d 9; see, also, Santa Cruz County v. McKnight (1918), 20 Ariz. 103, 177 P. 256, 258 [8]) or by the six-months' claim provision of section 376 of the city charter, hereinafter discussed.

The further suggestion that if plaintiffs had earlier claimed a fluctuating rather than a fixed pension defendant city might not have extended pension benefits to many employes not previously included in any existing retirement system (as it did by charter amendment in 1937, Stats. 1937, p. 2943), might not have added the post 1925 and 1927 pension benefits to the police and fire pension system which have been discussed hereinabove, and might not have increased the salaries paid to members of the departments, is likewise without merit; it is based on speculation and finds no substantial support in the evidence. The fact that, as already noted, no salary changes had occurred for some ten years prior to adoption of the 1937 charter amendment shows that at that time it was impossible to determine whether the city's future obligation to most of the present plaintiffs would have been greater or less dollarwise by payment of a fluctuating rather than fixed pension to them, and clearly indicates that plaintiffs' failure to earlier claim the fluctuating payments had no bearing upon the adoption by the electorate of the 1937 amendment extending pension benefits to additional city employes. Further, as likewise already noted, "one of the primary purposes of offering a pension, as additional compensation, is to induce competent persons to enter and remain in public service." (Packer v. Board of Retirement (1950), supra, 35 Cal.2d 212, 215, 217 P.2d 660; Kern v. City of Long Beach (1947), supra, 29 Cal.2d 848, 856, 179 P.2d 799.) It thus appears clear that the 1937 inclusion of additional employes in pension systems, as well as the addition of further benefits to the fire and police pension system, was induced by the necessity of attracting and holding competent employes, rather than by any reliance upon the failure of these plaintiffs to earlier assert a right to a fluctuating pension. The same may be said of salary increases extended to fire and police department members in 1926, 1943, and later years. Further, many of the salary ordinances themselves expressly recited that the purpose of the increase was to keep salaries adjusted to the current increase in the cost of living. Also, under the terms of section 425 of the city charter, the city council had the duty to "provide a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to private persons, firms or corporations under similar employment" (Stats. 1925, p. 1150), thus establishing that in the current inflationary era of rising salaries, the increases provided by defendant city were at least largely granted by reason of its own 1925 charter provisions, rather than being induced by these plaintiffs' failure to act. In summary, no prejudice or injury to defendants has been shown, and hence one of the elements of the defense of laches is lacking.

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[5] All of the plaintiffs in the Abney and Behrns cases (with one possible exception) and the husbands of all plaintiffs in the other three cases retired after the effective date of the 1926 salary increase.

[9–13] Plaintiffs are likewise correct in their contention that their second causes of action, for money judgments, constitute actions at law and therefore are not subject to the equitable defense of laches. It is provided in section 592 of the Code of Civil Procedure that "In actions * * * for money claimed as due upon contract, or as damages for breach of contract, * * * an issue of fact must be tried by a jury, unless a jury trial is waived * * *." This section was framed with a view of adopting the principle that the constitutional guaranty of the right to jury trial applies only to common law actions and not to suits in equity. (See Vallejo & N. R. Co. v. Reed Orchard Co. (1915), 169 Cal. 545, 556, 147 P. 238; 29 Cal.Jur.2d 482–485, and cases there cited; 18 Cal.Jur.2d 140–141; 1 Cal.Jur.2d 620–622.) Inasmuch as the second causes of action seek to recover money due as the vested contractual right of plaintiffs (see Allen v. City of Long Beach (1955), supra, 45 Cal.2d 128, 131 [1], 287 P.2d 765, and cases there cited), it is clear that such causes are actions at law rather than in equity. (See, also, Philpott v. Superior Court (1934), 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990; Brownrigg v. DeFrees (1925), supra, 196 Cal. 534, 539 [2], 238 P. 714.) The fact that both equitable (declaratory judgment) and legal (money judgment based on contract) relief are requested in the same action does not, for example, deprive plaintiff of a right to a jury trial on the legal issues or render all issues and relief sought equitable in nature. (Robinson v. Puls (1946), 28 Cal.2d 664, 665–666[1], 171 P.2d 430.) Inasmuch as laches is not available as a defense to an action at law (Mandracio v. Bartenders Union, Local 41 (1953), 41 Cal.2d 81, 85 [3], 256 P.2d 927) even though combined with the cumulative remedy of declaratory relief (see Code Civ.Proc. § 1062; Weber v. Marine Cooks' & Stewards' Ass'n (1954), 123 Cal.App.2d 328, 332, 266 P.2d 801), it follows that it is not available to defendants here as a defense to the causes of action seeking money judgments.

The Statute of Limitations

The trial court found and determined that both causes of action of each of the plaintiffs are barred by the three-year statute of limitations specified by section 312 and subdivision 1 of section 338 of the Code of Civil Procedure (see Skaggs v. City of Los Angeles (1954), supra, 43 Cal.2d 497, 500, 275 P.2d 9).

[14] As noted in Dillon v. Board of Pension Com'rs (1941), 18 Cal.2d 427, 430 [2], 116 P.2d 37, 136 A.L.R. 800, "The right to receive periodic payments under a pension is a continuing one (see Dryden v. Board of Pension Com'rs [1936], 6 Cal.2d 575, 59 P.2d 104), and any time limitation upon the right to sue for each instalment necessarily commences to run from the time when that instalment actually falls due." Defendants urge, however, that plaintiffs or the deceased husbands of the widow plaintiffs could have sought declaratory relief with respect to the 1925 and 1927 charter amendments at the times those amendments became effective, or at least at the times the fixed rather than fluctuating pension payments were subsequently commenced, that the three-year statute of limitations applies to such relief, and that therefore both the causes of action for declaratory relief as well as those for money judgments are barred because when these actions were filed more than three years had passed since declaratory relief could have been sought.[6]

[15–17] As indicated in Martin v. Henderson (1953), 40 Cal.2d 583, 593 [11], 225 P.2d 416, the rule is, however, that the availability of an action for declaratory relief in no way affects the period of limitations commencing upon the breach of an obligation to pay money. Neither is the right to declaratory relief with respect to the obligation to make the payments which fall within the limitations period barred. As declared in Maguire v. Hibernia Savings & Loan Soc. (1944), 23 Cal.2d 719, 734 [14, 15], 146 P.2d 673, 151 A.L.R. 1062, and relied upon in the Martin case, "We are of the opinion that the period of limitations applicable to ordinary actions at law and suits in equity should be applied in like manner to actions for declaratory relief. Thus, if declaratory relief is sought with reference to an obligation which has been breached and the right to commence an action for 'coercive' relief upon the cause of action arising therefrom is barred by the statute, the right to declaratory relief is likewise barred. On the other hand, if declaratory relief is sought 'before there has been a breach of the obligation in respect to which said declaration is sought,' or within the statutory period after the breach, the right to such relief is not barred by lapse of time." Here, as we have seen, the statutory time limitation upon the right to sue for each pension instalment commences to run from the time when that instalment falls due. It follows that even though plaintiffs might have earlier brought suit for declaratory relief similar to that filed by the active members of the Long Beach Police and Fire Departments in the Allen case (Allen v. City of Long Beach (1955), supra, 45 Cal.2d 128, 287 P.2d 765), their failure to do so does not operate to bar their right to declaratory relief with respect to future pension payments as well as to a monetary judgment for the difference, for three years (insofar as the subject statute is concerned) prior to the filing of these actions, between the amount of the fixed and the fluctuating pensions. (See, also, Fry v. Board of Education (1941), 17 Cal.2d 753, 755, 761 [9], 112 P.2d 229, where in mandamus actions recovery of back salary was allowed for the three-year period before actions commenced.) Cases relied upon by defendants involve either determinations as to the plaintiff's *status* as a pensioner or right to a pension (Dillon v. Board of Pension Com'rs (1941), supra, 18 Cal.2d 47, 430 [2], 116 P.2d 37, 136 A.L.R. 800; Hermanson v. Board of Pension Com'rs (1933), supra, 219 Cal. 622, 28 P.2d 21; Carey v. Retirement Board (1955), supra, 131 Cal.App.2d 739, 747 [3c], 281 P.2d 25), or the right to occupy a particular position as an employe (Leahey v. Department of Water and Power (1946), 76 Cal.App.2d 281, 284, 173 P.2d 69), and are not controlling or persuasive here.

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[6] Although not material in view of our determination, it appears that the husbands of certain of the widow plaintiffs died within less than three years before filing of the complaints.

Six-Months' Claim Provision of City Charter

Defendants further urge that under the claim provisions of section 376 of the city charter any recovery by plaintiffs for past due pension payments must be limited to those which accrued within six months prior to the times plaintiffs presented claims therefor. This point is meritorious.

[18] Shortly before bringing these actions, plaintiffs did present claims for the sums they seek as the difference between the amounts accrued on the fluctuating basis and the sums which had been paid on the fixed basis, apparently computed to cover the three-year period prior to presentation of the claims. Section 376 of the charter requires that all claims against the city other than for damages "shall be presented within six (6) months after the last item of the account or claim accrued." (Stats. 1927, p. 2014.) In Dillon v. Board of Pension Com'rs (1941), supra, 18 Cal.2d 427, 431–432 [7], 116 P.2d 37, 136 A.L.R. 800 (referring to Dryden v. Board of Pension Commissioners (1936), supra, 6 Cal.2d 575, 59 P.2d 104) this court declared, "With regard to pensions, the court interpreted the provision [section 376] as meaning that a claim could be made to the board within six months after the time when any given payment would have accrued had the right to a pension been estabished. Thus, a claimant can assert his right to a pension before the board at any time after the event giving rise to the claim has occurred so long as the claim is made within six

months after any payment would have accrued. If the pension is granted he is entitled to receive payments in the future but can recover only those past payments which would have accrued within a period six months prior to the time of the making of the claim." In the Dryden case, supra, the court was considering the pension claim of the widow of a Los Angeles police officer. Her claim had been filed some ten months after the death of her husband. The court held (at pages 580–581 of 6 Cal.2d, at pages 106–107 of 59 P.2d), "The right to pension payments *is a continuing right.* Petitioner by her conduct may have barred herself from collecting payments which have accrued [more than six months prior to filing of the claim], but this does not mean that she is without means to enforce the right to *present* and *future* pension payments * * * [at page 582 of 6 Cal.2d, at page 107 of 59 P.2d] 'It is our opinion that the petitioner is entitled to all those periodic pension payments which fell due within a period of six months prior to her application * * *, and to all those periodic pension payments which have accrued since that date and which will continue to accrue in the future under the provisions of section 183 of the charter.'"

From the foregoing discussion it appears that plaintiffs, in addition to payments which have accrued since their claims have been filed, and which will in the future come due, may likewise recover only those past due payments which accrued within six months prior to the times they presented claims therefor. Skidmore v. County of Alameda (1939), 13 Cal.2d 534, 538, 540, 90 P.2d 577, relied upon by plaintiffs, is not controlling here. It does not concern a claim for past due pension payments. In its closest similarity to the case at bar it states merely that (13 Cal.2d at page 540, 90 P.2d at page 581), "There is no language in the statute [Pol.Code, § 4075 as then constituted, now Gov.Code, § 29702] to express the intent that varying amounts which became due to the claimant for the performance of specified services under an express contract should be treated as separate claims, rather than as the items of one claim," and that (13 Cal.2d at page 539, 90 P.2d at page 580) "the items set forth in the plaintiffs' claim" (sales of land by the county based on investigations made and reports furnished by plaintiffs) "may be deemed to constitute an 'account or claim' within said section 4075." Skidmore v. County of Tuolumne (1939), 35 Cal.App.2d 525, 528–529 [1], 96 P.2d 178 relates to a cause of action similar to that involved in Skidmore v. County of Alameda, supra. In Nelson v. Merced County (1898), 122 Cal. 644, 55 P. 421, the nature of the claim of the plaintiff supervisor for a per diem allowance (as being a proper subject for an account) was held to be controlled by Statutes of 1893, page 365, "All claims against the county by members of the Board of Supervisors for per diem and mileage, or other service rendered by them, must be itemized and verified as other claims * * *."

Plaintiffs also contend that their various applications for retirement[7] made at or about the time their right to a pensionable status was recognized by the board constituted a sufficient compliance with section 376 under the specific holding of this court in Skaggs v. City of Los Angeles (1954), supra, 43 Cal.2d 497, 504–505 [6], 275 P.2d 9, which in turn relied upon the Dryden and the Dillon cases. The Skaggs case, however, involved status or right to any pension at all, and we believe the better view, and one in harmony with the purpose of limitations provisions is that where, as in these cases, status as a pensioner is established, then the pensioner who asserts a right to larger payments than those received must put the defendants upon notice by presentation of a claim to that specific effect.

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[7] It appears that the original application for retirement of each member consisted of a letter in which a general request for retirement from active service as of a given date was made, coupled with a recitation of the date of appointment, the aggregate period of service and the rank then held by the applicant. Thereafter the applicants signed printed application forms provided and prepared by defendants, which contained a request for retirement under the provisions of section 181 of the city charter, and payment of a pension. Certain of the forms refer to payment of "a pension equal to .... of the average monthly rate of salary * * * received," while others request payment of "a pension equal to .... of the annual salary attached to the rank or position held by your petitioner one year prior to this date of retirement."

Interest on Unpaid Balances Due Plaintiffs

[19] In September, 1955, subsequent to the commencement of these actions, section 3287 of the Civil Code was amended to read as follows: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. *This section is applicable to recovery of damages and interest from any such debtor, including any political subdivision of the State.*" (The italicized portion was added in 1955; Stats.1955, ch. 1477, § 1.)

Prior to the 1955 amendment the rule was that municipal corporations were not liable for interest in the absence of express statutory provision. (Los Angeles Dredging Co. v. City of Long Beach (1930), 210 Cal. 348, 362, 291 P. 839, 71 A.L.R. 161; Imperiale v. City & County of San Francisco (1954), 128 Cal.App.2d 277, 282–283 [2], 275 P.2d 569.) Defendants do not dispute that pending cases should be determined in accordance with the amendment if it is otherwise applicable, thus authorizing interest (on past due claims) from its effective date (see Gregory v. State of California (1948), 32 Cal.2d 700, 702–703, 197 P.2d 728, 4 A.L.R. 2d 924), but contend that a municipality is not a "political subdivision of the State" within the meaning of section 3287. In County of San Mateo v. Coburn (1900), 130 Cal. 631, 636, 63 P. 78, 621, it is declared that "A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government." This view was relied upon and reiterated in Otis v. City of Los Angeles (1942), 52 Cal.App.2d 605, 611–612, 126 P.2d 954, wherein it was decided that actions for declaratory relief under section 1060 of the Code of Civil Procedure may be maintained against municipal corporations. In so deciding the court expressly recognized that it had been held in Bayshore Sanitary District v. San Mateo County (1941), 48 Cal.App.2d 337, 119 P.2d 752, and Irvine v. Sacramento and San Joaquin Drainage Dist. (1942), 49 Cal. App.2d 707, 122 P.2d 320, that section 1060 of the Code of Civil Procedure does not authorize the bringing of an action for declaratory relief against the state or its political subdivision, but declared (at page 611 of 52 Cal.App.2d at page 957 of 126 P.2d) that "respondents' contention that the legal status of a municipal corporation is akin to that of a county cannot be sustained either upon reason or authority."

It is thus apparent that the interest provisions of section 3287 are not applicable to municipal corporations. People v. Hallner (1954), 43 Cal.2d 715, 277 P.2d 393, relied upon by plaintiffs, in which the expression "executive officer *of* this state" (italics added) as used in section 67 of the Penal Code relating to bribery, was construed as having the geographic meaning of "*in* this state," rested upon the principle that the section had previously been construed to the same effect, that the Legislature had thereafter considered the subject of bribery of public officers and made a number of statutory changes, but had not amended the section. The same principle applied in the present case indicates that in amending section 3287 in 1955 the Legislature was aware of the decisions in the County of San Mateo and Otis cases, supra, and approved of the judicial construction excluding municipal corporations from the concept of "political subdivisions of the State."

Plaintiffs suggest, however, that the purpose of amending the section was "to remedy the inequitable situation which was brought to light by the opinion" in the case of Imperiale v. City & County of San Francisco (1954), supra, 128 Cal.App.2d 277, 282–283 [2], 275 P.2d 569. If the amendment were intended by the Legislature to apply to municipal corporations as well as to the state's political subdivisions it would have been easy to use specific language so declaring. In the absence thereof, we conclude that the section does not authorize interest against municipal corporations, and that its recovery in the present cases must be denied.

Concerning Instructions on Remand

Certain stipulations were entered into between the parties from which, plaintiffs assert, the amounts due each plaintiff as of the date of trial may be computed in case plaintiffs are held entitled to a fluctuating pension. Relying on such stipulations, plaintiffs request that the judgments be reversed with instructions to the trial court to compute the respective amounts due each plaintiff and enter judgments accordingly. It is difficult to determine, however, whether the stipulations are sufficiently specific to permit exact and complete computations by the trial court, and we are of the view that under the circumstances it is more appropriate to direct that court to make the essential computations and enter judgments if it finds that it can do so upon the present record, and, if not, then to take such further evidence as may be necessary to compute the amounts due and thereupon to enter judgments not inconsistent with the conclusions announced in our opinion.

The judgments are reversed with directions to the trial court to enter judgments in favor of plaintiffs in accordance with the conclusions declared in the foregoing opinion, if the court finds that it can do so upon the present record, and, if not, then the court is directed to take such further evidence as may be necessary to compute the amounts due to each plaintiff, to make such computations, and thereupon to enter judgments accordingly.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

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50 Cal.2d 432

M. M. KOEHN, Petitioner and Respondent,

v.

STATE BOARD OF EQUALIZATION et al., Defendants and Respondents;

E. L. Ledger, Real Party in Interest;

Alcoholic Beverage Control Appeals Board, Appellant.

S. F. 19780.

Supreme Court of California,
In Bank.

June 4, 1958.

Rehearing Denied July 2, 1958.

Mandamus proceeding. The Superior Court, Alameda County, Agee, J., ordered issuance of writ of mandate, and alcoholic beverage control appeals board appealed. The Supreme Court, Shenk, J., held that where state board of equalization dismissed accusation filed against holder of liquor licenses and state board granted reconsideration and suspended license and on appeal the appeals board set aside order of suspension on theory that state board, because of its failure to act within the times specified in the Government Code, had no jurisdiction to grant reconsideration, the appeals board was acting within scope of functions assigned to it by the Constitution when it so decided, and consequently the appeals board was a "party aggrieved" by and could appeal from Superior Court's writ of mandate commanding appeals board to set aside its decision and to determine the issues presented by appeal from state board's order.

Motion to dismiss appeal denied.

McComb, J., dissented.

Opinion, 310 P.2d 185, vacated.

1. Appeal and Error ⟹151(4)

Where state board of equalization dismissed accusation filed against holder of liquor licenses and state board granted reconsideration and suspended license and on appeal the alcoholic beverage control appeals board set aside order of suspension on theory that state board, because of its failure to act within the times specified in the Government Code, had no jurisdiction to grant reconsideration, the appeals board was acting within scope of functions assigned to it by the Constitution when it so decided, and consequently the appeals board was a "party aggrieved" by and could appeal from Superior Court's writ of mandate commanding appeals board to set aside its decision and to determine the issues presented by appeal from state board's order. West's Ann.Bus. & Prof.Code, §§ 23051, 23084–23091; West's Ann.Code Civ.Proc. §§ 938, 1094.5; West's Ann.Gov.Code, §§ 11519, 11521; West's Ann.Const. art. 20, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Party Aggrieved".

2. Appeal and Error ⟹1

The policy of the law is to recognize a right to review the judgment of a lower court if not prohibited by law.

3. Appeal and Error ⟹1

The right of appeal is remedial, and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment.

4. Appeal and Error ⟹151(4)

Where the jurisdiction of a tribunal is involved, and the granting of a writ directed to the tribunal would have the effect of controlling or limiting that jurisdiction, the tribunal is an "aggrieved party" and is entitled to appeal. West's Ann.Code Civ. Proc. § 938.

See publication Words and Phrases, for other judicial constructions and definitions of "Aggrieved Party".

◆

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Dodge & Evans and Robert P. Brorby, Oakland, for real party in interest.

SHENK, Justice.

[1] The respondents have moved to dismiss the appeal taken by the Alcoholic Beverage Control Appeals Board on the ground that the appeals board is not an aggrieved party within the meaning of section 938 of the Code of Civil Procedure and is not entitled to appeal.[1]

On August 20, 1953, the State Board of Equalization dismissed an accusation filed by M. M. Koehn against E. L. Ledger, the holder of certain liquor licenses, and directed that the order become effective on September 21. Koehn filed a petition for reconsideration, and thereafter the state board postponed the effective date of its decision to October 13. A reconsideration was granted on October 8, and after further proceedings the state board in December 1954 ordered that Ledger's licenses be suspended indefinitely. Ledger appealed to the appeals board, which set aside the order of suspension on the theory that the state board did not have jurisdiction to grant a reconsideration in October 1953 because of failure to act within the times specified in sections 11519 and 11521 of the Government Code. Thereafter Koehn, acting pursuant to section 1094.5 of the Code of Civil Procedure, filed a petition in the superior court seeking a writ of mandate against the state board, the appeals board and others, to compel the appeals board to vacate its decision setting aside the order of suspension. In the meantime, the Department of Alcoholic Beverage Control had become the successor of the state board with reference to matters relating to alcoholic beverage control. Const. art. XX, § 22; Bus. & Prof.Code, § 23051.

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[1] Section 938 of the Code of Civil Procedure provides in part: "Any party aggrieved may appeal in the cases prescribed in this Title." The reference is to Title XIII which deals with appeals in civil actions.

An alternative writ was issued and directed to the state board, the department, its director, and the appeals board, commanding them to revoke Ledger's license and vacate the order setting aside the order of indefinite suspension, or show cause why they had not done so. The appeals board in its answer alleged facts in justification of its action in setting aside the decision of the state board and raised questions which involved the jurisdiction of the appeals board in matters wherein the action of the department was claimed to have become final. The state board and the department and its director joined forces with the petitioner and prayed that the appeals board be compelled to set aside its decision and order. They charged that the action of the appeals board was "arbitrary and capricious and constituted a prejudicial abuse of discretion in that the State Board of Equalization did have jurisdiction to grant reconsideration on October 8, 1953. * * *" The superior court made findings of fact and conclusions of law and held, among other things, that the action of the appeals board, in deciding that the state board was without jurisdiction to grant reconsideration, was unlawful, improper and in error as a matter of law, and that the appeals board's order setting aside the suspension of Ledger's licenses was not justified or sustained by the evidence or record before it and was contrary to law. The ensuing judgment ordered the issuance of a writ of mandate commanding the appeals board to set aside its decision and to proceed to determine any issues and questions left undecided on the appeal from the state board's order of suspension.

The appeals board then took this appeal from the judgment of the superior court, and the state board and the department have made this motion to dismiss.

[2, 3] The policy of the law is to recognize a right to review the judgment of a lower court if not prohibited by law. The "right of appeal is remedial, and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment." People v. Bank of San Luis Obispo, 152 Cal. 261, 264, 92 P. 481, 482; see also Santa Barbara County Water Agency v. All Persons, 47 Cal.2d 699, 712, 306 P.2d 875; Manning v. Gavin, 14 Cal.2d 44, 46, 92 P.2d 795.

[4] Under section 938 of the Code of Civil Procedure any party aggrieved may appeal in a proper case. Where the jurisdiction of a tribunal is involved, and the granting of a writ directed to the tribunal would have the effect of controlling or limiting that jurisdiction, the tribunal is an aggrieved party and entitled to appeal. Mendoza v. Small Claims Court, 49 Cal.2d 668, 321 P.2d 9; Simpson v. Police Court of City of Riverside, 160 Cal. 530, 532, 117 P. 553, 554. In the Simpson case, after pointing out that the appellant police court had no direct interest in a case before it, the decision says: "It has, however, a right to appeal from any judgment against it prohibiting it from proceeding in that action, and has a right to be relieved from any writ improperly issued so prohibiting it." The rule of the Simpson case has been followed and accepted without discussion or criticism in later cases which determined on the merits an appeal taken by a tribunal from a judgment granting a writ which

would have the effect of limiting or impairing the jurisdiction of the tribunal or of controlling its functioning. See Hidalgo v. Municipal Court, 129 Cal.App.2d 244, 277 P.2d 36 [mandamus to compel preparation of transcripts at county expense in a misdemeanor case, on appeal by court, judge and reporter, judgment granting writ reversed]; Zamloch, For and on Behalf of Cowan v. Municipal Court, 106 Cal.App.2d 260, 235 P.2d 25 [mandamus to compel dismissal of misdemeanor charges for violation of right to speedy trial; on appeal by court and judge, judgment directing dismissal affirmed]; Wyman v. Municipal Court, 102 Cal.App.2d 738, 228 P.2d 89, 229 P.2d 491 [prohibition to restrain court from revoking an order granting probation; on appeal by court, judgment granting writ affirmed]; People v. Police Court, 96 Cal. App.2d 217, 214 P.2d 593 [mandamus to compel entry of jury verdict of guilty; on appeal by court, judgment granting writ reversed]; Donner Finance Co. v. Municipal Court, 28 Cal.App.2d 112, 81 P.2d 1054 [prohibition to "annul" judgment and to restrain enforcement and issuance of execution; on appeal by court judge and clerk, judgment granting writ reversed]; Glasser v. Municipal Court, 27 Cal.App. 2d 455, 81 P.2d 260 [prohibition to restrain trial for violation of ordinance asserted to be unconstitutional; on appeal by court, judge, and perhaps others, judgment granting writ reversed]; cf. United States Fidelity & Guaranty Co. v. Justice Court, 99 Cal.App.2d 683, 222 P.2d 292 [certiorari to review forfeiture of bail bond; on appeal by court, judge, and perhaps others, judgment that surety bond was exonerated, reversed]).

As will be seen the appeals board in the present case was exercising its jurisdiction pursuant to constitutional grant of authority, and the writ of mandate ordered by the superior court, if not set aside, will operate to control the functioning of the appeals board, will interfere with the exercise of its jurisdiction and will limit or impair the jurisdiction which it claims to possess.

Section 22 of article XX of the Constitution provides in part that when an appeal is taken from an order of the department suspending or revoking a license, the appeals board "shall review the decision subject to such limitations as may be imposed by the Legislature. * * * Review by the board * * * shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. * * * Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order." See similar provisions in Bus. & Prof.Code, §§ 23084–23091.

The appeals board was acting pursuant to this authority when it determined that the state board had lost jurisdiction to grant a reconsideration. Although the appeals board may have been in error in making this determination, it was then performing the very function it was designed to perform, namely, to determine whether the department (or the state board as its predecessor) had "proceeded without or in excess of its jurisdiction" or had "proceeded in the manner required by law." In making this determination and performing this function, the appeals board necessarily was required to determine the proper rules of law and to pass upon its own jurisdiction in the matter. When the alternative writ of mandate was issued the return and answer of the appeals board raised not only the issue of whether the state board had acted within its jurisdiction, but also the issue whether the appeals board had acted within its jurisdiction and pursuant to its constitutional grant of authority. The primary question before the appeals board was whether the state board had lost power to grant a reconsideration. Determination of this question affected the appeals board's jurisdiction to act by fixing the time when the matter became final before the state board and the time when the appeals board might acquire jurisdiction on appeal.

The judgment of the superior court commands the appeals board to do something it claims it is not legally required to do, i. e., to set aside the decision which that board asserts it made properly and within its jurisdiction. The effect of the judgment is a holding that, as a matter of law, the appeals board could properly act in only one way and that its contrary action in holding invalid the state board's order of reconsideration was without or in excess of the appeals board's jurisdiction. When, as here, the appeals board has acted within the scope of the functions assigned to it by the Constitution, it has a vital interest in maintaining its integrity and seeing that it is not required to discharge its judicial duties contrary to law. It is prejudiced and aggrieved by any writ which has the effect of improperly controlling its functioning as a quasi judicial body, and it has a right to appeal for the purpose of testing the correctness of the judgment. The appeals board is the only party appellant herein and it is the only indispensable party to the proceeding. Without its presence there is no party against whom a writ of mandate could effectively operate. Its resistance to the writ is real and substantial, and it must therefore be deemed to be a party aggrieved by the judgment appealed from.

The motion to dismiss the appeal is denied.

GIBSON, C. J., and CARTER and SPENCE, JJ., concur.

McCOMB, J., dissents.

Rehearing denied: TRAYNOR, SCHAUER and McCOMB, JJ., dissented.

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50 Cal.2d 863

Russell S. MUNRO, Director of the Department of Alcoholic Beverage Control, State of California, Petitioner and Respondent,

v.

The ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the State of California and Ronald C. Chaney, Defendants,

The Alcoholic Beverage Control Appeals Board of the State of California, Appellant.

L. A. 24698.

Supreme Court of California,
In Bank.
June 4, 1958.
Rehearing Denied July 2, 1958.

Mandamus proceeding. The Superior Court, Los Angeles County, entered judgment granting writ of mandate, and the alcoholic beverage control appeals board appealed. The Supreme Court, Shenk, J., held that where department of alcoholic beverage control denied application for transfer of liquor license to applicant on ground that issuance of license to applicant would be contrary to public welfare and morals in view of applicant's failure to disclose that he had been arrested in Tennessee for larceny and fined $10 and sentenced to 60 days at penal farm, the appeals board was acting under its constitutional authority to review decisions of the department when it decided on applicant's appeal that there was not good cause for denial of license, and consequently appeals board was a "party aggrieved" by and could appeal from Superior Court's writ of mandate commanding appeals board to render new decision affirming department's denial of license.

Motion to dismiss appeal denied.

McComb, J., dissented.

Appeal and Error ⚷151(4)

Where department of alcoholic beverage control denied application for transfer of liquor license to applicant on ground that issuance of license to applicant would be contrary to public welfare and morals in view of applicant's failure to disclose that he had been arrested in Tennessee for larceny and fined $10 and sentenced to 60 days at penal farm, the alcoholic beverage control appeals board was acting under its constitutional authority to review decisions of the department when it decided on applicant's appeal that there was not good cause for denial of license, and consequently appeals board was a "party aggrieved" by and could appeal from Superior Court's writ of mandate commanding appeals board to render new decision affirming department's denial of license. West's Ann.Bus. & Prof.Code, §§ 23084–23091; West's Ann. Const. art. 20, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Party Aggrieved".

Edsel M. Haws, Senior Counsel, Sacramento, for apppellant.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The petitioner has moved to dismiss the appeal on the ground that the Alcoholic Beverage Control Appeals Board is not a party aggrieved by or entitled to appeal from the judgment.

The facts may be summarized as follows:

The application of Ronald C. Chaney for transfer of a liquor license disclosed a California arrest for assault but failed to mention the fact that he was subsequently arrested in Tennessee for larceny at the age of 18 or 19, and was sentenced to 60 days at a penal farm and a fine of $10. After a hearing, the Department of Alcoholic Beverage Control adopted the findings of its hearing officer to the effect that Chaney had misrepresented a material fact in his application and that the issuance of a license would be contrary to public welfare and morals.

Chaney appealed to the appeals board which determined that the findings did not support the decision denying a license, that there was no finding that Chaney knowingly or purposely omitted the fact of arrest in Tennessee, that the evidence would not support such a finding if made, that for all that appeared the omission was unintentional, resulting from an honest mistake or negligence, that the unintentional or careless failure to mention the arrest did not constitute good cause for denial of a license, and that the arrest, which occurred about six years before, when Chaney was 19, was not of sufficient materiality to furnish a reasonable basis upon which to deny a license.

On application by the director for a writ of mandate or certiorari, the superior court found that a transfer of the license to Chaney would be contrary to public welfare and morals, that there was substantial evidence to support the department's finding that Chaney misrepresented a material fact, that the denial of a license was a proper exercise of discretion by the department and that the appeals board's decision was arbitrary and unreasonable. The ensuing judgment granted a writ of mandate directing the appeals board to set aside its decision and to render a new decision affirming the department's denial of a license. The appeals board has appealed from that judgment.

The Constitution authorizes the appeals board to review decisions of the department, and the board was acting under this authority when it heard Chaney's appeal. Const. art. XX, § 22; see Bus. & Prof. Code, §§ 23084–23091. As is true in Koehn v. State Board of Equalization, Cal., 326 P.2d 502, this day decided, the judgment commands the board to do something which it claims it is not legally required to do, and the effect of the judgment is a determination that, as a matter of law, the appeals board could properly act in only one way (affirmance) and that its contrary action was without or in excess of its jurisdiction. For the reasons stated in the Koehn case the appeals board is aggrieved by the judgment and entitled to appeal.

The motion to dismiss the appeal is denied.

GIBSON, C. J., and CARTER and SPENCE, JJ., concur.

McCOMB, J., dissents.

Rehearing denied: TRAYNOR, SCHAUER and McCOMB, JJ., dissented.

161 Cal.App.2d 243

Martin J. O'MALLEY, Plaintiff and Respondent,

v.

E. J. GRIFFITH & COMPANY, Inc., Defendant and Appellant.

No. 17744.

District Court of Appeal, First District, Division 1, California.

June 11, 1958.

Action to recover an amount due from sale of scrap. From a judgment for plaintiff in the Superior Court, City and County of San Francisco, Orla St. Clair, J., the defendant appeals. The District Court of Appeal, Bray, J., held that the evidence was insufficient to establish an account stated.

Judgment affirmed.

1. Trial ⇨398

Where there is in the record evidence to support a recovery on either theory, the findings on the inconsistent theory may be disregarded as surplusage.

2. Account Stated ⇨19(3)

In action to recover amount allegedly due on a contract for the sale of scrap where there was concededly a balance due of some $11,000, evidence was insufficient to establish that such amount was discharged by an account stated by a letter written by an individual mentioning an amount of $10,500 where such amount was never owed by defendant to the plaintiff's assignor and the individual had no authority to write the letter.

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Slack & Zook, John E. Troxel, San Francisco, for appellant.

Arthur N. Ziegler, Allan L. Sapiro, O'Malley & Colthurst, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment in favor of plaintiff in the sum of $11,331.56.[1]

Question Presented.

Does the evidence support the court's finding that there was no account stated by the letter of October 8, 1952?

[1] Defendant also contends that the court's findings and judgment were inconsistent in that the court found that the $11,331.56 for which it gave judgment was due both for breach of contract and on an account stated. Inasmuch as defendant does not contend that the evidence does not support both theories (except as to whether said amount was paid) we deem it unnecessary to determine whether or not there was such inconsistency or to further discuss this contention.[2]

Was There a Second Account Stated?

This action grew out of a written contract entered into about June 1, 1952, wherein Micronesia Metal & Equipment Company, Inc. (plaintiff's assignor and herein referred to as "Micro") agreed to sell and E. J. Griffith & Company, Inc. (herein referred to as "Griffco") to buy a shipload of steel and iron scraps. Ninety per cent of the declared value was to be paid upon shipment and the balance to be ascertained in Japan after arrival of the ship there. Concededly the scrap was delivered, the actual cost determined to be $184,654.67, of which 90 per cent or $171,936 was paid as agreed and a balance of $11,331.56 left. Defendant contends that on October 8, 1952, an account was stated showing that of this latter amount all was paid except $831.10 which defendant offers to pay. The circumstances of this so-called second account stated follow: There had been a statement of account dated August 7, 1952, sent by Micro to Griffco showing the $11,331.56 balance. November 12, 1952, Griffco's vice president in Tokyo wrote to Griffco's general offices in Portland, Oregon, stating that Griffco still owed Micro $11,331.10. In June or July, 1955, Griffco was purchased by Getz Bros. At the trial no general ledgers or books of account reflecting the scrap transaction were produced. Getz Bros. had endeavored to get defendant's records from its Tokyo office where they had been kept, but were unsuccessful. However, three annual audits of defendant were produced. The 1952 audit contained a figure of $17,000, itemized under "Scrap Contract Expenses Reserve." The 1953 audit contained a figure of $11,331.10 as "reserve for scrap contract expenses." The 1954 audit contained no similar figure. Nor was there any such item on the balance sheet of Griffco when Getz Bros. purchased the company. Defendant produced a letter dated October 8, 1952, written on a Micro letterhead addressed to Griffco and signed "Micronesia Metal & Equipment Co. Inc., Jack Gotthold, Manager,"[3] stating: "We assume that you know that this Corporation has beeen purchased by new owners and the undersigned has been appointed Manager of the operations in the Mariana Islands and the Palau Islands. Upon perusal of our files, we find that there is a statement of account with you for the amount of $11,331.10. On the other hand, Mr. Bruce Aitchison, the General Manager of this Corporation, informed us that we owe you, as a finder's fee, the amount of $10,500. In consideration of this we ask you to kindly remit to us the balance of $831.10, for which we thank you." This letter was found in Griffco's files. There was no record of its having been answered or acted upon. The Aitchison mentioned in the letter was general manager of Micro from August or September of 1952, and for a while was a minority stockholder therein. By the time of the trial he owned 90 per cent of its stock and was its president. At the time of the execution of the contract Aitchison was a shareholder in Griffco. He and its president, Griffith, had discovered the scrap. Aitchison testified that he advised Griffith that no profit should be taken on the resale of the scrap. Instead a profit would be taken from the "demurrage or dispatch, and in shipping, stevedoring, and such." He also advised Griffith where he might sell the scrap.

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[1] The judgment originally provided that it was to bear interest at 6 per cent per annum. A nunc pro tunc order was made amending the interest to 7 per cent. No complaint is made of this correction.

[2] "Where, as here, there is in the record evidence to support a recovery on either theory, the findings on the inconsistent theory may be disregarded as surplusage." Niles v. Louis H. Rapoport & Sons, 53

Aitchison further testified that after the contract was entered into he obtained for Griffith an option to buy Micro. He and Griffith were going to buy it together. When Griffith was unable to obtain the necessary money Aitchison told Griffith that certain people were willing to take up the option (not telling him that he, Aitchison, was one of the people). Griffith told him to make any deal he could. Aitchison then asked his people "what was a fair finder's fee to Griffith and myself for having found this business, and brought it to their doorstep." He was referring to a fee to be

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Cal.App.2d 644, 652, 128 P.2d 50, 55: Baird v. Ocequeda, 8 Cal.2d 700, 703, 67 P.2d 1055; Crogan v. Metz, 47 Cal. 2d 398, 403, 303 P.2d 1029.

[3] Gotthold died before the trial and hence his testimony could not be obtained.

paid by "his people" who purchased Micro. They said 2 per cent, or $20,000. Aitchison then advised Griffith that that sum would be divided, $10,500 to Griffith and $9,500 to Aitchison. This was in Tokyo long after the scrap transaction had been completed. Griffith did not agree. Litigation followed between the two men. The litigation was settled. The details of the settlement are not clear. Apparently Griffco owed Aitchison for moneys loaned. Aitchison paid Griffco $50,000 for a general release of all claims from both Griffith and Griffco. Griffco then paid back Aitchison the $50,000 and later paid him an additional $26,000.

According to Aitchison, Gotthold had been employed and paid initially by a New York company owned by Aitchison's associates in the purchase of Micro. Gotthold was paid by Micro for only one month before his death. He never had any title from the corporation and was sent out by Aitchison's associates to watch Aitchison. However, Gotthold was employed by Micro as the man in charge of production of scrap in a certain area. He had no authority to make agreements. Aitchison testified that he never told Gotthold that Micro owed Griffith $10,500. That was a sum owed personally to Griffith by Aitchison and paid for in the $50,000 compromise.

[2] Under Aitchison's testimony the $10,500 mentioned in the Gotthold letter was never owed to Griffco by Micro and Gotthold had no authority to write the letter. That amount was a personal transaction between Aitchison and Griffith and the amount was paid. Griffith did not testify. While there were some inconsistencies in Aitchison's testimony, that and his credibility were matters for the trial court to pass upon. We cannot say as a matter of law, as we would be required to do in order to reverse the judgment, that Aitchison's testimony is false. Defendant relies on the Gotthold letter as being an account stated and as showing that Griffco's indebtedness to Micro was paid except for $831.10. However, notwithstanding this letter, Griffco's vice president in Tokyo in an interoffice communication admitted Griffco's indebtedness to Micro. This would indicate that Griffco did not consider the Gotthold letter to be an account stated. In Griffco's files there is a letter to it from Micro dated March 4, 1953, dealing with claims arising out of the voyage of the ship upon which the scrap was shipped, which states that Griffco still owes Micro "a considerable sum of money arising out of the cargo shipped aboard" that ship. Under the circumstances of this case, the Gotthold letter did not constitute an account stated, nor an admission of the truth of its contents.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

161 Cal.App.2d 259

Matter of the ESTATE of Edward I. COFFEY, Deceased.

Matter of the ESTATE of Kathleen Ann COFFEY, Deceased.

Gertrude HOFFMAN, John F. P. Byrne, Cameron C. Coffey, Edward P. Coffey, Herbert L. V. Coffey, George J. O'Sullivan, Regina O'Sullivan, George J. (Jack) O'Sullivan, Margaret O'Sullivan McMorrow, Margaret C. Coffey, Michael Garvey, Michael Horan, Morgan O'Connel, Michael O'Shea, Mary Scannel, Ellen Clifford, Charles O'Connell, Timothy O'Connell, William O'Connell, Bridget Fallon and Nora McEnry, Appellants,

v.

James W. HARVEY, Individually, and as Administrator of the Estate of Edward I. Coffey, deceased; and James W. Harvey, Individually and as Administrator of the Estate of Kathleen Ann Coffey, deceased, Respondent.

Civ. 17634.

District Court of Appeal, First District, Division 2, California.

June 11, 1958.

Hearing Denied Aug. 6, 1958.

Petition by administrator of estates of deceased remainder beneficiary of testamentary trust and his deceased wife for instructions. From an order of the Superior Court, City and County of San Francisco, Thomas M. Foley, J., a creditor of estate of deceased beneficiary and others appealed. The District Court of Appeal, Kaufman, P. J., held that on petition for instructions filed by administrator pursuant to West's Ann.Prob.Code, § 588, Superior Court, sitting in probate, properly authorized administrator in his discretion to prosecute decedents' claims to corpus of testamentary trust, notwithstanding prior order of court authorizing administrator to carry out proposed compromise of such claims.

Order affirmed as to appellant creditor and appeal dismissed as to other appellants.

1. Executors and Administrators 🔑82

On petition for instructions filed by administrator of estates of deceased remainder beneficiary of testamentary trust and his deceased wife, setting out reasons for failure to carry out proposed compromise of decedents' claims to corpus of testamentary trust, probate court properly authorized administrator in his discretion to prosecute such claims against testamentary trust, notwithstanding prior order authorizing him to compromise such claims. West's Ann.Prob.Code, §§ 578, 588, 718.5, 1200.

2. Executors and Administrators 🔑82

Filing of petition by administrator for instructions pursuant to Probate Code conferred jurisdiction upon probate court. West's Ann.Prob.Code, § 588.

3. Executors and Administrators 🔑87, 269

Under statutes authorizing executor or administrator to compromise, with approval of court, claims by or against estate represented by him, probate court has power only to approve or authorize such compromise and may not direct or compel the making of a compromise. West's Ann. Prob.Code, §§ 578, 718.5.

4. Executors and Administrators 🔑87, 269

Statutes authorizing executor or administrator to compromise, with approval of court, claims by or against estate represented by him are permissive and do not either enlarge or abrogate common-law power of executor or administrator to enter into compromise agreements, but only afford additional protection from liability. West's Ann.Prob.Code, §§ 578, 718.5.

5. Courts 🔑198

In exercise of powers conferred upon it, jurisdiction of superior court, sitting in probate, is limited and statutory and it has only those powers given by statute and incidental powers which enable court to exercise jurisdiction conferred upon it.

6. Constitutional Law 🔑92

Order of probate court, authorizing administrator of estates of deceased remainder beneficiary of testamentary trust and his deceased wife to carry out proposed compromise of decedents' claims to corpus of testamentary trust, even though final, could not create vested rights in favor of decedents' creditors or heirs. West's Ann. Prob.Code, §§ 578, 718.5.

7. Courts 🔑198

Superior court, sitting in probate, is generally without power to decide a disputed claim between an estate and a stranger thereto.

8. Executors and Administrators 🔑82

Persons who were not creditors of estates of deceased remainder beneficiary of testamentary trust or of his deceased wife and were not entitled to share in either estate were not entitled to appeal from order of probate court authorizing administrator of such estates in his discretion to prosecute claim to corpus of testamentary trust, where such appellants did not occupy relationship of executors or administrators or those purporting to assert a personal right derived through executor's or administrator's official capacity and did not assert claim to property acquired by claimants in course of probate proceedings. West's Ann.Prob.Code, § 588.

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Norman S. Stimmel, San Francisco, for Gertrude Hoffman.

O'Gara & O'Gara, San Francisco, for John F. P. Byrne et al.

James C. Purcell, Michael Riordan and S. Lee Vavuris, San Francisco, for Michael Garvey.

Mark M. Coleman, San Francisco, Herbert Chamberlin, San Francisco, of counsel, for Margaret M. Coffey.

Frank S. McGorty, Dorothy E. Handy, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

This is an appeal from an order of the Probate Court dated March 21, 1956, authorizing the respondent administrator in his discretion to prosecute the claim which he had made for the Estates of Coffey against the Estate of Liddle despite a previous order authorizing him to compromise said claim. The facts which give rise to this controversy are as follows:

Edward I. Coffey, an attorney, died intestate on June 20, 1943. His sole heir was his widow Kathleen, who was appointed administratrix. The Estate of Edward I. Coffey was distributed on October 15, 1945. As the estate was insolvent, the decree of final distribution provided that if any property was subsequently discovered, certain creditors were entitled to share therein in proportion to their respective claims as follows:

Jerome J. & Nora Enright (subsequently assigned to B. H. Freeman	$9,421.58
Mills Estate, Inc.	2,229.57
Gertrude Hoffman (one of the appellants here)	824.96

The decree further provided that any property remaining after the above claims were paid in full was to pass to the widow. The widow, Kathleen Coffey, died on July 27, 1947. Her only heirs were her sisters, Helen Keating, Mary S. Keating, and Elizabeth MacPherson, hereinafter referred to as the Keating sisters. The estate of Kathleen Coffey was also insolvent.

After the death of Kathleen Coffey, further property belonging to Edward I. Coffey was discovered. Accordingly, the estate of Edward I. Coffey was reopened. James W. Harvey, the respondent here, was appointed administrator of the Estate of Edward Coffey and administrator of the Estate of Kathleen Coffey. The newly discovered property in the estate of Edward I. Coffey consisted of a beneficial interest in a testamentary trust created by the will of Anne McNally Liddle. Anne McNally Liddle, a client of Edward I. Coffey, left certain property to Florence McNally for life, remainder to Edward I. Coffey and others. The will also provided that if any devisees died, their legacy was to be distributed to their heirs. Anne McNally Liddle died before Edward I. Coffey. Florence McNally, the life tenant, died in San Francisco on April 4, 1953. There is therefore a controversy as to whether Edward I. Coffey's interest in the Liddle Trust vested on the death of Anne McNally Liddle or on the death of Florence McNally. After the death of Florence McNally, the respondent filed a petition in Los Angeles, asking the Court to construe the Liddle will. The appellants, Bryne, etc., who are some of the cousins of Edward I. Coffey, filed a petition alleging that as Coffey's heirs at law who survived the life tenant, they were entitled to his share in the Liddle Trust. Both of these petitions are still pending in Los Angeles.

On April 18, 1955, the respondent filed a verified petition in the Superior Court of San Francisco, setting forth the above facts and asking the court to approve an agreement dated March 28, 1955, whereby some of the appellants and other claimants of the Liddle Trust agreed to compromise the claims of Edward I. Coffey and Kathleen Coffey to the Liddle Trust for $20,000. The petition also stated that the respondent had attempted to contact the Keating sisters and that they had refused to discuss the matter. No objection to the petition was filed. Notice was given to all parties that the petition would be heard on May 5, 1955. The Keating sisters were not present at the hearing and were not represented by counsel. The respondent testified that they had been duly notified. All other parties concerned were represented. The court approved the compromise agreement and entered its order on May 31, 1955. The order authorized the respondent to carry out the compromise (subject to approval by the Los Angeles Court) and pay the creditors of the Coffey estates and his own statutory fees from the $20,000. No appeal was taken from this order.

On March 9, 1956, the respondent filed an unverified petition for instructions in the Superior Court of San Francisco, setting forth the above facts and further stating that:

> "That subsequent to said order of May 31, 1955, authorizing the compromise, your petitioner appeared in the proceeding No. P–5073, in the Superior Court of the State of California, in and for the County of Los Angeles, at the time and place set for hearing, but because of the uncertainty of the rights of the claimants represented by O'Gara and O'Gara and the rights of the claimants represented by James C. Purcell, Michael Riordan, and John M. Riordan, the proposed compromise could not be completed, and your petitioner's petition before said Superior Court in said Proceeding No. P–4073 has remained on file and never been dismissed; that no funds or other consideration have been received by your petitioner by reason of said proposed compromise concerning said Florence McNally Trust. That no determination has been made by said Court, or any Court, as to the persons entitled to the remainder interest in said Florence McNally Trust, and the matter is now set for hearing before said Court, in Pasadena, California, on March 23, 1956; that in addition to your petitioner's petition, the petitions of the claimants represented by O'Gara and O'Gara, attorneys at law, and the claimants represented by Purcell, Riordan and Riordan, attorneys at law, are also before said Court in Pasadena; and petitioner is informed and believes that George H. Sullivan and Julien R. Bauer, attorneys at law, have also appeared in said proceeding in behalf of Helen Keating, Mary Stella Keating, Elizabeth K. MacPherson, and the Estate of Robert P. Keating, deceased, whom they allege to be heirs of Kathleen Ann Coffey, deceased, and on or about the 22nd day of February, 1956, said Sullivan and Bauer made demands upon your petitioner, James W. Harvey, to pursue the claims of said heirs to the said testamentary trust through the above-entitled two Coffey Estates. That until said demands were recently made upon him, petitioner had no knowledge whatsoever that Kathleen Ann Coffey, deceased, had been survived by a brother, Robert Keating, who died on January 14, 1949.

> "That petitioner desires to know whether it is for the best interests of the estates he represents to exercise the authority granted by the Order Authorizing Compromise of Claims, dated May 31, 1955, or to pursue the rights of the heirs of said Edward I. Coffey, deceased, and Kathleen Ann Coffey, deceased, to the Florence McNally Trust property, and attempt to obtain for the two above-entitled estates larger amounts of money, dependent upon the determination of the question of law involved in the Estate of Liddle with reference to the date of vesting of the remainder interest in the testamentary trust."

The appellants herein demurred and filed a verified opposition stating that the matter had been finally settled by the order of May 31, 1955. At the hearing on March 21, 1956, all of the appellants who are claimants to the Liddle Trust were represented, as well as the Keating sisters and the Estate of Robert P. Keating, and the Enright creditors of the Estate of Edward Coffey. On March 21, 1956, the Court granted the respondent's motion to strike the demurrer and instructed the respondent as follows:

> "That the order of May 31, 1955, authorizing a compromise of the claims of the two above-entitled Estates to the Liddle Trust Property, neither enlarged nor abrogated the regular powers of the Administrator of said Estates, but merely afforded him additional protection from liability in the event he should effect the compromise.
>
> "That it now appearing that it is not to the best interests of the two above-entitled Estates and the persons interested therein that the Administrator should effect the said proposed compromise, but rather that it is to the best interests of said Estates and the persons interested therein that the Administrator should press the claims of the said two Estates to the said Liddle Trust Property by urging his petition in pending proceedings before the Superior Court of the State of California, in and for the County of Los Angeles, at Pasadena, in the Matter of the Estate of Anne McNally Liddle, deceased, said Administrator is instructed and authorized to do whatever he, in his discretion, may determine to be to the best interests of the said Estates of Edward I. Coffey, deceased, and Kathleen Ann Coffey, deceased, and the persons interested in the said Estates, in connection with the claims of said estates, or either of them, to the Liddle Trust Property, and he is authorized to prosecute the proceedings on his petition on file in said Estate of Anne McNally Liddle, deceased, without any restrictions whatsoever on his lawful and statutory powers as Administrator by reason of the order of the above-entitled Court made and entered on or about May 31, 1955, or any part of said order; that he is authorized to take such action as appears to him, as Administrator, to be to the best interests of the said estates, and his discretionary and other powers as Administrator are in no wise restricted by said order of May 31, 1955."

It is the propriety of the above order of March 21, 1956, which is in issue here. Appellants maintain that the court had no jurisdiction to make the order appealed from as the order of May 31, 1955, was final and immune from collateral attack. That even if made in proper exercise of jurisdiction, the order of March 21, 1956, was an abuse of discretion as it deprived them of valuable property rights acquired under the compromise agreement.

[1] We think that the order of March 21, 1956, was a proper one and should be affirmed. The order was made pursuant to a petition for instructions filed under Probate Code, section 588, which provides:

> "In all cases where no other or no different procedure is provided by statute, the court on petition of the executor or administrator may from time

> to time instruct and direct him as to the administration of the estate and the disposition, management, operation, care, protection or preservation of the estate or any property thereof. Notice of the hearing of such petition shall be given for the period and in the manner required by section 1200 of this code. (Added Stats.1935, c. 724, p. 1973, § 10.)"

[2] Notice of the hearing of the petition was given as required by Section 1200 of the Probate Code and to persons entitled to special notice. The filing of the petition conferred jurisdiction. In re Estate of Green, 138 Cal.App.2d 211, 292 P.2d 651; Security-First National Bank of Los Angeles v. Superior Court, 1 Cal.2d 749, 37 P.2d 69.

[3–5] The order of May 31, 1955, was not an order directing a compromise or an order based on a petition filed pursuant to Section 588 of the Probate Code. In Re Estate of Lucas, 23 Cal.2d 454, 144 P.2d 340, relied upon by the appellants, the court affirmed an order made pursuant to a petition under section 588. The order of May 31, 1955, was based on Probate Code, sections 578 and 718.5. Under these sections, the Probate Court has power only to approve or authorize a compromise. The language of both of these sections is permissive. These statutes neither enlarge nor abrogate the common law power of the administrator to enter into compromise agreements, but only afford additional protection from liability. In re Estate of Lucas, supra, 23 Cal.2d 454, 464 and 465, 144 P.2d 340. As stated in McPike v. Superior Court, 220 Cal. 254, at pages 258, 259, 30 P.2d 17, at page 18:

> "It is equally well settled that while the superior court, sitting in probate, '* * * has no other powers than those given by statute and such incidental powers as pertain to it and enable the court to exercise the jurisdiction conferred upon it, and can only determine those questions or matters arising in the estate which it is authorized to do. Thus, in the exercise of the powers conferred upon it, its jurisdiction is limited * * * and statutory.' * * *
>
> "It is thus apparent that in the several instances enumerated where the Legislature intended to give the court jurisdiction to compel action by the administrator in his dealings with strangers to the estate it used definite and appropriate language to expressly grant such power. In the case of compromises, however, no such language was used. The court is not given power to 'direct' the making of compromises, but only to 'authorize' them. It is not provided that compromises 'shall' or 'must' be made by the administrator when authorized by the court, but that they 'may' be made. The internal evidence of the Probate Code indicates strongly that it was not the intention of the Legislature to confer upon courts sitting in probate the power or jurisdiction to compel action by the administrator in the case of compromises."

[6] In their brief, appellants concede the above point as elementary. The record of the hearing of June 3, 1955, clearly indicates that both sides understood the nature of the order of May 31, 1955. Appellants now maintain that the order created vested rights in their favor. It is clear, that an order merely authorizing a compromise, even though final, cannot create vested rights. Rather, it would appear that no rights are created until the compromise agreement is executed. For the various reasons set forth in the petition for instructions, the compromise was never completed.

[7, 8] While there is no question as to the right of the appellant Gertrude Hoffman, a creditor of the Estate of Edward Coffey to appeal, the respondent urges that the appeal of the other parties be dismissed

as they are not creditors of either estate and are not persons entitled to share in either estate. The general rule is that the superior court while sitting in probate is without power to decide a disputed claim between an estate and a stranger thereto. See Central Bank v. Superior Ct., 45 Cal.2d 10, 285 P.2d 906, and cases cited therein. In Schecter v. Superior Ct., 49 Cal.2d 3, 314 P.2d 10, 13, the Superior Court said: "In the Central Bank case the court set forth the two instances in which the essential 'privity' with the estate existed such as would confer jurisdiction on the court sitting in probate to determine the controversy. Privity was held to arise in the first instance 'out of the nature of the relationship existing between the parties to the controversy.' * * * The relationship was confined to that occupied by executors and administrators and those 'purporting to assert a personal right derived through the executor's or administrator's official capacity' including the claims of attorneys of representatives of estates into whose hands property of the estate had come, citing In re Estate of Troy, 92 Cal. App. 352, 268 P. 426, and In re Estate of De Barry, 43 Cal.App.2d 715, 111 P.2d 728. It was held that privity could also be predicated upon claims to property 'acquired by the claimant in the course of probate proceedings', again citing the Troy and De Barry cases."

It does not appear that the appellants, other than Gertrude Hoffman, meet either of these tests.

In view of the foregoing the order must be affirmed as to appellant Gertrude Hoffman, and the appeal dismissed as to all other appellants.

Order affirmed as to appellant Gertrude Hoffman.

Appeal dismissed as to other appellants.

DOOLING and DRAPER, JJ., concur.

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161 Cal.App.2d 284

Ardessa MARSHALL and Lon Marshall, Jr., Plaintiffs and Appellants,

v.

Hans BENEDICT, J. S. Rafter, individually and doing business as Richmond Hospital, et al., Defendants and Respondents.

Civ. 17341.

District Court of Appeal, First District, Division 2, California.

June 12, 1958.

Action for personal injuries sustained because of alleged medical malpractice. The Superior Court, City and County of San Francisco, Albert C. Woelenberg, J., dismissed action and plaintiffs appealed. The District Court of Appeal, Dooling, J., held that where plaintiffs' counsel had knowledge that motions for change of venue were set for hearing and that uncontradicted affidavit entitled one of defendants to a change of venue as a matter of law, mere act, on part of one of individual defendants, of filing a substitution of attorneys would not ordinarily lull counsel into not making inquiry concerning disposition of motions and did not authorize counsel to conclude that motions had been abandoned; and therefore, defendants were entitled to dismissal of complaint because plaintiffs had not paid fees and costs of transfer of case to another county, notwithstanding notice of making of order granting motion for change of venue had not been served on counsel for plaintiffs.

Judgment of dismissal affirmed.

1. Venue ⟹17

Filing of motion to strike portions of complaint did not constitute waiver of right to move for change of venue. West's Ann. Code Civ.Proc. §§ 399, 581b.

2. Venue ⟹41

Where none of defendants is resident of county in which action is brought, each defendant has a right to change of venue and no defendant can be denied that right by conduct of any other defendant. West's Ann.Code Civ.Proc. §§ 399, 581b.

3. Venue ⟹41

Where plaintiffs brought action against two individuals, individually, and doing business as a hospital, and others, fact that one of individuals filed motion to strike portions of complaint could not deprive other individual of his right to change of venue, even if filing motion to strike could be construed as waiver of right to move for change of venue. West's Ann. Code Civ.Proc. §§ 399, 581b.

4. Venue ⟹78

The effect of an order changing venue is to transfer the entire case to a new county. West's Ann.Code Civ.Proc. §§ 399, 581b.

5. Venue ⟹44

Where plaintiffs had stipulated that motions for change of venue might be made, plaintiffs were reasonably put on inquiry as to disposition made by court of such motions and notice of making of order granting motion for change of venue did not have to be served upon counsel for plaintiffs. West's Ann.Civ.Code, § 19; West's Ann.Code Civ.Proc. §§ 399, 581b.

6. Appeal and Error ⟹991

In proceedings on motion to dismiss action for injuries by reason of alleged medical malpractice on theory plaintiffs had failed to pay fees entailed by transfer of case to another county, question whether plaintiffs were misled by action of one of defendants in giving notice of taking of a deposition and the taking of a deposition and the filing of it into believing that no order of change of venue had been made was for trier of facts. West's Ann.Code Civ.Proc. §§ 399, 581b.

7. Appeal and Error ⟹900, 901, 996

On appeal, every intendment must be indulged in favor of trial court's action and appellate court can only reverse if, after drawing every inference from evidence before trial court which it could reasonably draw, appellate court is satisfied that trial court's determination finds no substantial support; and therefore, where plaintiffs' complaint was dismissed, the burden was on plaintiffs to persuade appellate court that, as a matter of law, the evidence produced before trial court compelled court to rule in favor of plaintiffs.

8. Venue ⟹80

Where plaintiffs' counsel had knowledge that motions for change of venue were set for hearing, and that uncontradicted affidavit entitled individual defendant to change of venue as a matter of law, court granted motion for change of venue but plaintiffs' counsel entirely failed to inquire about disposition made of motions and thereafter motions were filed to dismiss action for failure of plaintiffs to pay fees and costs for transfer of case to another county, burden was on plaintiffs to establish that an ordinarily prudent attorney would fail to take simple step of acquainting himself with action of trial court on motions for change of venue, under circumstances in order to defeat dismissal. West's Ann.Code Civ.Proc. §§ 399, 581b.

9. Venue ⟹80

Where plaintiffs' counsel had knowledge that motions for change of venue were set for hearing and that uncontradicted affidavit entitled one of defendants to a change of venue as a matter of law, mere act, on part of one of individual defendants, of filing a substitution of attorneys would not ordinarily lull counsel into not making inquiry concerning disposition of motions and did not authorize counsel to conclude that motions had been abandoned; and therefore defendants were entitled to dismissal of action because plaintiffs had not paid fees and costs of transfer of case to another county, notwithstanding notice of making of order granting motion for change of venue had not been served on counsel for plaintiffs. West's Ann.Code Civ.Proc. §§ 399, 581b.

10. Estoppel ⟹54

One of the essential elements of estoppel is ignorance of facts; one is not ignorant of facts, in sense in which that term is used in doctrine of estoppel, if he has notice of facts sufficient to put a reasonably prudent man upon inquiry the pursuit of which would have led to actual knowledge.

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Fitzgerald Ames, Sr., San Francisco, for appellants.

Lamb & Hoge, San Francisco, for respondent Benedict.

Bledsoe, Smith, Cathcart, Johnson & Phelps, Joseph W. Rogers, Jr., San Francisco, for respondent Rafter.

DOOLING, Justice.

Plaintiffs appeal from a judgment dismissing their action pursuant to Code of Civil Procedure, section 581b.

Plaintiffs filed their complaint in the San Francisco Superior Court charging injuries by reason of alleged medical malpractice. Respondents Benedict and Rafter, who were named as defendants, separately filed notices of motion for change of venue to Contra Costa County on the ground that they, and all other defendants, are residents of that county. By stipulation these motions were heard on September 15, 1954. No counter-affidavit or other opposition was presented and no appearance was made by appellants' counsel at the hearing of the motions. The court by written order filed on September 15, 1954 granted the motion of Benedict and ordered the case transferred to Contra Costa County.

Appellants failed to pay the fees entailed by such transfer, as required by section 399, Code of Civil Procedure, for more than one year after the making of said order, and on September 21, 1955 counsel for respondents served and filed a notice of motion to dismiss the action pursuant to said section 581b, which provides that where the action was not commenced in the proper court and has been ordered transferred to such court such action must be dismissed where the fees and costs for such transfer as provided in section 399 "have not been so paid for one year after the entry of the order for transfer."

Appellants countered with a motion to be relieved from their default in not paying such fees within the year. This motion to be relieved from default was denied on February 10, 1956 and the motion to dismiss was granted and the action ordered dismissed on February 21, 1956.

Appellants assert as grounds of reversal:

1. By filing a motion to strike portions of the complaint with his notice of motion for change of venue Rafter waived his right to have the venue changed.

2. The conduct of the respondents after the order was made misled appellants' counsel into the belief that the motions for change of venue had been abandoned and their motion for relief from default should have been granted on that ground.

3. Such conduct estops respondents to rely on the one-year provision of section 581b.

[1–3] Point 1 may be summarily disposed of. The filing of a motion to strike was not a waiver of the right to move for change of venue. Wood, Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 717, 73 P. 588; Lyons v. Brunswick-Balke, etc., Co., 20 Cal.2d 579, 583, 127 P.2d 924, 141 A.L.R. 1173. But even if it could be so construed the motion for change of venue made by Benedict was the motion which was granted. No conduct of Rafter could deprive Benedict of his right to change of venue. Where none of the defendants is a resident of the county in which the action is brought each defendant has a right to change of venue and no defendant can be denied that right by the conduct of any other defendant. "The language of section 395 requires the action to be tried in the county in which the defendants, or some of them, reside, not where they do not reside. The consent of certain defendants not residing in the county where the action is brought could not take away from the defendants who did not reside there the right to have the cause transferred to the county of their residence." Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 521, 274 P. 977, 979;

Wood, Curtis & Co. v. Herman Min. Co., supra, 139 Cal. 713, 716, 73 P. 588; Sourbis v. Rhoads, 50 Cal.App. 98, 100, 194 P. 521.

[4] The effect of the order changing venue is to transfer the entire case to the new county. It is inconceivable that in the one action the Contra Costa court should have jurisdiction over Benedict while the San Francisco court at the same time retained jurisdiction over Rafter.

[5, 6] Points 2 and 3 depend upon the same facts. No notice of the making of the order granting the motion for change of venue was served upon counsel for appellants. None was required. He had stipulated that the motions might be made on September 15, 1954 and was reasonably put on inquiry as to the disposition made by the court of such motions. Civ.Code, § 19; 36 Cal.Jur.2d, Notice, §§ 3–4, pp. 415–416. Thereafter a substitution of attorneys was filed by Rafter in the proceeding and the substituted attorneys gave notice of the taking of the deposition of one of the appellants, such deposition was taken with counsel for Benedict participating and the completed deposition was filed with the papers in the action in the office of the County Clerk in San Francisco. Also an affidavit for taking deposition of, and subpoena duces tecum to, the custodian of records of Mt. Zion Hospital was filed by Rafter with the San Francisco County Clerk. Counsel for appellants claims that he was misled by these proceedings into believing that no order for change of venue had been made.

This, at most, presented a question of fact for the trial court which was decided adversely to appellants by the order denying their motion for relief from default.

[7] On appeal every intendment must be indulged in favor of the trial court's action and we can only reverse if, after drawing every inference from the evidence before that court which it could reasonably draw, we are still satisfied that the trial court's determination finds no substantial support. The burden is on appellants to persuade us that as a matter of law the evidence produced before the court compelled that court to rule in favor of appellants.

[8, 9] Appellants' counsel had knowledge not only that the motions for change of venue were set for hearing on September 15, 1954, but also that the uncontradicted affidavit filed in support of Benedict's motion entitled Benedict to a change of venue as a matter of law. With this knowledge he entirely failed to inquire about the disposition made by the court of this motion. The order for change of venue was made on September 15, 1954. The substitution of attorneys was not filed until November 10, 1954. The notice of taking deposition was filed December 13, 1954. The burden was on appellants to satisfy the court that an ordinarily prudent attorney would fail for nearly two months to take the simple step of acquainting himself with the action of the trial court on a motion for change of venue which on the state of the record he must expect to be granted; then because of such an equivocal act as the filing of a substitution of attorneys in the clerk's office in San Francisco that he would be lulled into not making such inquiry for 33 days more; and finally because deposition proceedings were commenced in the San Francisco court almost three months after the motion for change of venue had been set for hearing that he might reasonably conclude that the motion had been abandoned without any effort to ascertain the fact. The facts speak for themselves and we cannot hold as a matter of law that on such a showing appellants were entitled to be relieved from their default.

[10] One of the essentials of an estoppel is ignorance of the facts. Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 273, 83 P.2d 503; Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp., 1 Cal.2d 121, 128, 34 P.2d 139; Benson v. Andrews, 138 Cal.App.2d 123, 138, 292 P.2d 39; 18 Cal.Jur.2d, Estoppel, § 5, p. 407. One is not ignorant of the facts, in the sense in which that term is used in the doctrine of estoppel, if he has "notice of facts sufficient to put a reasonably prudent

man upon inquiry, the pursuit of which would have led to actual knowledge." Banco Mercantil, S. A. v. Sauls, Inc., 140 Cal. App.2d 316, 323, 295 P.2d 55, 60; General Motors Acceptance Corp. v. Gandy, 200 Cal. 284, 298, 253 P. 137; Nilson v. Sarment, 153 Cal. 524, 531–532, 96 P. 315.

Whether or not appellants' counsel was reasonably justified in assuming that the motions for change of venue had been abandoned without taking the readily available means of ascertaining the truth presented a question for the trial court and on the record before us we cannot interfere with its decision.

Judgment of dismissal affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

161 Cal.App.2d 353

Matter of the ESTATE of John William TRAINER, Deceased.

Stanley TORME, Appellant,

v.

Margaret DUNCAN and John Duncan, Respondents.

Civ. 17683.

District Court of Appeal, First District, Division 2, California.

June 17, 1958.

Hearing Denied Aug. 13, 1958.

Proceedings in the matter of a decedent's estate. The Superior Court, Contra Costa County, Harold Jacoby, J., entered a decree determining heirship in favor of specific legatees, and a residuary legatee appealed. The District Court of Appeal, Dooling, J., held that by virtue of deeds of trust securing notes given to him as part of purchase price for land, testator had had a "remaining interest" in real property, which, by terms of Probate Code section, passed by will, and that there had been, by virtue of sale, no ademption of devises made by previously-executed will drawn by attorney and containing residuary clause.

Affirmed.

Wills 🔑6, 767

By virtue of deeds of trusts securing notes given him as part of purchase price for land sold, testator had a "remaining interest" in real property, which, by terms of Probate Code section, passed by will, and there was, by virtue of sale, no ademption of devises made by previously-executed will drawn by attorney and containing residuary clause. West's Ann.Prob.Code, §§ 73, 78.

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Darwin & Peckham, Robert F. Peckham, Sunnyvale, for appellant.

Robert L. Ward, Sturgis, Den-Dulk, Douglass & Anderson, John D. Den-Dulk, Oakland, for respondents.

DOOLING, Justice.

This is an appeal by residuary legatee from the decree determining heirship in favor of specific legatees Margaret and John Duncan, husband and wife.

The will, drawn by an attorney, devised one described parcel of real property to Margaret and another described parcel to Margaret and John in joint tenancy. Subsequently both parcels were sold and the testator received in each case a note for the balance of the purchase price secured by deed of trust on the parcel sold. The probate judge determined that the unpaid balance of each note so secured by deed of trust passed to Margaret and John Duncan under the will.

Appellant takes the position that by the sales of the subject matter of the two devises they were adeemed. Probate Code, § 73.

Respondents rely on Probate Code, section 78 and In re Estate of Moore, 135 Cal. App.2d 122, 286 P.2d 939, to support the finding of the probate court that as to the unpaid balances of the two promissory notes secured by deed of trust on the parcels of real property specifically devised to them there was no ademption.

Probate Code, section 78 reads: "Neither a charge or encumbrance placed by a testator upon property previously disposed of by his will, for the purpose of securing the payment of money or the performance of any covenant or agreement, *nor a conveyance,* settlement, or other act of a testator, *by which his interest in any such property is altered, but not wholly divested,* is a revocation of the disposal; but the property, subject to such charge or encumbrance, or *the remaining interest therein,* passes by the will." (Emphasis ours.)

In Re Estate of Moore, supra, 135 Cal. App.2d at pages 128–134, 286 P.2d at page 939, the court considered the effect of this section in an identical situation and held that a specific devise of real property was not adeemed as to the amount secured by deed of trust upon such property, pointing out that the creditor-devisor does have an interest in the real property since the title is held by the trustee for his benefit. The court in that case noticed that this result was not in harmony with the "preponderance of authority throughout the states" (135 Cal.App.2d at page 128, 286 P.2d at page 942), but after a thorough consideration of the California cases concluded that under California law "(t)he vendor's interest in the property has been 'altered, but not wholly divested' by a sale with trust deed back." 135 Cal.App.2d at page 132, 286 P.2d at page 944. We are satisfied with the reasoning and conclusion of the court in that case and feel that nothing can be added by further discussion.

Appellant attempts to distinguish the case before us from Estate of Moore on two grounds: 1. In Moore the will was holographic while the will before us was drawn by an attorney, and 2. in Moore an ademption would have resulted in partial intestacy since in that case the will contained no residuary clause as does the will before us. While the court in Moore referred to these facts, basically its decision did not depend upon them, but on the broad conclusion with which we are in complete agreement that by virtue of the deed of trust the devisor has a "remaining interest" in the real property which by the terms of Probate Code, section 78 "passes by the will."

Decree affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

161 Cal.App.2d 113

Harold GELBER and Elsie Q. Gelber, Appellants,

v.

William S. CAPPELLER, as Trustee under the Last Will and Testament of Edward B. Cappeller, Deceased, Nellie M. Cappeller, Bank of America National Trust and Savings Association, G. Robert Smith, Respondents.

Civ. 22629.

District Court of Appeal, Second District, Division 3, California.

June 5, 1958.

Rehearing Denied June 27, 1958.

Hearing Denied July 30, 1958.

Action by purchasers for specific performance of contract for sale of realty or in the alternative to recover damages for breach of contract. From adverse judgment of the Superior Court, Los Angeles County, Joseph W. Vickers, J., the purchasers appealed. The District Court of Appeal, Nourse, J. pro tem., held that evidence was insufficient to sustain finding that on date upon which purchasers completed conditions of escrow on their part that no contract existed between the parties, that vendors had cancelled escrow, and that contract of purchase and sale was terminated.

Judgment reversed.

1. Specific Performance ⚷121(9)
Vendor and Purchaser ⚷350

In action by purchasers for specific performance of contract for sale of realty or in the alternative to recover damages for breach of contract, evidence was insufficient to sustain finding that contract was not modified in such manner as to permit purchasers to nominate a third party in whom title to property should be vested upon consummation of contract.

2. Vendor and Purchaser ⚷82

Where after execution of modification of escrow instructions and nomination of a third person as vestee, both vendors caused to be placed in escrow a deed designating nominee named by purchasers and they thereafter continuously asserted, until their attempted rescission of contract, that purchasers were obligated to complete escrow upon basis of deed placed in escrow, there was a ratification by one of vendors of amendment which was signed only by his covendor and he was estopped from asserting that contract was not modified.

3. Vendor and Purchaser ⚷82

Where escrow instructions were amended so as to permit purchasers of realty to name a third person as vestee, escrow instructions as modified constituted a contract between parties for sale and purchase of property with title to vest in purchasers' nominee on consummation thereof.

4. Vendor and Purchaser ⚷89

Where vendors had fully performed all of terms of contract to purchase and sell and all of conditions of escrow on their part to be performed, contract, as well as escrow created under it, remained unaffected by purchasers' notice of cancellation of escrow.

5. Escrows ⚷8(2)
Vendor and Purchaser ⚷100, 119

Where purchasers attempted to cancel escrow but vendors insisted upon its performance and purchasers performed by depositing all moneys and instruments required of them with escrow holder before any attempt had been made by vendors to terminate escrow, and vendors had performed all conditions on their part, escrow holder was in a position to close escrow and contract to purchase and sell was fully consummated, and it was beyond power of either party to rescind contract or terminate escrow.

6. Vendor and Purchaser ⚷182

Where purchasers were required to deposit in escrow a deed of trust which would constitute a first lien upon property to secure balance of purchase price and purchasers named a company as vestee and vendors executed deed naming company as grantee in deed, company was only person which could execute deed of trust and purchasers had performed terms of contract on their part when they deposited deed of trust signed by company.

7. Deeds ⚷31
Mortgages ⚷11

Where deed placed in escrow by vendors named "Pacific Side Investment Corp., a California corporation" as the purchasers' vestee but deed of trust deposited in escrow bore a corporate seal bearing the name "Pacific Side Investments, Inc." the misnomer did not invalidate deed and trust deed executed by vestee was fully operative as a conveyance to trustee therein named.

8. Specific Performance ⚷121(10)
Vendor and Purchaser ⚷350

In action for specific performance of contract for sale of realty or in the alternative to recover damages for breach of contract, evidence was insufficient to sustain finding that on date upon which purchasers completed conditions of escrow on their part that no contract existed between parties, that vendors had cancelled escrow, and that contract of purchase and sale was terminated.

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Abraham Gottfried, Beverly Hills, for appellants.

Baker, LeBel & McNairy, Santa Monica, for respondents.

NOURSE, Justice pro tem.

[1] By their amended complaint in this action appellants sought to specifically enforce a contract for the sale to them by respondents of certain real property or in the alternative to recover damages for the breach of that contract. From a judgment denying either specific performance or damages they appeal.

By their amended complaint the appellants, Harold Gelber and Elsie Q. Gelber, alleged that the respondents, Nellie M. Cappeller, and William S. Cappeller [1] as trustee under a testamentary trust, were the owners of the subject real property and that on or about the 25th of February, 1955, they and the appellants placed escrow instructions with the defendant Bank of America National Trust and Savings Association (hereinafter called bank) wherein and whereby the respondents agreed to sell to the appellants the property in question and the appellants agreed to buy said real property for the sum of $12,500 and that the parties agreed that the title to said property should be vested in a nominee of appellants; that the appellants had performed all of the terms and conditions of the agreement on their part to be performed and were ready, willing and able to fulfill them and that the consideration of $12,500 was a fair and reasonable value of the property sold. The remaining allegations of the amended complaint are not pertinent to the questions necessary for us to decide on this appeal.

By their answer the respondents Cappeller admitted the execution of the contract of purchase and sale but denied that they had agreed that the vestee might be a person other than the appellants; denied that the appellants had performed the terms of the contract on their part to be performed; and alleged affirmatively that prior to the commencement of the action the contract had been terminated by respondents in accordance with the terms of the contract. It was stipulated at the trial that the $12,500 purchase price was the reasonable market value of the subject property at the time the contract was entered into.

The trial court found that the parties did enter into a contract in writing for the purchase and sale of the real property in question for the price of $12,500; that it was not true that the respondents agreed that said contract be modified to the end that appellants might nominate another person than themselves in whom title should be vested upon consummation of the transaction; found that it was not true that the appellants had performed all of the terms and conditions of the contract on their part to be performed and that respondents had, prior to the commencement of the action, terminated the contract sought to be enforced by appellants pursuant to the terms of the contract.[2]

It is appellants' contention that the finding that the contract had not been modified as to vesting of title in a nominee, the finding that the contract had been terminated by respondents prior to the commencement of the action in accordance with the terms of the contract and the finding that appellants had failed to perform the contract are contrary to the evidence; and that the evidence shows that the contract was fully performed by appellants and that, at the time respondents attempted to terminate, a true and irrevocable escrow existed and that the appellants were entitled to have the contract specifically enforced in accordance with its terms.

The pertinent facts are not in dispute. Chronologically stated they are: On or about February 25, 1955, there was signed and delivered to the respondent bank an instrument entitled "Escrow Instructions," by which the appellants agreed to, on or about April 21, 1955, deposit with the bank a certain amount of cash and a note for the balance of the purchase price secured by a deed of trust upon the subject property and instructed the bank to deliver the cash and said note and deed of trust to respondents when the bank had filed with it for record instruments entitling it to procure a policy of title insurance showing title to be vested in appellants subject only to the purchase money deed of trust executed by appellants and to general and special taxes for the fiscal year 1954—1955.

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[1] Where we refer to the respondents Cappeller we do not include William S. Cappeller in his individual capacity but only as trustee.

[2] There are many findings as to evidentiary matters but the foregoing states the substance of the findings of the court upon the ultimate facts.

It was further provided in appellants' instructions that if the bank were unable to comply therewith prior to April 21, 1955, it would comply as soon as possible thereafter "unless a written demand for return of money or instruments by a party to this escrow is received by you subsequent to such date and prior to the recording of any instrument provided for herein."

Respondents by their instructions accepted and approved the instructions of appellants and agreed to deposit with the bank the deed required to meet the conditions of appellants' instructions and authorized the delivery of this deed when the bank held for respondents' account the note and deed of trust and the down payment.

On March 10, 1955, there was deposited with the bank an instrument signed by appellant Harold Gelber and respondent Nellie M. Cappeller stating that "grantee vesting" would be handed the bank by Gelber and on March 11 Gelber deposited with the bank an instrument reading as follows: "Title to the within described property is to be vested in Pacific Side Investment Corp, A California Corporation." This instrument was signed in the name of the designated vestee by appellant Harold Gelber as president and his wife Elsie as secretary and affixed to it was a seal bearing the name "Pacific Side Investments, Inc.," and on the same date a real estate broker deposited with the bank for the account of appellants the sum of $1,250.

On May 2nd respondents deposited with the bank a grant deed executed by them as grantors and naming "Pacific Side Investment Corp., A California Corporation" as grantee, this deed having been signed and acknowledged by them on April 29, 1955.

On May 25th appellant Harold Gelber, in writing, gave notice to the bank cancelling the escrow and demanding return of his deposit. The respondents refused to accede to the cancellation of the escrow and notified the bank that they expected the bank to consummate the transaction. On August 3, 1955, the respondents, through their attorneys, demanded of appellants that they complete the escrow. After conferences with respondents' attorneys appellants on November 5, 1955, deposited $5,150 with the bank and on November 15, 1955, deposited in the escrow a promissory note for $7,500 signed by them and payable to respondents, this note being executed by appellants as individuals. At the same time they deposited a trust deed securing "one promissory note of even date herewith in the principal sum of $7,500.00 payable to Beneficiary or order" and which stated "This deed of trust is given to secure a portion of the purchase price of the within described property." This deed of trust was signed by "Pacific Side Investment,, Inc." and bore the seal of that corporation.

On the same date the appellants also deposited with the bank a demand, in writing, that the escrow be completed.

On November 17th the attorneys for respondents wrote the appellants that they had induced their clients to accept appellants' "cancellation of this transaction" and at the same time the respondents notified the appellants and the bank that they were cancelling the escrow.

In our opinion the foregoing facts establish the contract as alleged by appellants, i. e., a contract for the purchase by them, with title to be taken in the name of their nominee, of the property in question, and the full performance by them of that contract.

[2] The finding of the trial court that the original contract between the parties was not modified so as to permit appellants to nominate a third party in whom the title to the property should be vested upon con-

summation of the contract is entirely unsupported by the evidence. It is respondents' contention that as the amendment to the escrow instructions by which appellants were permitted to name a third person as vestee was signed only by the respondent Nellie M. Cappeller, it was insufficient to constitute a modification of the contract. This contention is without merit for after execution of this modification and the nomination of the vestee, both respondents caused to be placed in the escrow a grant deed of the property in question in which deed the nominee was named as grantee, and they thereafter continuously asserted, until their attempted rescission in the following November, that appellants were obligated to complete the escrow upon the basis of the deed placed in the escrow by respondents. These acts constituted a ratification by respondent William S. Cappeller of the amendment signed by his cograntor and estops him from asserting that the contract was not modified. Gregg v. Carey, 4 Cal. App. 354, 88 P. 282; Scott v. Glenn, 87 Cal. 221, 25 P. 405.

[3] The escrow instructions as modified constitute a contract between the parties for the sale and purchase of the subject property with title to be vested in the vendees' nominee on consummation thereof. Tuso v. Green, 194 Cal. 574, 229 P. 327; Thoroman v. David, 199 Cal. 386, 390, 249 P. 513. They also constituted an agreement between the parties to consummate their agreement in a certain manner, that is: By the deposit by the respondents of the instrument of conveyance with the escrow holder and the deposit by the appellants with that escrow holder of the down payment and a note for the balance of the purchase price and a deed of trust securing that note.

Under the instructions given by the parties the escrow holder became the common agent of both parties and held all monies and documents deposited with it for the benefit of both until either its powers under their instructions were terminated, or the conditions under which the escrow was to be closed by it had occurred in which latter event it became agent and trustee for the vendors as to the monies and documents deposited by the vendees and agent and trustee for the benefit of the vendees as to the instruments of conveyance of the other documents deposited by the grantor. Shreeves v. Pearson, 194 Cal. 699, 707, 230 P. 448; 18 Cal.Jur.2d 325–327, 341–342.

On May 25th the respondents had fully performed all of the terms of the contract of purchase and sale and all of the conditions of the escrow on their part to be performed, for they had deposited the deed required and instructed the escrow holder to procure the required policy of title insurance showing title to be vested in the vendees' nominee upon recordation of that instrument.

[4] When, on May 25th, appellants attempted to cancel the escrow, they were in default, having failed to deposit with the escrow holder the balance of the down payment or the note and deed of trust securing the balance of the purchase price. Being in default they had no right to either terminate the authority of the common agent of the parties or to terminate or rescind the contract of purchase and sale, and that contract, as well as the escrow created under it, remained unaffected by appellants' notice of cancellation. North American Dredging Co. of Nevada v. Outer Harbor Co., 178 Cal. 406, 413, 173 P. 756; Fairchild-Gilmore-Wilton Co. v. Southern etc. Co., 158 Cal. 264, 273, 110 P. 951; Pyle v. Benjamin, 102 Cal.App. 691, 697, 283 P. 372; 25 Cal.Jur., p. 659, 679–680.

[5] The notice given by appellants on May 25th to the escrow holder to cancel the escrow being but an abortive attempt to cancel their contract with respondents, respondents had the option of treating appellants' act in giving notice of cancellation of the escrow as an offer to rescind their contract, and accepting that offer with the result that the contract would have been mutually rescinded, or of treating it as a breach of the contract entitling them to

sue for damages or to stand upon the contract and insist upon its performance. 25 Cal.Jur. 704, 705; Amaranth Land Co. v. Corey, 182 Cal. 66, 67, 186 P. 765. Respondents adopted the latter course and appellants were entitled to accede to the respondents' repeated demand that they perform their contract. This they did by depositing all monies and instruments required of them with the escrow holder before any attempt had been made by respondents to terminate that escrow.

When appellants had completed all of the conditions of the escrow on their part to be performed (the final condition was complied with on November 15th) the escrow holder was in a position to close the escrow and the deed deposited by respondents became the property of the appellants, held in trust for them by the escrow holder and the monies and instruments deposited by appellants became the property of the respondents, held in trust for them by the escrow holder. Shreeves v. Pearson, supra, 194 Cal. 699, 707, 230 P. 448; 18 Cal.Jur. 2d 325–327, 341–342. In other words, on November 15th, the contract to purchase and sell had been fully consummated and it was beyond the power of either party to rescind the contract or terminate the escrow.

[6] It is the contention of the respondents, however, that appellants did not perform the terms of the contract on their part to be performed. Their contention in this regard is threefold. They first contend that they were entitled to a deed of trust executed by appellants as individuals, and that therefore the placing in escrow of a deed of trust executed by appellants' nominee did not constitute performance. This contention cannot be upheld. The appellants were required to deposit in the escrow a deed of trust which would constitute a first lien upon the property to secure the balance of the purchase price. The only person who could execute a deed of trust which would constitute such a lien was the person to whom title was conveyed by respondents. The parties having agreed that title should become vested in Pacific Side Investment Corp., and it having been named as grantee in the deed placed by respondents in the escrow, it was the only person who could execute the deed of trust.

Respondents next contend that inasmuch as the grantee named in the deed was "Pacific Side Investment Corp., A California Corporation" and as the deed of trust was executed by Pacific Side Investment, Inc. that the deposit of that trust deed in the escrow did not constitute performance by appellants.

[7] There was no evidence that there was any such corporation as Pacific Side Investment Corp., and it is apparent from the evidence that the use of this name constituted merely a misnomer. The amendment to the escrow instructions which named the nominee vendee of appellants, was executed in the name of "Pacific Side Investment Corp, A California Corporation," but it, as well as the note placed in the escrow and which was executed by the appellants individually, bore a corporate seal bearing the name "Pacific Side Investments, Inc." There was therefore evidence before the court which would have permitted it to order the deed placed in the escrow by respondents corrected so as to show the proper name of the grantee. The misnomer did not, therefore, invalidate the deed as a conveyance to Pacific Side Investments, Inc., and the trust deed executed by it was fully operative as a conveyance to the trustee therein named. Sixth District Agr. Ass'n v. Wright, 154 Cal. 119, 97 P. 144; Budd v. Joseph Zukin Blouses, Inc., 90 Cal.App. 447, 265 P. 1038; Indian Refining Co., Inc. v. Royal Oil Co., Inc., 102 Cal.App. 710, 283, P. 856; Goldberg, Bowen & Co. v. Dimick, 169 Cal. 187, 146 P. 672; 12 Cal.Jur.2d 653.

It is further asserted by respondents that the deed of trust deposited by appellants in the escrow, did not, by its terms, secure payment of the note deposited by them in the escrow. They assert that the trust deed purports to secure the note of the party executing the deed of trust (the trustor). We find nothing in the deed of trust to support this contention. Read as a whole, it purports to secure the balance of the purchase price of the subject property as evidenced by a promissory note of "even date" in the principal sum of $7,500. The note executed by appellants evidenced the indebtedness comprising the balance of the purchase price and as it is the balance of the purchase price which is secured, the fact that indebtedness is evidenced by the promissory note of the vendees under the contract in no way affects the efficacy of the trust deed to secure that indebtedness.

When, on November 17, 1955, respondents notified the trustee to cancel the escrow and attempted thereby to rescind or terminate their contract of purchase and sale, the appellants were not in default but had fully performed all of the conditions of the contract on their part to be performed and the escrow holder was no longer the common agent of the parties but held the deed deposited by respondents for the benefit of the appellants only and held the monies and documents deposited by appellants for the benefit of the respondents and it was its duty to complete and close the escrow.

In short, at the time respondents attempted the termination of the transaction, both parties had waived the time limitation for the close of the escrow as set forth in the escrow instructions and there had been, through the escrow, a delivery of the deed, a delivery of the cash and of the note and the trust deed securing the balance of the purchase price, and the transaction was fully consummated.

[8] It follows that the finding of the trial court that on November 15 (the date upon which appellants completed the conditions of the escrow on their part to be performed) no contract existed between the parties, the finding that the respondents cancelled the escrow and the implied finding that the contract of purchase and sale was terminated are wholly unsupported and contrary to the evidence.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

Rehearing denied: SHINN, P. J., dissented.

Hearing denied; SCHAUER and McCOMB, JJ., dissenting.

WEST KEY NUMBER SYSTEM

161 Cal.App.2d 552

Emily MARANGI, Plaintiff and Respondent,

v.

Louie J. DOMENICI and Mable P. Domenici, Defendants and Appellants.

Civ. 23085.

District Court of Appeal, Second District, Division 2, California.

June 23, 1958.

Hearing Denied Aug. 21, 1958.

Action to enjoin obstruction of an easement pertaining to a driveway separating the residences of the opposing parties. Judgment for plaintiff in the Superior Court of Los Angeles County, John Leslie Goddard, J., pro tem., and the defendants appealed. The District Court of Appeal, Ashburn, J., held that the question of whether the plaintiff's use of the driveway was but a permissive neighborly accommodation and not under a claim of right was a question of fact.

Judgment affirmed.

1. Appeal and Error 🔑931(1)

On appeal from a judgment for respondent, evidence at points of conflict must be construed most favorably to the respondent.

2. Easements 🔑8(4)

Exclusiveness of user is not essential to the acquisition of a prescriptive easement, and the term "exclusive" does not mean that the easement must be used by one person only, but that right shall not depend for its enjoyment on a similar right in others, and it must be exclusive as against the community at large, and the use may be "exclusive" in the required sense, even though it is participated in by the owner of the servient tenement, or by the owners of adjoining land. West's Ann. Civ.Code, § 1104.

See publication Words and Phrases, for other judicial constructions and definitions of "Exclusive".

3. Easements ⚷38

In suit to enjoin the obstruction of an easement of a driveway separating residences of parties, use of the driveway by the plaintiff and their grantors was not impaired by the enjoyment of a like right by the defendants and others. West's Ann. Civ.Code, § 1104.

4. Easements ⚷36(3), 37

In suit to enjoin the obstruction of an easement of a driveway between residences of parties, evidence did not establish that the plaintiff's use of the driveway was but a permissive neighborly accommodation and not under claim of right but the question was essentially one of fact. West's Ann. Code Civ.Proc. §§ 325, 385.

5. Easements ⚷36(3)

In suit to enjoin the obstruction of an easement pertaining to a driveway between parties, evidence did not establish that the use of driveway by the plaintiff originated in any permission from the defendants, where it had existed and continued for many years before the defendants ever acquired the property, and the fact that plaintiff never asked permission to use the driveway suggested a claim of a right to do so. West's Ann.Civ.Code, § 1104.

6. Easements ⚷26(1)

Changes in the extent or nature of user which did not increase the burden on the servient tenement did not destroy the easement though acquired by prescription. West's Ann.Civ.Code, § 1104.

7. Easements ⚷30(1)

In suit to enjoin obstruction of an easement pertaining to a driveway between properties of opposing parties, nonuser for vehicular traffic of a portion of the driveway did not impair the existing easement or prove its nonexistence in view of the use of such portion by pedestrians which continued to date, thereby showing absence of an intent to abandon.

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Dockweiler & Dockweiler, Los Angeles, for appellants.

Hahn & Hahn, Pasadena, Leonard M. Marangi, Alhambra, for respondent.

ASHBURN, Justice.

[1] Defendants appeal from a judgment quieting in plaintiff title to a certain easement, enjoining obstruction of same and awarding damages for prior interference with its use. Appellants do not complain of the injunction or the amount of damages or method of computing the same. They urge reversible error in the adjudication of ownership by plaintiff of the easement in question. The claim is insufficiency of the evidence. There is little conflict therein and the evidence at those points of conflict must be construed most favorably to respondent. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550; New v. New, 148 Cal.App.2d 372, 383, 306 P.2d 987.

The easement pertains to a parcel of land which is 6 feet 10 inches wide and separates the residences of the opposing parties. Their lots are 30 feet wide and about 160 feet deep, fronting on Manitou Avenue in the city of Los Angeles. That street bounds the lots on the north and the disputed parcel runs north and south. Plaintiff owns the lot on the east and defendants the one on the west. Originally, both parcels were owned by Mr. and Mrs. Miller. Defendants' lot then had a house on the front portion, known as number 2912 Manitou Avenue, and a barn in the rear. Plaintiff's parcel had a front house, number 2914, a rear house and behind it a garage. The Millers first sold the property owned by plaintiffs. It went initially to Sarah Clem, who conveyed it to Seventh Day Adventist Church which sold to plaintiff Marangi in 1920. Mr. and Mrs. Miller continued to live in number 2912 until they sold it to Mrs. Malengo about 20 to 25 years before the trial, which would be somewhere from 1932 to 1937. It then passed to Mrs. Malengo, junior, who in turn sold to defendants Domenici in November, 1949.

When plaintiff acquired her property in 1920 there was an unpaved driveway about 6 feet wide between the two houses, which the Millers and plaintiff used in common for vehicular and pedestrian traffic; plaintiff's use was primarily for access to the rear house and to the garage where her husband parked his automobile; the Millers had no car, but they built a residence in the rear of their lot which was occupied by their daughter, the driveway being used for her purposes. There was no fence separating the properties while the Millers owned number 2912. In 1924 or 1925, the driveway was paved to its full width of 6 feet and plaintiff and Miller each paid half of the cost. Neither party asked permission at any time to use the driveway and both used it continuously as desired.

This probably was a tacit recognition of an existing fact, namely, that plaintiff was the owner of an easement to use the entire strip, the easement growing out of the Miller conveyance to Clem and plaintiff's succession to Clem's title. Apparently § 1104, Civil Code, vested such title in Clem and her successors in interest. It says: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." But respondent does not rest her case upon this theory and the evidence does not affirmatively show that the driveway was in existence at the time of conveyance to Clem. Respondent relies upon prescriptive title to the easement and the judgment rests upon an affirmative finding to that effect. To that question we address ourselves.

Mrs. Malengo, senior, the mother of defendants' vendor, while she was owner of 2912 built a four-foot wooden fence; this was about 1930; the fence extended from the back line of the lot to a point near the front line of the rear residence on plaintiff's property, which point is also about 83 feet from the front line of the lots. Plaintiff and Mrs. Malengo did not know exactly where the boundary line was, so they settled upon the location where the fence was built and orally agreed that it was the true boundary. Later survey, made for defendants, showed that the fence was about two feet west of the true boundary. When the younger Mrs. Malengo owned the property she replaced the wooden fence with a chain link fence upon the same line and extending to the same point as the one it replaced. This was done in the early 1940's and there the fence remained until defendant tore it down on April 10, 1957. The Malengos, mother and daughter-in-law, used the driveway as their convenience dictated and so did the plaintiff. No request for permission was made on either side and there were no objections. When World War II came, Mr. Marangi discontinued the use of his garage for storing his car, as he was participating in a share-the-ride arrangement, but the driveway was used for access to the garage or back yard as occasion arose. When the war was over, use of the garage for storage was resumed to some extent and its use for other purposes continued. There was no means of access to it other than the driveway in question. At all times the portion north of the rear residence was used as needed for accommodation of the tenants living in the rear residence on each of the two lots.

In November, 1949, defendants Domenici bought the property known as number 2912 from Malengo. The driveway was then being used openly and continuously by plaintiff and her tenants and also by Mrs. Malengo and her tenants. Defendant shortly began to object to the use of the driveway by plaintiff or her tenants, either for vehicles or as pedestrians. He told them to keep off his side of it and threatened to charge them rent for use of same. Plaintiff and her tenants ignored these objections and threats and continued to use the full width of the driveway for vehicles and pedestrians, doing so openly and under obvious claim of right. This continued for a period in excess of the statutory five years (Code Civ.Proc. § 325),—from 1949 or 1950 until April 10, 1957. The last preceding statement is subject to this qualification: In 1954 plaintiff built a porch on the west side of her rear residence, leaving less than four feet of clearance between it and the existing fence. This rendered vehicular travel to the garage impossible and use of the driveway back of the porch was discontinued except for pedestrian travel. However, the use of the driveway for its full six foot width from the front of this residence to the street, about 83 feet, was at all times continued as before. (The judgment is limited to that portion of the driveway.)

On April 10, 1957, defendant tore down the existing fence and built a new one upon or near the true boundary line as shown by his survey, some 12 inches to the east of the old one. This fence, five feet high, extended from the back line to the front line of the lots, leaving only 22 inches between the fence and plaintiff's front house, thus preventing any use of the driveway for vehicles and rendering difficult its use by pedestrians on plaintiff's side of the fence. Plaintiff on the same day, April 10, 1957, sued for an injunction and obtained a mandatory preliminary injunction on May 1, 1957, requiring the removal of the fence. This was done. The court, after trial on the merits, granted a permanent injunction against obstructing plaintiff's easement by maintaining a fence thereon or in any other manner. The basic finding reads: "That plaintiff and cross-defendant, continuously, for approximately 37 years, used the full width of the driveway separating plaintiff's and defendants' property, including approximately 5 feet of defendants' property, for ingress to and egress from plaintiff's property, for vehicular and pedestrian traffic, without permission and under a claim of right."[1]

Appellants' arguments on appeal attack the sufficiency of the evidence to sustain certain elements of a prescriptive easement, counsel insisting that it spells merely permissive neighborly accommodation rather than open, notorious and adverse user.

[2, 3] Emphasis is laid upon the contention that "exclusiveness is one of the elements necessary to an adverse occupancy in order that it may ripen into a title," quoting Miller v. Doheny, 50 Cal.App. 413, 419, 195 P. 745, 748, a case which on appeal did not involve the sufficiency of the evidence of existence of an easement. Appellants' argument is predicated upon the fact of use of the driveway by both plaintiff and defendants and by their respective predecessors in interest. It is settled law in this state that exclusiveness of user is not essential to acquisition of a prescriptive easement. The matter is thus explained in 28 C.J.S. Easements § 15, pp. 658–659: "It is generally stated that the user must be exclusive. * * * The term 'exclusive,' however, does not mean that the easement must be used by one person only, but simply that the right shall not depend for its enjoyment on a similar right in others; it must be exclusive as against the community or public at large. The use may be exclusive in the required sense even though it is participated in by the

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[1] During the pendency of this action plaintiff sold the property to Catarino and Lupe Navarro, but the action has been continued in the name of Marangi pursuant to § 385, Code of Civil Procedure; the judgment runs in their favor. No point is made on appeal with respect to this procedure.

owner of the servient tenement, or by the owners of adjoining land." That such is the law of California appears from the following decisions: Crawford v. Lambert, 136 Cal.App. 617, 620, 29 P.2d 428; Bernstein v. Dodik, 129 Cal.App. 454, 458, 18 P.2d 983; Morse v. Miller, 128 Cal.App.2d 237, 249–250, 275 P.2d 545; Lindsay v. King, 138 Cal.App.2d 333, 343, 292 P.2d 23; O'Banion v. Borba, 32 Cal.2d 145, 151, 195 P.2d 10. In the Crawford case, supra, it is said: "The use of the way under a claim of right, while necessarily hostile, need not amount to an ouster or the exclusion of the owner of the servient tenement from its use." 136 Cal.App. at page 620, 29 P.2d at page 430. In Bernstein, supra: "It is not necessary that one claiming by adverse possession be in personal occupation, since occupation by a tenant inures to his benefit. Weyse v. Biedebach, supra [86 Cal.App. 712, 261 P. 1086]; Beckett v. City of Petaluma, 171 Cal. 309, 153 P. 20. The use of said right of way by respondents and their grantors was not impaired by the enjoyment of a like right by appellants and others. Wells v. Dias, supra [57 Cal.App. 670, 207 P. 913]; Lund v. Johnson, 162 Wash. 525, 298 P. 702." 129 Cal.App. at page 458, 18 P.2d at page 985. See also, 17A Am.Jur. § 70, p. 682; Annotation, 27 A.L.R.2d at page 337.

[4] The claim that plaintiff's use of the driveway was but a permissive neighborly accommodation and not under claim of right cannot prevail in the face of the record at bar. That question is essentially one of fact. O'Banion v. Borba, supra, 32 Cal.2d at page 150, 195 P.2d at page 13; Bernstein v. Dodik, supra, 129 Cal.App. at page 457, 18 P.2d at page 984; Crawford v. Lambert, supra, 136 Cal.App. at page 620, 29 P.2d at page 429; Dooling v. Dabel, 82 Cal.App.2d 417, 422, 186 P.2d 183. The following cases cited by appellants recognize this rule: Clarke v. Clarke, 133 Cal. 667, 66 P. 10; Eddy v. Demichelis, 100 Cal.App. 517, 280 P. 389; Dooling v. Dabel, supra. Appellants' opening brief says that they "fully realize that the chief question for the trial Judge to decide was a factual one in the light of the relationship of the parties and the surrounding circumstances."

[5] The use of the driveway by plaintiff could not have originated in any permission from defendants, for it had existed and continued for many years before they ever acquired the property, and the fact that plaintiff never asked permission to use the driveway suggests a claim of right to do so. See, Costello v. Sharp, 65 Cal.App. 152, 162, 223 P. 567. The open and continuous use by plaintiff and her tenants, for foot travel and for vehicles, in the face of defendant's demands that they desist and his threats to charge them rent, is inconsistent with any idea of neighborly accommodation or permissive use. The case of Smith v. Skrbek, 71 Cal.App.2d 351, 162 P.2d 674, 677, cited by appellants, says that the "use of the roadway must be so obvious as to constitute implied notice of the adverse claim." This standard is met in full measure at bar. The language of O'Banion v. Borba, supra, 32 Cal.2d 145, at page 148, 195 P.2d 10, at page 12, is here apposite: "From the foregoing circumstances an inference reasonably arises which constitutes substantial evidence that, contrary to defendants' contention, plaintiffs' use of the easements was open and notorious and under a claim of right; that the use was such that notice of a claim of right adverse to the owner of the servient tenement may be imputed to him. Certainly from those circumstances we cannot say as a matter of law that the trial court's conclusion finds no basis in the evidence." At page 149 of 32 Cal.2d, at page 13 of 195 P.2d: "The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner. There seems to be no apparent reason for dis-

cussing the matter from the standpoint of presumptions. For the trial court the question is whether the circumstances proven do or do not justify an inference showing the required elements. In the appellate court the issue is merely whether there is sufficient evidence to support the judgment of the trial court."

Cases cited by appellants in support of their claim of neighborly accommodation, rather than adverse user, are readily distinguishable. In each of the following cases the court ruled that the evidence was not such as to overthrow the finding of the trial court that the alleged prescriptive easement did not exist: Smith v. Skrbek, supra; Clarke v. Clarke, supra; Eddy v. Demichelis, supra; Enos v. Murtaugh, 47 Cal.App.2d 269, 117 P.2d 905; Lyons v. Schwartz, 40 Cal.App.2d 60, 104 P.2d 383; Janke v. McMahon, 21 Cal.App. 781, 133 P. 21; Dooling v. Dabel, supra; Miller v. Doheny, supra; Pinheiro v. Bettencourt, 17 Cal.App. 111, 118 P. 941; Orr v. Kirk, 100 Cal.App.2d 678, 224 P.2d 71. The judgment in each case was affirmed. In Kaler v. Brown, 101 Cal.App.2d 716, 226 P.2d 66, the finding of permissive use was based upon undisputed evidence. Such authorities are of little value in an effort to overthrow the factual finding of the trial court.

[6, 7] A suggestion, rather than an argument, is made by appellants' counsel that the non-user for vehicular traffic of the rear portion of the driveway, the portion extending from the front of the rear house to the back property line, somehow impairs the existing easement or proves its non-existence. This view is untenable, as indicated by the ruling in Murray v. Fuller, 82 Cal.App.2d 400, 407, 186 P.2d 157. Moreover, the use of this portion of the driveway by pedestrians has continued to date, thus showing absence of intent to abandon. Changes in the extent or nature of user which do not increase the burden on the servient tenement do not destroy the easement though acquired by prescription. See, Baldwin v. Boston & M. R. R., 181 Mass. 166, 63 N.E. 428, 430; Virginia Hot Springs Co. v. Lowman, 126 Va. 424, 101 S.E. 326, 328; Phillips v. Bonadies, 105 Conn. 722, 136 A. 684, 686. As above pointed out, the judgment is limited to the 83 feet of driveway lying north of the rear house on plaintiff's premises.

No prejudicial error appearing in this case, the judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

161 Cal.App.2d 280

CHRISTIAN SERVICE SOCIETY, a Membership Cemetery Corporation, Plaintiff and Appellant,

v.

The COUNTY OF BUTTE, Defendant and Respondent.

Civ. 9331.

District Court of Appeal, Third District, California.

June 11, 1958.

Action by membership cemetery corporation for declaratory relief. From an adverse judgment of the Superior Court, Butte County, Dudley G. McGregor, J., denying relief, plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held that since land purchased by plaintiff for purpose of establishing a cemetery had not been dedicated to cemetery purposes in the manner prescribed by statute, West's Ann.Health & Safety Code, §§ 8550, 8551, 8553, prior to enactment of zoning ordinance by county, requiring a use permit for use of land for cemetery purposes, a pre-existing or otherwise legally recognized cemetery had not been established on such land prior to enactment of zoning ordinance, and that subsequent dedication of land pursuant to statute did not exempt plaintiff from compliance with terms of zoning ordinance.

Judgment affirmed.

1. Counties ⚿21½

Where plat of land purchased by membership cemetery corporation for purpose of establishing a cemetery and written declaration dedicating such land exclusively to cemetery purposes had not been filed for record in county recorder's office prior to enactment of interim zoning ordinance by county to maintain the status quo for area including such land or prior to subsequent enactment of permanent zoning ordinance, requiring a use permit for use of such land for cemetery purposes, a pre-existing or otherwise legally recognized cemetery had not been established, though cemetery corporation had acquired possession of land under contract to purchase and had recorded, pursuant to statute, its declaration of intention to use such land for cemetery purposes prior to enactment of either zoning ordinance. West's Ann.Health & Safety Code, §§ 8525, 8526, 8550, 8551, 8553.

2. Counties ⚿21½

Dedication of land exclusively to cemetery purposes, pursuant to statute, after enactment of zoning ordinance by county, requiring a use permit for use of such land for cemetery purposes, did not exempt owner of such land from compliance with all terms of zoning ordinance. West's Ann.Health & Safety Code, §§ 8550, 8551, 8553.

◆

Frank L. Willis, Chico, for appellant.

Charles H. Andrews, County Counsel, and Francis R. Crable, Asst. County Counsel, Chico, for respondent.

WARNE, Justice pro tem.

Plaintiff, Christian Service Society, a Membership Cemetery Corporation, successor in interest to the Chico Burial Society, appeals from a judgment denying plaintiff relief in an action for declaratory relief and declaring that plaintiff had established no preexisting or nonconforming use for cemetery purposes in the land involved herein prior to the adoption by Butte County of a certain interim zoning ordinance and a succeeding permanent zoning ordinance.

On August 4, 1953, plaintiff, through its predecessor in interest, acquired possession of certain real property consisting of 14 acres, pursuant to a contract of purchase executed by it and the owners thereof whereby the Chico Burial Society agreed to purchase the property for the purpose of establishing a cemetery. The agreement provided that no interments in the property should be made until $1,000 had been paid and that only one acre should be dedicated for use for cemetery purposes until the total purchase price had been paid.

Pursuant to the authority vested in it under the provisions of the Health and Safety Code, plaintiff recorded, on September 3, 1953, its declaration of intention to use the land in question for cemetery purposes. Section 8525 of that Code provides: "A cemetery authority may execute a declaration acknowledged so as to enable it to be recorded, describing the property and declaring its intention to use all or part of the property for cemetery purposes." And section 8526 provides: "The declaration may be filed for record in the office of the recorder of the county in which the property is situated, and from the date of filing the declaration is constructive notice of the use for which the property is intended." Prior to the date of recordation petitions requesting that the area be zoned were received by the board of supervisors of Butte County from residents of the surrounding area. On September 8, 1953, the board adopted an interim zoning ordinance effective immediately, as an emergency measure to maintain the status quo, for an area including said land. Following hearings by the planning commission and its recommendations, the board adopted, on December 14, 1953, effective 30 days thereafter, a permanent zoning ordinance. Neither ordinance prohibited cemeteries, but required a use permit for such land use. On September 14, 1953, plaintiff petitioned the commission for a variance. The commission considered the petition as an application for recognition of an existing nonconforming use in the real property. The petition was subsequently denied by the commission and the board upon the ground that an existing nonconforming use for cemetery purposes had not been established by plaintiff. No formal application for a use permit pursuant to said ordinance was filed by plaintiff.

In August, 1953, plaintiff dug, at negligible expense, certain test holes to determine whether or not the ground was suitable for graves, and also commenced the construction of a caretaker's house on the property. In April, 1955, plaintiff surveyed one acre thereof, and on April 5, 1955, filed a map or plat showing the results of said survey and purporting to dedicate one acre of this land for cemetery purposes. No use was made by plaintiff of this property for cemetery purposes up to the time of trial. The only expense incurred to improve the real property was for the construction of said caretaker's house.

Plaintiff contends that the court erred in declaring that plaintiff had not established a preexisting or otherwise legally recognized cemetery on the land, and under such circumstances the zoning ordinances of the county of Butte had no effect on the right of plaintiff to use the land without further permit.

[1] We find no merit in this contention since there had been no dedication of the land prior to the enactment of either ordinance. Section 8550 of the Health and Safety Code provides that the cemetery authority from time to time, as its property may be required for interment purposes, shall survey and subdivide it into sections, blocks, plots, avenues, walks or other subdivisions and make a good and substantial map or plat showing the sections, blocks, plots, avenues, walks or other subdivisions, with descriptive names or numbers; section 8551 of said Code provides: "The cemetery authority shall file the map or plat in the office of the recorder of the county in which all or a portion of the property is situated. The cemetery authority shall also file for record in the county recorder's office a written declaration of dedication of the property delineated on the plat or map, dedicating the property exclusively to cemetery purposes." Section 8553 provides: "Upon the filing of the map or plat and the filing of the declaration for record, the dedication is complete for all purposes and thereafter the property shall be held, occupied, and used exclusively for a cemetery and for cemetery purposes."

[2] In the case of Application of Laurel Hill Cemetery Association, 73 Cal.App. 193, 196, 238 P. 732, 733, the court said: "He who would assert that a dedication has been made must show that all of the calls of the statute have been followed because such provisions have been held to be of the substance of the creation of a dedication." In the instant case "all of the calls of the statute" had not been made prior to the enactment of either ordinance. In fact, plaintiff makes no claim that prior to the adoption of such ordinances it had filed the map or plat for record as required by section 8551, or the declaration dedicating the property exclusively to cemetery purposes in compliance with section 8551. A compliance with the provisions of the statute following the enactment of the zoning ordinance did not exempt plaintiff from a compliance with all the terms of said ordinance.

Since we have concluded that the judgment must be affirmed for this reason alone, we deem it unnecesary to discuss the other points presented in the briefs.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

161 Cal.App.2d 340

Berscella CIAMBETTI, doing business as Mint Cafe, Plaintiff and Respondent,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State OF CALIFORNIA, and Alcoholic Beverage Control Appeals Board of the State of California, Respondents and Appellants.

Civ. 9256.

District Court of Appeal, Third District, California.

June 16, 1958.

Proceeding before Alcoholic Beverage Control Department on accusation charging licensee with having refilled two whiskey bottles and for not having been, for some time, the sole owner of business operated by her. After adverse action of board, licensee filed petition for writ of mandate. The Superior Court, Solano County, Harlow V. Greenwood, J., enjoined indefinite suspension of license and Department appealed. The District Court of Appeal, Peek, J., held that finding that husband of sole licensee of bar located at premises of which wife was the sole grantee, was a part owner of business contrary to statute, was not supported by substantial evidence.

Affirmed.

1. Husband and Wife ⟹249

Generally, character of property as separate or community is fixed as of time it is acquired, and character so fixed continues until changed in some manner recognized by law, as by agreement of parties.

2. Husband and Wife ⟹262(1)

Law will not allow idle presumptions to be indulged in as against a deed delivered and recorded, and facts must be proven from which it is clearly made to appear that property in such case is community property, or deed will be given effect according to its terms.

3. Husband and Wife ⟹262(1)

Where real property was purchased in wife's name as sole grantee there was strong presumption that realty was separate estate of wife, and presumption could not be overthrown except by clear and convincing proof. West's Ann.Civ.Code, § 164.

4. Husband and Wife ⟹254

Where wife was sole grantee of property, fact that both spouses joined in execution of deeds of trust or mortgages given to secure notes evidencing loans would not alter original status of property as her separate estate, and improvements even if made by husband upon wife's separate property and out of community funds would give him no interest therein.

5. Intoxicating Liquors ⟹108(5)

In proceedings before Department of Alcoholic Beverage Control on accusations charging that sole licensee of business had not been the sole owner thereof contrary to statutes, finding that husband of sole licensee of premises of which wife was the sole grantee, was a part owner of business, was not supported by substantial evidence. West's Ann.Bus. & Prof.Code, §§ 23300, 23355, 23951, 24040, 24200(c).

Edmund G. Brown, Atty. Gen., by E. G. Funk, Asst. Atty. Gen., and William T. Chidlaw, Deputy Atty. Gen., for appellant.

Thomas F. O'Hara, Vallejo, for respondent.

PEEK, Justice.

This appeal arises out of an accusation containing two counts filed by the Department of Alcoholic Beverage Control, hereinafter referred to as the department. In Count I plaintiff was charged with having refilled two one-quart bottles of whiskey. Count II charged that plaintiff for some time has not been the sole owner of the business operated by her, but that her husband, James Ciambetti, is a part owner thereof in violation of sections 23300, 23355, 23951, 24040 and 24200(c) of the Alcoholic Beverage Control Act, Business and Professions Code.

A hearing officer before whom the matter was heard found both charges to be true and recommended the license be suspended for 30 days on Count I and that it be suspended indefinitely on Count II. The department adopted the recommendations of the hearing officer and plaintiff then appealed to the Alcoholic Beverage Control Appeals Board. The board affirmed the action of the department and thereafter plaintiff filed her petition for a writ of mandate in the superior court. That court enjoined the suspension on Count II and this appeal followed.

The charge contained in Count I, being admitted, we have therefore limited our examination of the record solely to the evidence in support of Count II. Although the accusation contained in Count II was dependent upon evidence of ownership of the license itself, much of the testimony introduced by the department had to do with the property interests of Berscelia and James, apparently upon the theory that such evidence showed an intent to operate a community business. A summary of the evidence in this regard shows that plaintiff and her husband were married in 1945. The real property on which the licensed premises are located was acquired by plaintiff as sole grantee on September 17, 1946. While the record is not clear, it would appear that Berscelia and James operated a restaurant known as the Mint Cafe on the premises, and that for approximately two years prior to 1951 he had a beer license in his name. On October 23, 1950, plaintiff in her name alone purchased a general on-sale liquor license for the sum of $12,187.10, of which all but $187.10 was paid in cash. And on January 26, 1951, a general on-sale license was issued to her as the sole licensee by the then administrator of the department's Vallejo office. In order to equip the bar, a note and deed of trust was executed on February 17, 1951, by "Berscelia Ciambetti, a married woman, as her separate property, of the City of Suisun, County of Solano, State of California, and Jim Ciambetti, her husband," as trustors. On April 21, 1953, a deed of reconveyance was executed to "Berscelia Ciambetti, a married woman, as her separate property, and Jim Ciambetti, her husband." A second loan was secured in the sum of $12,000. The note and deed of trust was executed by "Jim Ciambetti and Berscelia Ciambetti, his wife." Shortly thereafter a notice of intention to mortgage the equipment in the restaurant and bar was executed by "* * * Jim Ciambetti and Berscelia Ciambetti dba The Mint Cafe" and the subsequent chattel mortgage was executed by "Jim Ciambetti and Berscelia Ciambetti, his wife." A fire insurance policy on the building was issued to Berscelia. A glass insurance policy was also issued in her name, and likewise a workmen's compensation and employer's liability policy was issued to her as the employer and as an individual doing business as the Mint Cafe. Joint federal and state income tax returns which were filed by James and Berscelia for the years 1952, 1953 and 1954, showed Berscelia to be the owner of the bar and cafe and Jim to be the manager. His withholding tax statements for 1952, and 1953 and 1954 showed him to have been paid wages by Berscelia. He was a member of the Bartenders and Culinary Workers Union and consistently paid his monthly dues. A joint checking account for the Mint Cafe showed that for the period from May 20, 1955, through August 19, 1955, three checks had been signed by Berscelia and 170 by James. The checks were of two types: On one "Mint Cafe" was printed in large letters and below that "Jim Ciambetti and Berscelia Ciambetti" appeared in smaller letters. On the other checks the only words appearing were "Mint Cafe, Main Street, Suisun." A neon sign on the premises contained the lettering, "Jimmy's Mint Club."

Agent Pierce of the department testified that on August 29, 1955, he had examined various documents of record in Solano County which were admitted in evidence, and found that the real property, fixtures and equipment of the Mint Cafe were in the name of Berscelia. He likewise examined their income tax returns which also showed her to be the sole owner and James to be her manager receiving wages as such. He further testified that on the following day he had questioned her regarding her ownership of the Mint Cafe; that she stated the source of the money to start the business was a $4,000 loan obtained from one Fred Leicke; that to this sum was added funds from a joint savings account of herself and her husband; that she did not know the exact amount obtained from said account and referred him to her accountant. From the accountant he learned that $15,200 had been borrowed on fixtures and equipment of the Mint Cafe and a prior residence located in Suisun, and that this money was used to build a home and to remodel the Mint Cafe. She also stated to him that she owned the fixtures and equipment in the cafe. She further told him she had been suffering from ill health for a considerable time.

A second agent for the department, Ralph Sitts, corroborated much of Pierce's testimony and added that a contract for electrical repairs on December 31, 1951, in the sum of $3,898.25 was executed by the husband alone.

A bartender, formerly employed by plaintiff, was called by the department and testified that Mrs. Ciambetti stated she would hire him but she would have to obtain her husband's approval; that the only orders he received were from the husband; that he saw plaintiff at the premises, and that on a few occasions he had seen her check out at the end of the day.

Berscelia testified that she purchased the real property for $11,000, $7,000 of which was from her own funds, and that her husband gave her some money; that the additional funds needed to start the business were obtained by borrowing money and that her husband gave her some of his earnings; that her husband had a beer license on the premises for a couple of years prior to 1951; that it was with the consent of the administrator of the Vallejo office that she retained the original neon sign on the premises when her license was issued; that the reason for her husband's name appearing upon the documents evidencing the loans on the premises was that the lenders required that both she and her husband sign the instruments; that she actively participated in the management of the license to the extent premitted by her physical condition; and that she did the hiring and firing, neither of which was done by her husband. She further testified in regard to the bartender called by the department that she had both hired and fired him; that her husband worked at the cafe two full days a week and part time for the remainder; that checks were issued regularly to him for such work and that she managed the bar whenever physically able to be present. Her testimony concerning her illness was that she had been constantly under a doctor's care for an arthritic condition for the preceding five years. A report dated November 1, 1955, signed by Dr. Tranter, stated that he had treated her since the preceding Spring by giving her cortisone and other remedies by daily injections and frequently twice daily for chronic rheumatoid arthritis with severe secondary anemia, a condition which caused a definite incapacity.

Two additional witnesses, one a newspaper publisher and the other a judicial district judge, were called by plaintiff and testified to acquaintanceship and business dealings with plaintiff during the period in question and that at all times they considered her to be, and dealt with her as, the owner of the licensed premises.

The trial court found certain allegations of plaintiff's complaint to be true and the denials thereof to be untrue. Among the allegations set forth in the complaint which the trial court found to be true was the allegation that "Your petitioner alleges that this Application is one in which the Court is authorized by law to exercise its independent judgment on the evidence, * * *"

It is the board's first contention that by finding that such allegation was true the court exceeded its jurisdiction by reweighing the evidence and hence exceeded the scope of review to be exercised by the superior court, in that its review should have been limited to a consideration of whether or not there was any substantial evidence to support the conclusion of the department. It would appear that whatever term the court may have used in relation to its action would be wholly immaterial, since if in fact there was no substantial evidence to sustain the determination of the department, the conclusion of the superior court must be affirmed.

Appellants next contend that the finding of the hearing officer which was adopted by the department, i. e., that James was a part owner of the liquor business, was supported by substantial evidence, and therefore the conclusion of the trial court overruling the department must be reversed. The argument in support of such contention is that the department could reasonably infer from the evidence that the motive behind the purchase of the real property in 1946 was to operate a community business. It is next stated that the department could also infer from the purchase of the liquor license five years later in 1951 that this action was likewise in furtherance of the original intent to operate a community liquor business. This is then followed by a detailed discussion concerning the money borrowed after the original purchase of the real property in rationalization of the conclusion reached by the department.

[1-4] It is the general rule that "* * * the character of property as separate or community is fixed as of the time it is acquired. The character so fixed continues until it is changed in some manner recognized by law, as by agreement of the parties." Garten v. Garten, 140 Cal. App.2d 489, 492, 295 P.2d 23, 25. "The law will not allow idle presumptions to be indulged in as against a deed delivered and recorded. Facts must be proven from which it is clearly made to appear that the property in such case is community property, or the deed will be given effect according to its terms." Alferitz v. Arrivillaga, 143 Cal. 646, 649, 77 P. 657, 658. Here the evidence shows without conflict that the real property was purchased in plaintiff's name as sole grantee, as was the license. Under such circumstances it is the presumption, under section 164 of the Civil Code, that the property so purchased was the separate estate of the wife. It is a strong presumption (Acme Distributing Co. v. Collins, 9 Cir., 247 F.2d 607) and cannot be overthrown except by clear and convincing proof. Attebury v. Wayland, 73 Cal.App.2d 1, 5, 165 P.2d 524. Nor can it be rebutted solely by evidence as to the source of the funds. Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656. It is the further rule that the money which was borrowed on the credit of such property was also plaintiff's separate estate. The fact that both spouses joined in the execution of the deeds of trust or mortgages given to secure the notes evidencing the loans did not alter the original status of the property. Dyment v. Nelson, 166 Cal. 38, 134 P. 988. The improvements, even if made by the husband upon the wife's separate property and out of community funds, gave him no interest therein. Holtze v. Holtze, 2 Cal.2d 566, 42 P.2d 323. Nor could the other incidental acts of the husband in relation to the management of the property be considered as acts indicating ownership such as would overcome the presumption. Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180.

[5] It necessarily follows that since the conclusion of the department was based wholly upon inferences drawn from the record and was not supported by substantial evidence, the judgment of the trial court must be affirmed.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

161 Cal.App.2d 307

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

William HAYWOOD and Justin G. Scott, Defendants,

William Haywood, Respondent.

Cr. 6035.

District Court of Appeal, Second District, Division 1, California.

June 13, 1958.

Proceedings on motion to set aside information on ground that defendant had been committed without reasonable or probable cause. The Superior Court of Los Angeles County, Herbert V. Walker, J., granted motion and ordered defendant discharged from custody. The State appealed. The District Court of Appeal, White, P. J., held that evidence established that magistrate properly committed defendant, who was accused of burglary, to answer in superior court.

Order reversed.

1. Criminal Law 🔑238

In proceedings on motion to set aside information charging crime of burglary on ground that defendant had been committed without reasonable or probable cause, evidence before committing magistrate established the corpus delicti of crime of burglary. West's Ann.Pen.Code, §§ 459, 995.

2. Criminal Law 🔑238

In proceedings on motion to set aside an information charging defendant with crime of burglary on ground defendant had been committed without reasonable or probable cause, evidence that property found in automobile used by defendant was similar to stolen property was sufficient identification to warrant holding of defendant to answer in superior court. West's Ann.Pen. Code, §§ 459, 995.

3. Burglary 🔑42(1)

While unexplained possession of recently stolen property by defendant, standing alone, is not sufficient to justify conviction of burglary, the fact of possession of recently stolen property unexplained is a circumstance tending to show guilt when accompanied by suspicious circumstances for purposes of determining whether magistrate is authorized to commit defendant. West's Ann.Pen.Code, §§ 459, 995.

4. Criminal Law 🔑234

Committing magistrate at preliminary examination of defendant, who was accused of burglary, was authorized to take into consideration defendant's attempted flight as well as his use of a fictitious name, as indicating a consciousness of guilt for purposes of determining whether defendant should be committed. West's Ann.Pen. Code, § 995.

5. Indictment and Information 🔑140(1)

In passing upon a motion to set aside an information, on ground defendant has been committed without reasonable or probable cause, it is record of the magistrate that is decisive; it is magistrate's function to weigh evidence and resolve conflicts and determine credibility of witnesses.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., of Los Angeles County; Jere J. Sullivan, Lewis Watnick, Robert Lederman, Deputy Dist. Attys., Los Angeles, for appellant.

No appearance for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, the above named defendants were charged with the crime of burglary (Penal Code, sec. 459).

Defendant Haywood entered his plea of not guilty, which plea was later withdrawn, and a motion was made under Penal Code, Section 995, to set aside the information on the ground that defendant had been committed without reasonable or probable cause. The motion was granted and defendant Haywood ordered discharged from custody. From such order the People prosecute this appeal.

Concerning the background of this prosecution, the record reflects that the following is a fair epitome of the evidence presented to the committing magistrate. Ejner Jensen is an assistant superintendent of installations for the Department of Water and Power, City of Los Angeles, and had seen People's Exhibit 1 for identification, which was an assortment of copper and other materials. The last time he had seen these materials was the latter part of February or the first part of March, 1957, at the department's patrol station on the corner of Century and Clovis Avenue within the boundaries of Station B in Los Angeles. The materials were inside of a stucco building with four walls and a roof and metal doors and windows. These materials (People's Exhibit 1) were the property of the Department of Water and Power and are peculiar in that the Department of Water and Power is the only utility in the country to use those fittings.

No one was given any permission or consent to remove the articles in People's Exhibit 1 for identification from the premises in question. The Department of Water and Power manufactures the pieces in their own shops.

R. B. McCaulou is a chief electrical plant operator for the Bureau of Power and Light and supervises the premises located at Century and Clovis Avenue. He recognized items, like those in People's Exhibit 1 for identification, and has items such as these stored in the building at Century and Clovis Avenue, which is in the County of Los Angeles. He gave no one consent or permission to remove these items from that building.

Edwin J. Sanders is one of the arresting police officers in this case. On April 30, 1957, at approximately 11 p. m., he was standing on the west side of Clovis Avenue and observed a 1948 maroon, four-door Chevrolet automobile standing in front of the water and power building and observed a person sitting in the driver's seat of this vehicle. This person was later identified as defendant Scott. The witness pointed out the defendant Scott for the record.

At approximately the same time he observed "Mr. Thompson, who was identified to us as Thompson" running from the yard of the water and power building to the car. Mr. Thompson and defendant Haywood were found to be one and the same person; the name Thompson being used by the defendant Haywood. The witness pointed out the defendant Haywood for the record. The witness observed the defendant Haywood running from the yard of the department of water and power toward the car and "jump" into it. The witness ran over to the car and observed the defendant Scott and Haywood attempting to drive away. The witness observed People's Exhibit 2, a large crowbar, approximately ten or fifteen minutes later on the right side of the gate from which you enter the water and power grounds.

Officers Sanders saw People's Exhibit 1 for identification immediately after he placed defendants under arrest. When he and his partner looked into the sacks which were in the defendant's possession in the car and observed "these fittings and wire cable and brass," it was approximately 11:15 p. m. Among other things in the car where the defendants were, there was a small pry bar and a screwdriver in the front seat. There were also cloth gunny sacks which contained items similar to People's Exhibit 1 for identification. The witness went over and looked at the water and power building and observed a window open to the rear of the back building. The window was dusty "and there were fresh claw marks on the outside of the window."

When the witness first saw defendant Haywood he was approximately five to seven feet west of the fence on the outside going toward the automobile.

P. N. Bagoye is one of the investigating police officers in this case and in the course of his investigation had a conversation with defendant Haywood. Haywood was asked about the articles shown in evidence and was asked if he had obtained these in the department of water and power and he stated that he did. He was asked how he went about obtaining them and he said he had met a fellow by the name of Otis in a cafe, around 9:30 or 10 o'clock on the night of the 30th and Otis told him to go over and pick them up and he went over to the bureau of water and power where they were lying "alongside" of the yard, next to the fence and he put them in the car and was arrested by the officers. The officer also had a conversation with the defendant Scott which was identically the same as that had with the defendant Haywood.

The sole question presented on this appeal is whether there was reasonable and probable cause to warrant the committing magistrate in holding defendant Haywood to answer in the superior court.

[1] In support of his motion under Penal Code, Section 995, defendant Haywood first advanced the argument that the corpus delicti of the crime of burglary was not established. This contention is devoid of merit. There was evidence that the property in question belonged to the department of water and power. It was taken from a building occupied by them without the permission of any custodian thereof. Officer Sanders observed defendant Haywood "running in a slow trot" from the yard, "jump" into the automobile and sit on the rear seat where People's Exhibit 1 was found. A rear window of the building was open and there were fresh claw marks on the outside thereof. A large crowbar was observed on the right side of the gate through which entrance is had to the water and power department grounds. Found on the front seat of the automobile occupied by defendants was a small pry bar and a screwdriver. To say that these facts do not constitute the corpus delicti of the crime of burglary is to do violence to reason and challenge credulity.

[2] On hearing of the motion in the court below defendant Haywood also contended that the property in the automobile was identified only as being similar to that stored in the building. To us, it is clear that the identification was adequately proved. That evidence of similarity is sufficient was the holding in several cases (People v. Frahm, 107 Cal.App. 253, 266, 290 P. 678 and cases therein cited).

[3, 4] While the unexplained possession of recently stolen property by the defendant standing alone is not sufficient to justify his conviction of burglary, however, the fact of possession of recently stolen property unexplained is a circumstance tending to show guilt when accompanied with suspicious circumstances. The record before us contains abundant evidence of "other inculpatory circumstances" connecting defendant Haywood with the offense charged against him. The evidence presented to the committing magistrate in the instant case was equally as strong and convincing as that held sufficient to sustain a conviction of the crime of burglary in People v. McClure, 133 Cal.App.2d 631, 284 P.2d 887. The magistrate at the preliminary examination was also authorized to take into consideration the attempted flight of defendant Haywood as well as his use of a fictitious name (Thompson), as indicating a consciousness of guilt (People v. Santora, 51 Cal.App.2d 707, 710, 125 P.2d 606; People v. Costa, 137 Cal.App. 617, 619, 31 P.2d 248; People v. Liss, 35 Cal.2d 570, 576, 219 P.2d 789).

In People v. Platt, 124 Cal.App.2d 123, 130, 131, 268 P.2d 529, 534, Mr. Justice Vallée, speaking for the court, summarizes the rules applicable to the sufficiency of the evidence to hold an accused to answer to the superior court as follows:

> "The evidence necessary to justify an order holding a defendant to answer to the superior court is not subject to the same test as that before a trial jury in a criminal action, and reasonable or probable cause may be found for hold-

ing to answer although the evidence does not establish the defendant's guilt beyond a reasonable doubt. All that is required is a reasonable probability of the defendant's guilt. Davis v. Superior Court, 78 Cal.App.2d 25, 27, 177 P.2d 314. 'Reasonable or probable cause', required to uphold the commitment of a defendant, Pen.Code, § 995, exists if there is sufficient proof to make it reasonable to believe that the defendant is guilty of the offense charged. [Citing cases.]

"On a motion to set aside an information, the question of the guilt or innocence of the defendant is not before the court, nor does the issue concern the quantum of evidence necessary to sustain a judgment of conviction. The court is only to determine whether the magistrate, acting as a man of ordinary caution or prudence could conscientiously entertain a reasonable suspicion that a public offense had been committed in which the defendant had participated. [Citing case.] A court may not substitute its judgment as to the weight of the evidence for that of the magistrate. If there is some evidence to support the information, the courts will not inquire into its sufficiency. Under section 995 of the Penal Code, the information will be set aside only where there is no evidence that a crime has been committed or there is no evidence to connect the defendant with a crime shown to have been committed. [Citing case.]" See also People v. Flanders, 140 Cal.App. 2d 765, 768, 296 P.2d 13.

[5] In passing upon a motion to set aside an information under Section 995 of the Penal Code, it is the record of the magistrate that is decisive. It is his function to weigh the evidence, and resolve conflicts and determine the credibility of witnesses. These things the superior court cannot do in testing the sufficiency of the showing made before the magistrate on a motion such as the one now engaging our attention.

The order is reversed.

FOURT and LILLIE, JJ., concur.

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161 Cal.App.2d 272

Esther HUMMEL, Plaintiff, Cross-Defendant and Appellant,

v.

W. Westley HUMMEL, Defendant, Cross-Complainant and Respondent.

Civ. 9209.

District Court of Appeal, Third District, California.

June 11, 1958.

Action for divorce. From an order denying the motion of the wife to vacate an interlocutory decree of divorce previously granted the husband on his cross complaint in the Superior Court of Sacramento County, J. O. Moncur, J., the wife appeals. The District Court of Appeal, Peek, J., held that the evidence did not establish an abuse of discretion by the trial court in refusing to vacate the decree for alleged excusable neglect by the wife or her attorneys.

Order affirmed.

1. Appeal and Error 🔑957(1)
Judgment 🔑139, 143(3)

It is not every inadvertence or negligence that warrants relief under the statute authorizing the setting aside of a default, but it is only such inadvertence or negligence as may reasonably be characterized as "excusable", and an application for relief under the statute is addressed to the sound discretion of the trial court, and in absence of a clear showing of an abuse thereof, the trial court's ruling will not be disturbed on appeal. West's Ann.Code Civ.Proc. § 473.

2. Divorce ⚷165(3)

Wife was not entitled to have vacated an interlocutory decree of divorce granted the husband on his cross-complaint on ground of excusable neglect on her part and that of her attorneys for failure to produce document wherein husband relinquished all claims to certain property to the wife where the document was in her possession at all times from the date of execution and her reasons for not informing her attorneys thereof were insufficient. West's Ann.Code Civ.Proc. § 473.

3. Judgment ⚷143(10)

It is not the purpose of the statute respecting the setting aside of defaults to permit the setting aside of judgments which are the result of inexcusable neglect of the parties or their attorneys in the performance of the latters' obligations to their clients. West's Ann.Code Civ.Proc. § 473.

4. Divorce ⚷165(3)

Wife was not entitled to vacate an interlocutory decree of divorce previously granted the husband on his cross-complaint on ground of excusable neglect in failure to produce a writing even if the fault thereof were not her own but was allegedly the result of the alleged negligence of her attorneys, since the wife was chargeable therewith. West's Ann.Code Civ.Proc. § 473.

5. Appeal and Error ⚷957(1)
Judgment ⚷135

The showing to be made on a motion under the statute to set aside a default is the same as on a motion for new trial upon the ground of newly-discovered evidence, and unless it can be said on review that the showing made was of such a character as to make it manifest that the case would result differently on a new trial in view of the newly-discovered evidence, the order will not be disturbed. West's Ann.Code Civ.Proc. § 473.

6. Divorce ⚷165(3)

Wife was not entitled to have vacated an interlocutory decree of divorce previously granted the husband on his cross-complaint on the ground of excusable neglect because of nonproduction of a written instrument where it could not be said that if the document had been produced a different result on a new trial would result. West's Ann.Code Civ.Proc. § 473.

◆

George E. Paras, Sacramento, for appellant.

Frank K. Richardson, Sacramento, for respondent.

PEEK, Justice.

Plaintiff appeals from an order denying her motion under section 473 of the Code of Civil Procedure to vacate an interlocutory decree of divorce previously granted defendant on his cross-complaint.

The parties were married on August 23, 1952. On July 20, 1954, plaintiff filed her complaint for divorce on the ground of extreme cruelty and alleged that certain parcels of real property were the community property of the parties. Defendant's answer and cross-complaint admitted the allegation relative to the property. The trial court found that the previously mentioned real property was the community property of the parties; that plaintiff had been guilty of extreme cruelty; and that the real property should be sold forthwith and the net proceeds divided between the parties, 55 per cent to the defendant and 45 per cent to plaintiff. Plaintiff thereafter filed notice of her intention to move for a new trial on the grounds of newly-discovered evidence, insufficiency of the evidence to sustain the decree, and errors in law. The minutes of the court show that on the date set for hearing Mr. Lemmon of the law firm of Johnson and Lemmon, plaintiff's then counsel, appeared but she did not. Pursuant to his request. the hearing was continued for one week. The minutes of that hearing recite that plaintiff and her counsel appeared and that her motion was denied. Thereafter plaintiff, by her present counsel, noticed an appeal from the interlocutory decree. Her appeal was subsequently abandoned and she then filed a motion to vacate the interlocutory decree, the denial of which forms the basis for the present appeal.

Her affidavit in support of the motion alleged that prior to the marriage of the parties they purchased as joint tenants the two parcels of real property on "H" and "Q" Streets in Sacramento; that she paid the sum of $3,412.22 of the down payment on the "Q" Street property and the defendant paid the sum of $100; that thereafter income from the property was used to repay a $3,400 loan thereon; that she paid the $3,400 and defendant paid $100 of the down payment on the "H" Street property; that throughout the marriage of the parties the real property was considered by both parties to be her separate property; that on numerous occasions defendant agreed to make improvements on said property for her benefit; that on or about September 4, 1953, defendant executed and delivered to her the following instrument which was in her handwriting and signed by him:

> "September 4, 1953. I hereby relinquish all claims, rights, and demands upon property at 2611 H Street and 1303 Q Street, Sacramento. It is from this day forth, September fourth, one thousand nine hundred and fifty-three, to be regarded as her sole and personal property.
>
> "/s/ W. W. Hummel"

Her affidavit further alleged that defendant advised her that said instrument was of no legal consequence because it did not contain her name; that she did not inform her attorneys, Johnson and Lemmon, at the time of filing the complaint for divorce of the existence of said instrument because she had been led to believe by defendant that the same was of no legal significance; that she was unable thereafter to locate the same although she searched therefor; that her marital difficulties had caused her to be in a state of extreme emotional distress until the entry of the interlocutory decree; that subsequent to the trial of the divorce action and prior to April 7, 1955, she found the instrument and promptly took it to her attorneys; that prior to May 16, 1955, at the suggestion of her then counsel, Johnson and Lemmon, and consistent with her own desires, she consulted Harrison W. Call, an attorney, who advised her that immediate steps should be taken to bring the instrument to the attention of the court; that on August 23 she retained Mr. Call as her attorney, and on August 25 signed a substitution of attorneys in blank; that Mr. Call informed her he would take charge of her case, would present the instrument as a ground for a new trial and as a ground for quieting her title to the property; that after her notice of motion for a new trial was filed on September 26, 1955, by her then attorneys, Lambert and Lemmon, that firm believed that the proceedings in connection with that motion would be handled by Mr. Call who had represented to them that he was then acting as her counsel; and that Mr. Lemmon appeared for her at the hearing set for November 2 merely because he had been unable to contact Mr. Call. The affidavit further states that subsequent to the denial of her motion for a new trial Mr. Call advised her that he was representing her and would file a timely appeal from the interlocutory decree; that after having failed in her attempts to contact Mr. Call, she retained her present counsel, Mr. Paras, and on December 14 a substitution was accordingly filed.

At the hearing on the motion to set aside the interlocutory decree, plaintiff testified that when she retained Mr. Call in August of 1955 he stated he would proceed with the case; that she relied upon him to represent her, but that he did nothing. It was stipulated by counsel that if Mr. Lemmon were called as a witness he would testify that on the date the document in question was first shown to him he advised Mrs. Hummel that it was a matter of importance with respect to a motion for a new trial provided the parties were unable to divide their property in accordance with the suggestion contained in the memorandum opinion of the court filed on April 7, 1955; that on August 1, 1955, she informed him that she could not follow his advice relating to the division of the property and he thereupon advised her to seek other legal assistance; that on August 25, 1955, Mr. Call informed him by telephone that he (Call) had been retained by Mrs. Hummel to represent her in the action; that on September 20, 1955, he informed her of his receipt of the notice of entry of judgment and advised her of the urgency of pressing her claim with reference to the property in question; that she told him she would so notify Call; that thereafter on two occasions during September through November he again advised her concerning the urgency of her motion for a new trial; that at Mr. Call's request he appeared at the hearing on November 2 to secure a continuance and that he appeared at the November 8 hearing solely to protect Mrs. Hummel's rights.

The defendant testified that he had placed more money in the property than had plaintiff and produced accounts in support thereof. He further testified that there had been many arguments throughout their marriage; that the signing of the instrument was preceded by an argument, and his only reason for doing so was to get some peace.

It is now plaintiff's contention that her affidavit and the evidence introduced in support thereof showed excusable neglect on her part and that of her attorneys, and therefore the court abused its discretion in denying her motion to set aside the interlocutory decree.

[1] The condition or situation which section 473 of the Code of Civil Procedure seeks to remedy is one in which a party to a cause is unexpectedly placed to his injury without any fault or negligence of his own which ordinary prudence could not have guarded against. But it is not every inadvertence or negligence that warrants relief. It is "* * * only such inadvertence or negligence as may reasonably be characterized as excusable." Hughes v. Wright, 64 Cal.App.2d 897, 901, 149 P.2d 392, 395. An application for relief under said section is addressed to the sound discretion of the trial court, and in the absence of a clear showing of an abuse of such discretion, the trial court's ruling will not be disturbed on appeal. Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385.

[2] Here plaintiff's affidavit in support of her motion shows that she had the document in question in her possession at all times from the date of its execution. Her stated reasons for not informing her attorneys of its existence were (1) that her husband had told her it was of no legal value; (2) that she was not aware of its legal significance; and (3) that although she believed him she searched for it but was unable to locate the same. She further alleged she informed her attorneys of its existence prior to April 7, 1955. This, it should be noted, was several months prior to the entry of the interlocutory decree and her motion for a new trial. Furthermore the record shows that her present counsel and counsel for defendant stipulated at the hearing on the present motion that Mr. Lemmon, her original counsel, knew of its existence on either May 6 or June 3, 1955, and that he informed her it could be used on a motion for new trial. However, it was not until January 11, 1956, that the document was presented to the court for consideration in connection with her present motion. Her affidavit also avers that subsequent to May 16, at the suggestion of Mr. Lemmon and consistent with her own desires, she consulted Mr. Call who also advised her that immediate steps should be taken to bring the writing to the attention of the court; and that on August 23 she retained Mr. Call and signed a substitution of attorneys in blank. However the substitution was never filed and Mr. Lemmon and

his firm continued as attorneys of record making two appearances for her concerning the present motion. On December 14 Mr. Paras, her present counsel, was substituted.

Certainly from the record as summarized it cannot be said that plaintiff has sustained the burden of showing by clear and convincing proof that the trial court so abused its discretion as to warrant this court in disturbing the order under the rule as enunciated in Beard v. Beard, supra.

[3, 4] Even assuming that her failure to produce the instrument in question at the hearing on her motion for a new trial was not by reason of any fault of her own but was the result of the negligence of her attorneys, nevertheless she was chargeable therewith. Colvin v. Sibley, 117 Cal. App.2d 144, 146, 255 P.2d 16. It is not the purpose of section 473 to permit the setting aside of judgments which are the result of inexcusable neglect of the parties or their attorneys in the performance of the latters' obligations to their clients. Stahl v. Fahrman, 126 Cal.App.2d 755, 758, 272 P.2d 927.

[5, 6] In addition to what has heretofore been said, it is the further well-established rule that the showing to be made on a motion under section 473 is the same as on a motion for a new trial upon the ground of newly-discovered evidence. Therefore, unless it can be said on review that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial in view of the newly-discovered evidence, the order of the trial court will not be disturbed. In re Estate of Harkness, 176 Cal. 537, 540, 169 P. 78. Under the record before this court it cannot be said that the document in question would or should cause a different result on a new trial.

The order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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161 Cal.App.2d 208

Warren HOBGOOD, Plaintiff and Appellant,

v.

J. W. GLASS, Leon Hughes, Louis F. Wood, aka Louie F. Wood, Doe One To Doe Four, Inclusive, John Doe Company, a copartnership, John Doe Company, a corporation, Defendants.

Louis F. Wood, also known as Louie F. Wood, Respondent.

Civ. 22803.

District Court of Appeal, Second District, Division 2, California.

June 9, 1958.

Trucking broker brought action against three nonresidents, who were allegedly partners, for damages for breach of alleged express oral contract to transport poultry and for negligence in performance of the contract. The broker was unable to effect personal service of summons on nonresidents, and only the first nonresident appeared and answered. The Superior Court of Los Angeles County, Joseph L. Call, J., entered an order dismissing the second and third nonresidents from the action and thereafter entered judgment in favor of the first nonresident, and the broker appealed. The District Court of Appeal, Herndon, J., held that the order dismissing the second and third defendants from the action was error, and that the error was prejudicial, where the second nonresident, after having been dismissed as a defendant, testified with impunity, so as to exonerate the first nonresident by describing himself and third nonresident as the sole parties responsible under the contract.

Judgment reversed.

1. Dismissal and Nonsuit ⚷63

Where trucking broker brought action against three nonresidents, who were allegedly partners, for damages for breach of alleged express oral contract to transport poultry and for negligence in performance of contract, and broker was unable to effect personal service of summons on nonresidents, and only first nonresident appeared and answered, trial court erred in dismissing second and third nonresidents from the action, since broker, if he had prevailed against first nonresident, could have had judgment against first nonresident, leaving action pending as against other nonresidents, and would have had right later to summon the other nonresidents to show cause why they should not be bound by judgment against first nonresident. West's Ann.Corp.Code, § 15015; West's Ann. Code Civ.Proc. §§ 414, 989.

2. Appeal and Error ⚷1036(5)
Dismissal and Nonsuit ⚷63

Where trucking broker brought action against three nonresidents, who were allegedly partners, for damages for breach of alleged express oral contract to transport poultry and for negligence in performance of contract, and broker was unable to effect personal service of summons on nonresidents, and only first nonresident appeared and answered, and trial court erroneously dismissed the second and third nonresidents from the action, and second nonresident then appeared as a witness for first nonresident and, with impunity, so testified as to exonerate first nonresident by describing himself and third nonresident as sole parties responsible under contract sued on, and judgment was entered for first nonresident, order dismissing second and third nonresidents from the action was prejudicially erroneous. West's Ann.Corp. Code, §§ 15013–15015; West's Ann.Code Civ.Proc. §§ 414, 989.

Nessen & Becker, Los Angeles, for appellant.

Charles Chorna, and Bertram H. Ross, Los Angeles, for respondent.

HERNDON, Justice.

This is an appeal by plaintiff from a judgment for defendant Wood in an action, tried without a jury, seeking damages for breach of an express oral contract to transport certain poultry from Georgia to California, and, in a separate count, for negligence in the performance of the contract.

Plaintiff is a trucking broker in Georgia. Shortly before December 22, 1955, a California corporation (hereinafter referred to as "the consignee") placed an order with plaintiff to haul a load of poultry from Athens, Georgia, to Los Angeles. The complaint alleges an express oral contract whereby plaintiff's hauling contract was subcontracted to defendants Glass, Wood and Hughes allegedly acting as partners or joint venturers. The load of poultry which is the subject of this action left Athens, Georgia, on December 22, 1955, and was delivered in Los Angeles almost fourteen days later by one Billie Brock, the driver of the truck.

When the load was delivered there was considerable spoilage. Ultimately the Federal Food and Drug Administration filed a libel action in the local United States District Court, and the entire load, valued at $7,000, was condemned. On the demand of the consignee in Los Angeles, plaintiff paid the consignee's claim, taking from the consignee an assignment of all its rights in and to the cause of action and in and to the poultry. Although there was a small amount of salvage from the load, the net loss claimed by plaintiff exceeded $5,000.

Plaintiff was unable to effect personal service of summons on any of the three named defendants, all being non-residents. However, plaintiff levied an attachment on the truck and trailer. This attachment apparently induced the defendant Wood to appear and answer. He claimed sole ownership of the truck. The other two defendants made no appearance. By his answer, Wood denied that he was either a partner or an employee of the other defendants and denied that he had anything to do with the transaction which is the subject of this action.

Plaintiff elected to bring the action to trial as against the answering defendant Wood. At the outset of the trial, on motion by counsel for defendant Wood, and over plaintiff's objection, the court ordered the action dismissed as to the defendants Glass and Hughes. The proceedings on this motion are reported in the transcript as follows:

"Mr. Ross: May I suggest at this time, your Honor, in that defendant, Wood, whom we represent, is the only defendant who has been served, that it would be in the interest of justice to dismiss as against all other defendants.

"The Court: Now, let's see—

"Mr. Ross: Louis F. Wood—he is the only answering defendant.

"The Court: All right, I guess you are correct. Louis F. Wood is the only answering defendant?

"Mr. Ross: That is correct.

"The Court: He answers as, I presume of course, an individual?

"Mr. Ross: That is correct.

"The Court: All right. We will dismiss all other defendants, other than Louis F. Wood.

"Mr. Becker: If the Court please, the only reason the other defendants have not answered is because they are all non-residents; even Mr. Wood is a non-resident of the State of California, and the only reason that we have jurisdiction to proceed is by reason of the attachment of some of his property in the State of California, and it seems to me that it isn't essential to dismiss the other defendants at this time, particularly as we intend to show that the evidence in this case will indicate that the other defendants, and the defendant Wood, were in partners, or were a partnership.

"The Court: Well, of course, if they haven't answered you can't proceed against them. They are not before the Court.

"Mr. Becker: Not at this trial—

"The Court: No, and you couldn't bring them in later. In other words, I couldn't render a partial judgment, for instance, a judgment in favor of plaintiff against this answering defendant and leave the case wide open against other defendants that haven't answered. You couldn't go to trial, ultimately, as against the other defendants in any event because you would have your case adjudicated here. In other words, you are ready for trial or you are not ready for trial.

"Mr. Becker: We are ready for trial, your Honor, and we intend to proceed for trial, and, if necessary, only against the defendant, the answering defendant, Wood.

"The Court: I think the motion is well taken. If none of the other defendants answered, I think it is only proper to keep the pleadings in shape, that we dismiss out any defendants that are not here before the Court. I will grant the request. I think it is necessary to keep the pleadings in shape and straight that we do. Motion will be granted.

"Mr. Ross: Thank you, your Honor."

Plaintiff assigns the making of this order as prejudicial error.

[1] The order of dismissal was clearly erroneous, and was made upon several misconceptions of law as the above quoted statements of the trial judge indicate. Since plaintiff was proceeding upon a cause of action *ex contractu* against three defendants alleged to be partners, he had a clear right to proceed against the defendant served. Code of Civil Procedure, § 414.[1] The liability of partners for debts and obligations arising out of contract is joint. Corp.Code, § 15015. It is not questioned that if plaintiff had prevailed against Wood, the court could have rendered judgment against him leaving the action pending as against the others. Merchants' National Bank of Los Angeles v. Clark-Parker Co., 215 Cal. 296, 299, 9 P.2d 826, 81

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[1] § 414. "When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants."

A.L.R. 778. And, had plaintiff recovered judgment against Wood on a contractual obligation of the partnership as alleged he would have had the right later to summon the other jointly indebted defendants to show cause why they should not be bound by it. Code Civ.Proc. § 989.[2]

In Iwanaga v. Hagopian, 39 Cal.App. 584, 585, 179 P. 523, the court refers to the common law rule that a partnership obligation is joint, and not joint and several, and to the corollary rule that a judgment against less than all the partners upon such a liability extinguishes the original claim against all for the reason that the joint obligation is deemed merged in the judgment. The decision then proceeds to point out that in California the common law rules have been abrogated by statute:

"In some states the rigor of this common-law rule has been relaxed by statutes, which declare the obligations of copartners to be several as well as joint. But in this state the common-law rule has been expressly enacted by section 2442 of the Civil Code, which declares the liability of copartners to be joint, and we have no provision permitting several judgments to be recovered in several actions upon a joint obligation. The extent to which the common-law rule on this subject has been changed by the provisions of section 414 and section 989 of the Code of Civil Procedure is by permitting (section 414) an action brought against the joint debtors, but in which the summons has not been served on all, to proceed to judgment against those served, and (section 989) after judgment so obtained, to bring in any of the defendants not served by an order to show cause why they should not be bound by the judgment."

It may be noted that after the decision in Iwanaga v. Hagopian, supra, section 2442 of the Civil Code was repealed by the enactment of the Uniform Partnership Act in 1929, and that subsequent statutory changes in the nature of partnership obligations are reflected in the presently effective provisions of the Corporations Code. Corp.Code, §§ 15013, 15014, and 15015. Clearly, however, those subsequent changes do not affect the application of sections 414 and 989 of the Code of Civil Procedure in the case at bar.

Respondent has not cited us to any statute or decision affording any supportable ground upon which to justify the order of dismissal. It is urged, however, that plaintiff was not prejudiced by the order. Determination of the question of prejudice requires a consideration of subsequent developments in the trial.

Plaintiff testified that the three defendants, Wood, Glass and Hughes, represented themselves as partners and co-participants in the hauling venture at the time the contract was made. He testified to subsequent conversations and conduct which tended to support his version that the contract to haul the poultry was the joint undertaking of all three defendants. The defendant Wood, on the other hand, testified: that he had never entered into any business relationship with Glass or Hughes; that he had merely introduced Glass and Hughes to plaintiff as persons who were interested in obtaining hauling contracts; and that the use of his truck by Glass and Hughes to deliver the poultry to Los Angeles was wholly unauthorized.

On cross-examination, Wood reiterated his testimony that Glass and Hughes had taken his truck without his permission, and further testified that he first learned of the unauthorized use of his truck on January 8, 1956, some seventeen days after the commencement of the trip. Wood gave further testimony on this subject under cross-examination as follows:

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[2] § 989. "When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in section 414 of this code, those who were not originally served with the summons, and did not appear in the action, may be summoned to appear before the court in which such judgment is entered to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons."

"Q. Did you file a suit against Hughes and Glass? A. No, sir.

"Q. Did they give—did you take any note or promise of indemnity for the loss of the truck, or the use of the truck? A. No, sir, I haven't.

"Q. Pretty friendly with Mr. Hughes and Mr. Glass? A. We have been friends for a long time. I believe they will do what they told me they would.

"Q. What is it they told you they would do? A. That they will make it right if things don't work out. I mean, if I don't get my truck back."

On the second day of trial, defendant Wood produced as his only witness (other than himself) the erstwhile defendant Glass. Mr. Glass gave testimony in effect as follows: that the contract was in fact that of defendant Hughes and himself; that Wood was not a party to it; that he and Hughes were partners, but that defendant Wood was not associated with them; and that he had taken Wood's truck without permission because his own truck was unavailable.

On cross-examination, Glass was asked whether he knew before he came out to California that he was coming out for the purpose of testifying in this case. He answered: "I knew there was going to be a trial, and I came out here to see about it." After the court ruled that this answer was evasive, the witness answered the question in the affirmative. Later in the cross-examination, Glass was asked whether he had ever appeared or answered in the instant cause. After the court had sustained an objection to the question on the ground that it was immaterial, counsel for plaintiff made the following statement: "Mr. Becker: I think, your Honor, we have this situation. We have been unable to effect service upon this witness heretofore, who is actually a party, and I was considering asking leave of Court in some manner to serve him at this time, to enjoin [sic] him as one of the other defendants in this action. I don't know how the mechanics, or the procedure with respect to trial would be. Perhaps during the noon recess I can determine that."

To the foregoing, the court responded as follows: "The Court: First of all, I have no right to open this case up and bring in new parties, in my opinion. The case is proceeding to trial and, of course the defendant here, this gentleman, is not a proper party to this case the way we are here, the status of the proceedings.[3] Therefore, I think the last question, or questions, are immaterial in this case. I am just going to try this case. I won't try some speculative case in the future. Whether he is served or isn't served is another thing. That is the point, you see."

[2] In our view, the foregoing serves to emphasize the prejudice suffered by plaintiff as a result of the erroneous dismissal as to the defendants Glass and Hughes.[4] Counsel for defendant Wood, through his gratuitous intervention in behalf of the non-appearing defendants (from whom he claimed no authority of representation), sought and obtained an erroneous order whereby he gained for his client and for defendant Glass substantial advantages to which neither was rightfully entitled. Having been dismissed as a defendant, Glass was enabled with impunity to so testify as to exonerate Wood by describing Hughes and himself as the sole parties responsible under the contract sued upon. By exonerating Wood and bringing about the release of the attached truck, Glass was enabled to relieve himself of liability under his agreement with Wood to indem-

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[3] In view of the order of dismissal the witness was apparently regarded as a stranger to the action and presumably his testimony was evaluated accordingly.

[4] Since the parties do not discuss the question of the finality or appealability of the order we need not consider it. (But see Baxter v. Boege, 173 Cal. 589, 160 P. 1072; Dabney Oil Co. v. Providence Oil Co., 29 Cal.App. 251, 155 P. 114; Nolan v. Smith, 137 Cal. 360, 70 P. 166; 3 Cal.Jur.2d 455 et seq., § 40.)

nify the latter in the event he lost his truck as a result of the attachment.

This misuse of the procedural rules does not comport with our notions of fair play. We think plaintiff was not only entitled to the benefit of the statutory provisions to which we have alluded, but, under their proper application, he also was entitled to have the non-appearing defendants in the dilemma which inhered in the situation: whether to remain away from the trial and suffer any consequences resulting from that action or to appear in the action, submit themselves to the jurisdiction of the court and abide by its judgment.

It is clear beyond any reasonable doubt that Wood and Glass at the time of trial were acting in friendly concert, notwithstanding their testimony to the effect that Glass had wrongfully converted Wood's truck by taking it on a trip across the continent without his knowledge or consent.

Other errors assigned by plaintiff relate to matters which are not likely again to be presented upon a retrial. It is therefore unnecessary to discuss them.

The judgment is reversed.

FOX, P. J., and ASHBURN, J., concur.

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161 Cal.App.2d 87

Florine HOLMAN, Plaintiff and Appellant,
v.
Paul E. VIKO, Defendant and Respondent.
Giuseppe F. GOTTA, Plaintiff and Appellant,
v.
Paul E. VIKO, Defendant and Respondent.
Civ. 22845, 22846.

District Court of Appeal, Second District,
Division 2, California.
June 4, 1958.

Action by pedestrians for personal injuries sustained when while attempting to cross the street they were struck by defendant's automobile. The Superior Court, Los Angeles County, Ben Koenig, J., entered judgments adverse to plaintiffs and they appealed. The District Court of Appeal, Asburn, J., held that giving of instruction upon void municipal ordinance regulating pedestrian crossings was prejudicial error, in view of fact it created a conflict with statute pertaining to pedestrian crossing between controlled intersections, and supplied an element necessary to last clear chance instruction, namely, negligence upon part of pedestrians in getting into a position of danger.

Judgments reversed.

Herndon, J., dissented in part.

1. Municipal Corporations ⇨592(1)

The Vehicle Code has pre-empted the field of regulation of crossing a roadway at or between intersections by pedestrians, except to the extent that local legislation is expressly authorized by the Vehicle Code. West's Ann.Vehicle Code, § 458.

2. Statutes ⇨212.1

The legislature is presumed to have been familiar with existing statutes and court rulings.

3. Automobiles ⇨217(3)

Statute providing that every pedestrian crossing a roadway at any point other than within a marked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway, impliedly authorizes crossing between intersections subject only to an obligation to yield the right of way to approaching vehicles. West's Ann.Vehicle Code, § 562.

4. Municipal Corporations ⇨592(1)

Statute pertaining to local regulation of pedestrians does not expressly authorize regulation of manner of pedestrian crossing by local authorities, and a mere implication to that effect is not sufficient to satisfy statute providing that provisions of Vehicle Code are applicable throughout the state and that no local authority shall enact or enforce any ordinance on matters covered unless expressly authorized. West's Ann.Vehicle Code, §§ 458, 459.1.

5. Municipal Corporations 🔑592(1)

Use by pedestrians of roadways between intersections is a subject which has been pre-empted by state statute, subject only to exceptions expressly declared by the legislature, and section of the Los Angeles Municipal Code regulating such pedestrian crossing is not within one of those exceptions, and is void. West's Ann.Vehicle Code, § 459.1.

6. Appeal and Error 🔑1064(1)
Automobiles 🔑246(31)

In actions by pedestrians for personal injuries sustained when they were injured by defendant's automobile while crossing a street, while they were not within any crosswalk, giving of instruction upon void municipal ordinance regulating pedestrian crossings was prejudicial error, in view of fact it created a conflict with statute pertaining to pedestrian crossing between controlled intersections, and supplied an element necessary to last clear chance instruction, namely, negligence upon part of pedestrians in getting into a position of danger. West's Ann.Vehicle Code, §§ 459.1, 562.

7. Negligence 🔑83.8

The doctrine of last clear chance is but one phase of the concept of proximate cause, designed to relieve a negligent plaintiff from the consequences of his own carelessness in those instances where defendant has had in fact a last clear chance to avoid the accident.

8. Negligence 🔑83.10

The only purpose of the last clear chance doctrine is to relieve the injured party from the rigid application of the rule that contributory negligence will bar his recovery, when the circumstances are such that it may be said that such party's negligence is a remote rather than a proximate cause of his injuries.

9. Negligence 🔑83.5

Application of rule of last clear chance, in a negligence action, presupposes negligence on plaintiff's part.

10. Negligence 🔑83.1

Rule of last clear chance does not apply if any of its elements are absent.

11. Negligence 🔑83.4

Doctrine of last clear chance may be invoked if, and only if, trier of facts finds from the evidence that the plaintiff was in a position of danger and, by his own negligence, became unable to escape from such position by use of ordinary care, that defendant knew plaintiff was in a position of danger and further knew, or in exercise of ordinary care should have known, that plaintiff was unable to escape therefrom, and that thereafter defendant had the last clear chance to avoid the accident by exercise of ordinary care but failed to exercise such last clear chance and the accident occurred as a proximate result of such failure.

12. Negligence 🔑83.5

The phrase "that the plaintiff was in a position of danger, and by his own negligence, became unable to escape from such position by use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger," as used in rule for determining applicability of last clear chance doctrine, does not contemplate negligence occurring after plaintiff gets into a position of danger, but presupposes that negligence of plaintiff got him into a position from which he could not extricate himself through exercise of ordinary care.

13. Automobiles 🔑227(3)

In action for personal injuries sustained by pedestrians when struck by defendant's automobile, if pedestrians stopped before entering defendant's lane of traffic, and apparently waited for him to cross, but when he was about 50 feet west of the point of impact suddenly dashed across in front of him, and he immediately applied his brakes and swerved to avoid them, doctrine of last clear chance was not applicable since pedestrians were in no danger until they began to run across the street, and as soon as they did so, defendant did all he could to avert the accident, but was unable to avoid it.

14. Automobiles 🔑227

In action by pedestrians for personal injuries sustained when they were struck by defendant's automobile while attempting to cross the street, if defendant-driver slowed down his automobile and apparently signalled for pedestrians to cross in front of his automobile, and then attempted to drive by in front of them, doctrine of last clear chance was not applicable, for under such circumstances no inference of negligence was raised on the part of either pedestrian.

15. Automobiles 🔑227(3)

In action by pedestrians for personal injuries sustained when they were struck by defendant's automobile, while attempting to cross the street, if defendant, after having almost stopped his automobile, accelerated it at the same instant that pedestrians started to run across the street in front of his automobile, no time was left for last or any clear chance for defendant to avoid the accident, and therefore doctrine of last clear chance was not applicable.

16. Appeal and Error 🔑994(2)
Trial 🔑140(1)

A jury is justified in accepting part of a witness' testimony while rejecting the remainder and, after repeating the process a number of times, may assemble the accepted fragments into a mosaic of truth which withstands the scrutiny of appellate review.

Zeman, Hertzberg & Schekman, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee and Kenneth R. Garrett, Los Angeles, for respondent.

ASHBURN, Justice.

Appeals from judgments for defendant in two companion personal injury actions. The cases were tried together before a jury and plaintiffs base their appeals upon alleged errors in instructions. Counsel claim error (1) in instructing the jury that violation of § 80.39 of Los Angeles Municipal Code would constitute negligence per se, and (2) in refusing to give an instruction on the last clear chance doctrine. We have concluded that there was reversible error in the instruction based upon the municipal ordinance, but no error in refusal of a last clear chance instruction.

The accident occurred while plaintiffs were crossing Ninth Street in the city of Los Angeles near the middle of the block between Alvarado Street and Westlake Avenue, on November 13, 1955. They were not within any crosswalk. One of the plaintiffs and another witness testified that appellants were crossing the street diagonally. The court instructed the jury concerning the State law as follows: "You are instructed that Section 562(a) and (b) of the Vehicle Code of the State of California on the date of the accident provided as follows: 'Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.' 'The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway.'" Upon the ordinance provision it instructed in these words: "You are instructed that Section 80.39 of the Los Angeles Municipal Code in effect on the date this accident occurred provided that: 'No pedestrian shall cross a roadway at any place other than by a route at right angles to the curb, or by the shortest route to the opposite curb except in a marked crosswalk.' * * * Conduct which is in violation of Section 80.39 of the Los Angeles Municipal Code and Section 671 of the Vehicle Code of the State of California, just read to you, constitutes, in itself, negligence. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. * *"

Appellants' contention is that the field is covered by the State law as expressed in the Vehicle Code and hence the ordinance is void. Section 458 of the code provides: "The provisions of this division are applicable and uniform throughout the State and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this division *unless expressly authorized herein.*" (Emphasis added.) In 1943 § 459.1 was added to the code. It reads: "Local Regulation of Pedestrians and Turning Movements. (a) The provisions of Chapter 10 of Division 9 of this code regulating pedestrians shall not be deemed to prevent local authorities, by ordinance, from adopting ordinances prohibiting pedestrians from crossing roadways at other than crosswalks. (b) The provisions of Chapter 8 of Division 9 of this code regulating the turning of vehicles shall not be deemed to prevent local authorities, by ordinance, from prohibiting the making of any turning movement by any vehicle at any intersection or between any designated intersections." [1]

Before the enactment of § 459.1 it became settled law that §§ 562 and 563, Vehicle Code,[2] had preempted the field of regulation of the subject of crossing streets between intersections. In Pipoly v. Benson, 1942, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515, the court dealt with § 80.38, Los Angeles Municipal Code, which prohibited crossing in a central traffic district or any business district other than by crosswalk. It was held that the regulation of traffic upon the streets of a city is not a municipal affair and that such an ordinance as § 80.38 is invalid because the field has been occupied by State legislation. At page 370 of 20 Cal.2d, at page 485 of 125 P.2d the court said: "Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute. Thus, it has been held from an early date that an ordinance which is substantially identical with a state statute is invalid because it is an attempt to duplicate the prohibition of the statute." At page 371 of 20 Cal.2d, at page 485 of 125 P.2d: "Where the statute contains language indicating that the legislature did not intend its regulations to be exclusive, the general rule permitting additional supplementary local regulations has been applied. In re Iverson, supra, 199 Cal. 582, at page 588, 250 P. 681; Natural Milk Producers Ass'n of California v. City and County of San Francisco, 20 Cal.2d 101, 124 P.2d 25; In re Simmons, supra, 199 Cal. 590, at page 593, 250 P. 684. Conversely where the statute contains express provisions indicating that the legislature intends its regulations to be exclusive within a certain field, the courts have given effect to this intention." After quoting § 458, Vehicle Code, the court said, 20 Cal.2d at page 372, 125 P.2d at page 486: "The regulation of pedestrian traffic in its use of the public roadways, however, is not a matter concerning which express authorization has been given for local regulation." And 20 Cal.2d at page 375, 125 P.2d at page 487: "For the reasons set forth herein, we conclude that section 80.38 of the Municipal Code of Los Angeles must be held to be unconstitutional since it conflicts with the Vehicle Code by attempting to legislate upon a subject intended to be covered fully by an act of the legislature. The instruction given by the

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1. Subdivision (b) was amended in 1947 by adding the words "or between any designated intersections."

2. Veh.Code, § 562: "Crossing at Other Than Crosswalks. (a) [*Yielding of right of way to vehicles.*] Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. (b) [*Duty of driver to exercise care.*] The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway."
Veh.Code, § 563: "Pedestrians Between Controlled Intersections. Between adjacent intersections controlled by traffic control signal devices or by police officers pedestrians shall not cross the roadway at any place except in a crosswalk."

trial court which was based upon the provisions of the Los Angeles ordinance, therefore, was erroneous and since it conflicted with the instruction based upon the provisions of the Vehicle Code, the error requires a reversal of the judgment." The court distinguished Quinn v. Rosenfeld, 15 Cal.2d 486, 102 P.2d 317, as follows: "Defendants also rely upon our decision in Quinn v. Rosenfeld, supra, but the local ordinance there involved was not the basis for the decision. No instructions to a jury were involved in that case, and the decision concluded that since the ordinance made no attempt to prohibit the plaintiff's conduct, it was unnecessary to decide whether the ordinance was invalid on the ground that it related to a matter covered by division IX of the Vehicle Code. Quinn v. Rosenfeld, supra, 15 Cal.2d at page 490, 102 P.2d 317. The case was decided solely with reference to the provisions of the Vehicle Code and is not in conflict with our conclusions herein." (20 Cal.2d at page 374, 125 P.2d at page 487.)

Fuentes v. Ling, 1942, 21 Cal.2d 59, 130 P.2d 121, makes the same holding as Pipoly, supra, with reference to an ordinance in similar terms.

Wilton v. Henkin, 1942, 52 Cal.App.2d 368, 126 P.2d 425. A local ordinance prohibited crossing in the business district except by crosswalk; it also prohibited crossing at any place except by a route at right angles to the curb or by the shortest route to the opposite curb. The court held that the first mentioned provision (like the one involved in the Pipoly case, supra) was void because the field was governed by the Vehicle Code. The opinion does not expressly rule upon validity of the prohibition of diagonal crossing.

Stricklin v. Rosemeyer, 1942, 52 Cal.App.2d 558, 126 P.2d 665, dealt with an ordinance providing: "'It shall be unlawful for any person to be in any roadway other than a safety zone or cross-walk; provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian.'" (52 Cal.App.2d at page 561, 126 P.2d at page 666.) This was held to be invalid under the doctrine of the Pipoly case, supra.

Ryan v. San Diego Elec. Ry. Co., 1942, 52 Cal.App.2d 460, 126 P.2d 401, dealt with an ordinance substantially the same as the one declared void in Pipoly and of course made the same ruling.

Nosbonne v. Brill, 1942, 53 Cal.App.2d 436, 128 P.2d 57, held a similar ordinance to be invalid.

[1] In view of the declaration of § 458, quoted supra, the aggregate effect of the above cited cases is the establishment of a rule that the Vehicle Code has preempted the field of regulation of crossing a roadway at or between intersections except to the extent that local legislation is "expressly authorized" by the Vehicle Code.

[2–4] Following the Pipoly and other cases, supra, the legislature passed in 1943 section 459.1. It expressly permits local regulation which (1) prohibits pedestrians from crossing roadways except at crosswalks, and (2) as amended in 1947 prohibiting any turning movement by any vehicle between designated intersections. The legislature is presumed to have been familiar with existing statutes and court rulings. In re Estate of Simpson, 43 Cal.2d 594, 600, 275 P.2d 467, 47 A.L.R.2d 991; Buckley v. Chadwick, 45 Cal.2d 183, 193, 288 P.2d 12, 289 P.2d 242; Freeman v. Jergins, 125 Cal.App.2d 536, 552–553, 271 P.2d 210. It specifically authorized local ordinances wholly prohibiting crossing between intersections by pedestrians. Section 562 impliedly authorizes crossing between intersections subject only to an obligation to yield the right-of-way to approaching vehicles. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 95, 239 P. 709, 41 A.L.R. 1027; Broedlow v. LeGros, 88 Cal.App. 671, 676, 263 P. 1027; Jacoby v. Johnson, 84 Cal.App.2d 271, 274, 190 P.2d 243. It cannot be said that regulation of manner of crossing was expressly authorized by § 459.1. An implication to that effect is not enough to satisfy § 458. Had it been the intention of the legislature to open to local control the entire subject of crossing between intersections, it would have been an easy matter to say so. On the contrary, the new section was carefully limited to local prohibition of crossing by pedestrians and prohibition of turning movements by vehicles between intersections.

Newton v. Thomas, 1955, 137 Cal.App.2d 748, 762, 291 P.2d 503, was decided after enactment of § 459.1. The local ordinance forbade (a) crossing in the business district other than by crosswalk, (b) standing in the roadway so as to interfere with traffic (§ 40), (c) crossing other than by a route at right angles to the curb. The court held § 40 invalid under the doctrine of the Pipoly case, supra.

[5] We conclude that it remains the law as declared in Pipoly, supra, that use by pedestrians of roadways between intersections is a subject which has been preempted by State statute, subject only to exceptions expressly (not impliedly) declared by the legislature; that § 80.39 of the Los Angeles Municipal Code is not within one of those exceptions and hence is void.

[6] The giving of instructions upon § 562, Vehicle Code, and said ordinance, created a conflict which requires a reversal. On this subject the Pipoly decision, supra, says: "The decisive issue presented by this appeal, therefore, is whether the Los Angeles ordinance regulating the conduct of pedestrians at crosswalks is in conflict with the provisions of the Vehicle Code and is for that reason invalid. If so, the giving of conflicting instructions where one is based upon the provisions of an invalid ordinance clearly constitutes error." Pipoly v. Benson, supra, 20 Cal.2d 366, 369, 125 P.2d 482, 484, 147 A.L.R. 515. As will be seen from the discussion of last clear chance, infra, the instruction upon the ordinance was especially prejudicial here for it supplied one of the elements necessary to a last clear chance instruction, negligence upon the part of plaintiffs in getting into a position of danger.

Concerning the applicability of the last clear chance rule to the facts shown by the record before us, we hold that there was no error in the refusal of such an instruction.

[7, 8] The doctrine of last clear chance is but one phase of the concept of proximate cause, designed to relieve a negligent plaintiff from the consequences of his own carelessness in those instances where defendant has had in fact a last clear chance to avoid the accident. "The only purpose of the last clear chance doctrine is to relieve the injured party from the rigid application of the rule that contributory negligence will bar his recovery, when the circumstances are such that it may be said that such party's negligence is a remote, rather than a proximate, cause of his injuries. Girdner v. Union Oil Co., 216 Cal. 197, 201–204, 13 P.2d 915; Center v. Yellow Cab Co., 216 Cal. 205, 207–208, 13 P.2d 918. In other words, the last clear chance doctrine is but a 'phase of the doctrine of proximate cause' in its relation to the negligence of the injured party who seeks to invoke it." Sparks v. Redinger, 44 Cal.2d 121, 124, 279 P.2d 971, 973. "As was said in the Center case at pages 207–208 of 216 Cal., at page 920 of 13 P.2d: 'The doctrine of (plaintiff's) continuing negligence has no application unless the negligence is the proximate cause of the injury. *If all the elements of the doctrine of the last clear chance are present and plaintiff's negligence becomes remote in causation, then the doctrine applies.* If, on the other hand, any of the elements of the doctrine are lacking, courts have declared, and rightfully so, that plaintiff's negligence being continuous and contributory with that of defendant bars a recovery.' (Emphasis added.)" Doran v. City & County of San Francisco, 44 Cal.2d 477, 488, 283 P.2d 1, 8. To the same effect, see, Girdner v. Union Oil Co., 216 Cal. 197, 201–203, 13 P.2d 915.

[9, 10] The application of the rule presupposes negligence on plaintiffs' part. Sparks v. Redinger, supra, 44 Cal.2d 121, 124, 279 P.2d 971; Selinsky v. Olsen, 38 Cal.2d 102, 105, 237 P.2d 645; Rodabaugh v. Tekus, 39 Cal.2d 290, 293, 246 P.2d 663;

35 Cal.Jur.2d § 258, p. 802. The rule does not apply if any of its elements is absent. Doran v. City & County of San Francisco, 44 Cal.2d 477, 483, 283 P.2d 1.

[11, 12] The latest authoritative statement is found in Brandelius v. City & County of San Francisco, 47 Cal.2d 729, 743, 306 P.2d 432, 440: "The doctrine of last clear chance may be invoked if, and only if, the trier of the facts finds from the evidence: (1) that the plaintiff was in a position of danger and, by his own negligence, became unable to escape from such position by the use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger; (2) that defendant knew that plaintiff was in a position of danger and further knew, or in the exercise of ordinary care should have known, that plaintiff was unable to escape therefrom; and (3) that thereafter defendant had the last clear chance to avoid the accident by the exercise of ordinary care but failed to exercise such last clear chance, and the accident occurred as a proximate result of such failure." The context shows, we think, that the phrase "that the plaintiff was in a position of danger and, by his own negligence, became unable to escape from such position by the use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger" does not contemplate negligence occurring after plaintiff gets into a position of danger but, as stated in Sparks v. Redinger, supra, 44 Cal.2d 121, 279 P.2d 971, presupposes that negligence of plaintiff got him into a position from which he could not extricate himself through exercise of ordinary care. At page 740 of 47 Cal.2d, at page 439 of 306 P.2d of Brandelius, supra, it is said: "The formula, as reiterated in the recent cases in three numbered subdivisions, reads as follows: '(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape." Immediately following the restatement of the formula is this explanation: "In restating the formula, it has not been our purpose to add to or detract from the conditions prescribed in the approved formula set forth in the Girdner case and reiterated in our recent decisions. On the contrary, the main purpose has been to state more clearly the vital time element involved in the application of the doctrine." (47 Cal.2d at page 743, 306 P.2d at page 441.)

The accident happened on November 13, 1955, about 2:15 a. m. Plaintiffs had walked east from Alvarado on the north side of Ninth Street some 140 to 150 feet. They were looking for the residence of a friend in an apartment house on the south side of the street near the center of the block. Having recognized it they started across the street and were hit by defendant's eastbound automobile when they had passed a few feet beyond the double white line in the center of the street. The transcript contains three versions of this accident, none of which presents all the elements of last clear chance.

[13] First is that of defendant, called as a witness under § 2055, Code of Civil Procedure. (Defendant called no witnesses in his own behalf.) His testimony was substantially as follows. He was driving east on Ninth Street in the lane next the double white line; his car, a 1953 Mercury, had good brakes in good order, and also a horn. He first saw plaintiffs when he was about 10 to 20 feet east of the intersection. They were at or near the north curb and seemed to hesitate; when he saw them he reduced his speed from 20–25 miles an hour to 15–20 miles. He continued to watch plaintiffs who had their heads directed toward him and were aware of his proximity; he thought they were waiting for him; his speed was then increased to 25 miles, but when he was about 50 feet west of the point of impact plaintiffs sud-

denly dashed across in front of him; he immediately applied his brakes, laying down 10 to 20 feet of skid mark but was unable to avoid the accident, although he swerved to the right some two to four feet. He struck plaintiffs at about the center of his eastbound lane or about five feet south of the double line; his car went some 10 to 20 feet beyond the point of impact. Plaintiffs were lying just in front of his car when it stopped.

There was no last clear chance here for plaintiffs, near the north curb or on the north half of the street, were in no danger until they began to run across the street; as soon as they did so defendant did all he could to avert an accident but was unable to avoid one. It was to emphasize the time element of last clear chance that the formula was restated in Brandelius, supra. In the Doran case, supra, 44 Cal.2d 477, 487, 283 P.2d 1, 7, the author of the Brandelius opinion also said: "The underlying basis for the application of this doctrine, which permits an injured person to recover despite his continuing and contributory negligence, is that defendant was afforded a *last* chance and a *clear* chance to avoid the accident *after* defendant had discovered that plaintiff was in a helpless situation." And 44 Cal.2d at page 488, 283 P.2d at page 7: "But the chance which is afforded to defendant must be something more than a bare possible chance. It must be not only a *last* chance but a *clear* chance, following actual knowledge of plaintiff's helplessness, to avoid the accident by the exercise of ordinary care; and, by its very terms, the doctrine excludes from its application any case in which plaintiff's state of helplessness, resulting from his own negligence is created so nearly simultaneously with the happening of the accident that neither party may be fairly said to have thereafter a last clear chance to avoid the accident."

[14] Plaintiffs were substantially agreed upon their version of the occurrence. Having seen the apartment they were looking for they stopped at the north curb, looked east and saw that no cars were approaching from that direction; looked right and saw defendant's car stopped on the west side of Alvarado waiting for the traffic light to turn in his favor. No other cars were to be seen. They concluded it was safe to cross the street and walk 15 feet into it (the total width was 50 feet); there they stopped, looking toward defendant's car; they then walked five more feet and stopped again; defendant had slowed almost to a stop and with his arm outside the window waved his hand back and forth in a manner which plaintiffs thought to be an invitation to cross in front of him; immediately before he did this plaintiff Holman saw a red reflection from the back of his car which would indicate application of the brakes. The car was then 70 to 75 feet away and plaintiffs were four to five feet north of the double line. When they saw defendant's signal to cross they started to do so at a fast walk. Mrs. Holman testified:

> "Well, when I felt that we were—he was going to give the right of way, I hurried across. * * * Well, when I knew it was safe enough, I started to hurry across to the other side of the curb.
>
> "Q. You started doing this when he was about seventy, seventy-five feet away from you, right? A. Yes.
>
> "Q. When you say 'hurry' then did you increase your speed from what you had been going? A. Yes. I hurried; I didn't run.
>
> "Q. What did you mean, a real fast walk— A. That's right.
>
> "Q. —or would you describe it as a 'trot'? A. No.
>
> "Q. Just a real fast walk? A. Just 'walk.'"
>
> Mr. Gotta:
>
> "Q. Indicating with your left hand going from the left to the right, is that right? A. Just like that (indicating).
>
> "Q. So, what did you do when you saw him do that? A. Doing that I have the right to cross. * * *

"Q. (By Mr. Schekman) Mr. Gotta, when you saw the man's hand move from left to right like you indicated, what did the car do? A. The car slowing down when he showed his hand, like say 'Cross.' I crossed. * *

"Q. And then you proceeded then to cross? A. Proceeded to walk to cross. * * *

"A. Then I saw the car slowing down, and I saw his arm, the left arm, outside of the car, was moving his arm like that (indicating).

"The Court: Left to right. A. Waving it left and right. So I figured, so he let me pass, so he give me the chance to pass when he was doing like that."

When plaintiffs got into defendant's traffic lane they were struck immediately. While visiting plaintiff Holman in the hospital later, defendant was asked: "How come you hit us after we stopped?" and replied: "I thought I could get by you; and, so, I stepped on the gas."

This version affords no basis for a last clear chance instruction for it raises no inference of negligence on the part of either plaintiff. The court's instruction concerning Municipal Code § 80.39 erroneously supplied this element; that presumption having been removed by our ruling that the ordinance is invalid we look in vain for evidence of negligence on the part of plaintiffs. They were in no danger at all when on the north half of the street (there were no westbound cars in the vicinity); they stopped to permit defendant to pass them but, traveling very slowly, he waived his right-of-way when he invited them to go across ahead of him (see People v. Noland, 83 Cal.App.2d Supp. 819, 821–822, 189 P.2d 84). They proceeded with expedition and would have crossed safely had defendant not suddenly and without warning accelerated his speed to a point where he could not avoid striking plaintiffs even by swerving to the south in front of them, as he tried to do. The element of negligence on the part of plaintiffs being absent, the rule of last clear chance could not apply.

[15] Mrs. Dora Wilkerson, apparently a disinterested spectator, gave a third version of the occurrence. She was in a driveway on the south side of the street, headed north and almost opposite plaintiffs; she was waiting to enter Ninth Street. She saw plaintiffs at the curb about one-fourth of a block from the intersection; Gotta was on the curb and Mrs. Holman just off it; they were holding hands. Defendant, who had been traveling about 25 miles an hour, slowed down to approximately 10 miles; as plaintiffs took a few steps, about 5 feet from the curb, defendant came almost to a stop; his car was then about 25 to 30 feet from plaintiffs' line of travel. They hesitated, stopped, and suddenly started to run across the street; at the same instant the driver accelerated his car and ran into them. He then slammed on his brakes but it was too late to avoid the accident. The plaintiffs started to run and the car increased its speed at the same instant. This left no time for a last or any clear chance for defendant to avoid the accident. The situation falls within the Rodabaugh line of cases (supra, 39 Cal.2d 290, 246 P.2d 663). Therein the court quoted from a former opinion rendered by the same author in Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 232, 28 P.2d 932, as follows: "'Like many other cases involving collisions between moving vehicles, the accident may be said to have happened within the twinkling of an eye after the first indication of danger. While the doctrine of last clear chance has been applied in certain exceptional cases involving collisions between moving vehicles, we are of the opinion that it should not be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can fairly be said to have had a *last clear chance* thereafter to avoid the consequences. To apply the doctrine to such cases would be equivalent to denying the existence of the general rule which makes

contributory negligence a bar to recovery.'" (39 Cal.2d at page 295, 246 P.2d at page 666.)

[16] None of the three versions above summarized brings last clear chance into the situation. True, a jury is justified in accepting part of a witness' testimony while rejecting the remainder and, after repeating the process a number of times, may assemble the accepted fragments into a mosaic of truth which withstands the scrutiny of appellate review (Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 291–292, 105 P.2d 984; In re Estate of Pelton, 140 Cal.App.2d 512, 516, 295 P.2d 483.) But we see no basis here for a last clear chance as a result of that process of evaluation of the evidence. Unquestionably plaintiffs were in no position of danger while on the north half of the street; they were still safe when they stopped a few feet north of the center line of the street. All witnesses agree that they were aware of the approach of defendant's car for they were watching it. They never arrived at a place of danger until they were in the eastbound lane and in defendant's line of travel. If they got there by his invitation they had a right in the exercise of ordinary care to assume that the invitation would not be withdrawn without notice. But defendant sounded no horn and suddenly increased the speed of his car, trying to pass them. Thus, on the assumption of invitation to plaintiffs to cross, there was no room for last clear chance because there was no negligence on plaintiffs' part and they were not in any actual danger until defendant suddenly speeded his car and ran directly into them. The proximate cause of the accident in these circumstances would be defendant's negligence, but not on the basis of last clear chance, for one of its elements—negligence of plaintiffs—was lacking. Incidentally, the court adequately instructed the jury upon the general principles of proximate cause.

If it be inferred, as defendant claims, that plaintiffs suddenly started to run just as he increased his speed in an attempt to swing around in front of them, we have no last clear chance for the assumed negligence of both parties was simultaneous—the necessary time lag is wanting.

If plaintiffs were walking, slow or fast, across the south half of the street (as they claim), and the defendant did not wave them across (as he claims), they were in no danger until they were in defendant's line of travel; they were aware of his approach as all the evidence shows; they could always save themselves by stopping, as any pedestrian can do immediately (see Holmes v. South Pac. Coast Ry. Co., 97 Cal. 161, 170, 31 P. 834), until they stepped into defendant's path when he was traveling so fast that he could not stop in time to avoid them. When that situation developed, if it did, there was no last clear chance because defendant had no chance at all.

Because of the error in giving the instruction upon the municipal ordinance, each of the judgments is reversed.

FOX, P. J., concurs.

HERNDON, Justice (concurring and dissenting).

I concur in the judgment of reversal, but my conclusions with respect to the two controlling questions of law are directly opposite to those of the majority.

Upon the Evidence In This Record, the Jury Could Reasonably Have Found the Existence of Every Element Essential To the Application of the Doctrine of Last Clear Chance.

Having in mind the well-established rule that in determining the applicability of the doctrine of last clear chance the court must view the evidence in the light "most favorable to the contention that the doctrine is applicable" (Selinsky v. Olson, 38 Cal.2d 102, 103, 237 P.2d 645, 646; Daniels v. City and County of San Francisco, 40 Cal.2d 614, 617, 255 P.2d 785). I conclude from my survey of the record that appellants are clearly right in their contention that the jury should have been instructed on that doctrine.[1]

Preliminarily, I would point out what appear to me to be basic and demonstrable fallacies in the reasoning of the majority opinion, and in the method of evaluation which it applies to the evidence.

In the first place, the majority begin their process of determining the presence or absence of the elements essential to the application of the doctrine by placing the testimonies of the several witnesses in separate compartments, and by analyzing the contents of each compartment separately. However, the jury was entitled to utilize a very different process, namely, that of accepting such parts of the several testimonies as they found credible, and if the sum of the accepted parts included all the elements essential to the application of the doctrine, they had both the right and the duty to apply it in accordance with appropriate instructions. The majority opinion recognizes that the latter process of evaluation is the proper one, but conspicuously fails, it seems to me, to give it anything approaching adequate employment in this case.

In the second place, in analyzing the testimony, the majority find missing therefrom any reasonable basis for the essential finding that plaintiffs by their own negligence had gotten into a position of peril from which they were unable to escape by the use of ordinary care. On this point, the majority have the following to say concerning plaintiffs' version of the facts: "This version affords no basis for a last clear chance instruction for it raises no inference of negligence on the part of either plaintiff. The court's instruction concerning Municipal Code § 80.39 erroneously supplied this element; that presumption having been removed by our ruling that the ordinance is invalid we look in vain for negligence on the part of plaintiffs."

I shall assume for the purposes of this discussion that the majority are right in their holding that Municipal Code section 80.39 is void and, therefore, that plaintiffs' diagonal crossing of the street could not be considered negligence as a *matter of law.* But surely it does not follow that the jury could not have found that such conduct, under the circumstances appearing, was negligent *as a matter of fact.* In enacting section 80.39 of the Municipal Code (albeit a void ordinance because of its supposed invasion of a field fully pre-empted by the state) the Los Angeles City Council clearly expressed its view that a diagonal crossing of streets by pedestrians outside marked crosswalks was such a dangerous procedure (at any time of day) that it ought to be prohibited. Thus, the intent was to render such conduct unlawful, and, therefore, negligent as a matter of law. Apart from the question of validity, I think no one would contend that the council's view was unreasonable. But casting aside the ordinance as void, would anyone assert that a jury could not reasonably find the same conduct to be negligent as a *matter of fact,* especially in the dark of night and under all the circumstances appearing in the instant case?

A third fallacy in the majority opinion is that it defines the zone of danger too narrowly in holding that "[T]hey [plaintiffs] never arrived at a place of danger until they were in the eastbound lane and in defendant's line of travel". This idea proceeds on the mistaken assumption that the line of travel of defendant's vehicle was fixed and pre-determined like that of a streetcar following the course of its rails. There were various lines of travel that the defendant might have selected during the time he travelled the distance of forty to seventy-five feet (as he testified) after he saw plaintiffs start to run across the street and before he struck them.

The jury could well have believed quite realistically that plaintiffs were in peril from the instant they had committed themselves to their decision to cross ahead of defendant's vehicle, at whatever point in the street they made that decision. And, in view of the conflicts in the testimony of the several witnesses, the jury might have placed that point almost anywhere in the northerly half of the street.

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[1] Compare Hensley v. Sellers, 160 Cal. App.2d 117, 324 P.2d 954, wherein refusal to instruct on the doctrine of last clear chance was held reversible error in a case presenting a factual situation less favorable to its application.

In the fourth place, the majority err in holding that the only basis for finding that plaintiffs were in a position of helpless peril due to their own negligence was the testimony to the effect that they crossed by a diagonal path. I submit, on the contrary, that the jury might reasonably have found: (a) that plaintiffs were negligent in attempting under the circumstances to cross ahead of defendant's car *at any angle*; (b) that their negligence continued to operate as a *circumstantial* factor (as distinguished from a proximate cause) whether defendant did or did not signal them an invitation to cross ahead of him; and (c) that plaintiffs became wholly unable to escape at a time when defendant, being well aware of their helpless peril, yet had ample time either to slow down, stop, or so change his direction of travel as to avoid hitting them.

It is, of course, well understood that the purpose of the last clear chance doctrine is "to relieve the injured party from the rigid application of the rule that contributory negligence will bar his recovery, when the circumstances are such that it may be said that such party's negligence is a remote, rather than a proximate, cause of his injuries." Sparks v. Redinger, 44 Cal.2d 121, 124, 279 P.2d 971, 973; Girdner v. Union Oil Co., 216 Cal. 197, 201–204, 13 P.2d 915. And I agree that in this case plaintiffs' continuing and contributory negligence would bar their recovery unless the elements of the doctrine of last clear chance were found to be present so as to render plaintiffs' negligence *"remote in causation"*. Center v. Yellow Cab Co., 216 Cal. 205, 207–208, 13 P.2d 918, 920. The majority opinion does not discuss the pedestrian cases primarily relied upon by appellants—cases sufficiently similar in their factual situations to constitute persuasive precedents: Cole v. Ridings, 95 Cal.App.2d 136, 212 P.2d 597, and Lebkicher v. Crosby, 123 Cal.App.2d 631, 267 P.2d 361. I think the majority decision is not consistent with those last cited.

Applying the formula as restated in Brandelius v. City and County of San Francisco, 47 Cal.2d 729, at page 743, 306 P.2d 432, at page 440, and viewing the evidence in a light favorable to the application of the doctrine, I submit that the jury would have been entitled to find the facts, ultimate and evidentiary, as suggested in the following summary:

(1) Plaintiffs were in a position of danger, and, by their own negligence, became unable to escape from such position by the use of ordinary care, either (a) because it became physically impossible for them to escape, or (b) because they were totally unaware of the danger.

That plaintiffs got into a position of danger is too obvious to argue, whether the danger zone was as narrow as the majority defines it, or much wider as I think the jury might have viewed it. And they got into it *negligently* for any of several factual reasons that the jury might have found, including (a) proceeding in a southeasterly direction with their backs toward the approaching car, they took a longer diagonal course when a shorter direct course might have enabled them to get safely across ahead of defendant's car; or (b) they were negligent in attempting, under the circumstances, to run across the street ahead of defendant's car at *any* angle and regardless of whether defendant did or did not signal them to proceed.

Thus, by their own negligence, plaintiffs got into this position of danger, and by their own negligence became unable to escape from it (a) because after they negligently got into defendant's line of travel, it was physically impossible for them to move fast enough in either direction to escape, particularly in view of the much greater, *and rapidly increasing*, rate of speed at which defendant's car was advancing upon them, or, in the alternative, (b) because they were totally unaware of the danger from and after the time when they saw defendant's signal which they interpreted as a yielding of the right of way, or (if no such signal was given) from the time they observed defendant slowing down so perceptibly that they assumed he was in the process of stopping to yield the right of way which plaintiffs were negligently violating.

(2) Defendant knew that plaintiffs were in a position of danger, and further knew, or in the exercise of ordinary care should have known, that plaintiffs were unable to escape therefrom.

According to his own testimony, defendant was aware of plaintiffs' position of peril when he was still at a distance from them which he thought might have been as great as 75 feet. The following is a part of his testimony: "I applied my brakes when I first saw them start across, forty to sixty-five, seventy-five feet from the point of impact. * * * Well, there's a certain amount of reaction time. In that time, from the point of impact I decided that they were running across and I should apply my brakes. So at that time I did."

That defendant knew, or should have known, that plaintiffs were unable to escape could be inferred from any of several permissible assumptions of fact, all supported by substantial evidence: (a) that defendant signalled to plaintiffs to proceed and by this means made it a practical certainty that they would cross the path of his vehicle without further attention to it in the belief that he was stopping to yield the right of way; or (b) that when defendant saw plaintiffs start to run across his line of travel with their backs partially turned (when he was as far as 75 feet away) he knew, or should have known from their behavior that they were unaware of their peril, or even if they were aware of their peril, that it was too late for them to escape by any means then available to them because of the speed at which he was travelling.

(3) After defendant saw plaintiffs in their position of peril, and after he had knowledge of their inability to escape, he had the last clear chance to avoid the accident by the exercise of ordinary care, but failed to exercise such last clear chance, and the accident occurred as a proximate result of such failure.

Defendant's testimony that he undertook to apply his brakes when he was at a distance from the point of impact, which he estimated as being possibly 75 feet (between 40 and 75), would support a finding that he was aware of plaintiffs' position of danger when he was still far enough from them to enable him in the exercise of ordinary care to slow down, stop, or avoid plaintiffs by a suitable change of direction. Especially significant at this point is the following testimony of plaintiff Holman concerning her conversation with defendant, when defendant went to visit her in the hospital: "I said, 'How come you hit us after we stopped?' And his words to me were: 'I thought I could get by you and so I stepped on the gas.'"

If the jury believed that defendant signalled plaintiffs to proceed, thus indicating his intention to yield the right of way, it would follow that defendant necessarily knew, or should have known, that plaintiffs from that point would be unaware of any further threat of danger from his vehicle.

But if the jury believed that no such signal was given by defendant, there was the testimony of the witness Wilkerson to the effect that defendant, after bringing his car almost to a complete stop, suddenly accelerated to about 25 miles per hour. This testimony alone, with the inferences that might legitimately be drawn from it, would supply all the requirements of the third subdivision of the Brandelius formula. In short, defendant's last clear chance consisted of his ample opportunity to slow down, stop, or alter his course after he had actual knowledge of plaintiffs' position of helpless peril. But instead of continuing slowly, or stopping, he appeared suddenly to change his mind and accelerated his speed to such an extent that it became impossible for plaintiffs to escape.

It is not unlikely that other combinations of factual findings supportable by the evidence could be suggested under which the proper application of the doctrine of last clear chance would be even more clear.

Section 80.39 of the Los Angeles Municipal Code Is A Valid Ordinance And the Jury Was Properly Instructed That Its Violation Would Constitute Negligence.

I regard the question of the validity of the ordinance here under consideration as a close and debatable one. The question is important enough to deserve the most careful consideration. Obviously, it is a matter of great importance to local authorities to know exactly how far local ordinances regulating pedestrian traffic can be validly enacted and enforced.

The appalling number of pedestrians killed and maimed ever year in the process of crossing our California streets and highways testifies eloquently to the need for regulations reasonably designed to promote safety. It is for this reason that I am quite hesitant to strike down as invalid the very sensible ordinance here under consideration. Moreover, I think the doctrine of preemption ought not to be pushed any further than necessary in this area in which the preservation of local power to accommodate traffic regulations to the peculiar requirements of local conditions is highly desirable.

The rules enunciated in Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515, as I read them, provide ample support for the conclusion that the validity of the ordinance here in question should be sustained. The controlling question is posed by the following language, found, 20 Cal.2d at page 371, 125 P.2d at page 485 of the Pipoly decision:

> "*The difficult question in such cases is whether the state law was intended to occupy the entire field. Where the statute contains language indicating that the legislature did not intend its regulations to be exclusive, the general rule permitting additional supplementary local regulations has been applied.*" (Emphasis added.)

The Pipoly decision struck down Municipal Code section 80.38 on the basis of a conclusion that the Legislature had intended the provisions of the Vehicle Code relating to pedestrian traffic to be *exclusive*—had intended, in other words, to occupy the entire field.

At the very next session of the Legislature, the lawmakers enacted section 459.1 of the Vehicle Code, expressly authorizing local ordinances "prohibiting pedestrians from crossing roadways at other than crosswalks". Manifestly, this legislation was intended to *validate* the very type of ordinance which Pipoly had *nullified.* But beyond that, the lawmakers thereby in effect said this: *If it formerly was our intent to occupy the entire field of pedestrian traffic regulation, we hereby declare that such no longer is our intent. If the Vehicle Code provisions relating to pedestrian traffic were formerly regarded as exclusive, we hereby declare that they should no longer be so regarded.* Thus, the Legislature swept away the basis for the exception to the well-settled general rule, which the Pipoly decision recognizes in the following language, 20 Cal.2d at page 370, 125 P.2d at page 484:

> "The applicable rule in these situations where state control is dominant has been stated as follows: 'Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable.' Mann v. Scott, supra, 180 Cal. [550], at page 556, 182 P. [281, at] page 283. The cases in this state have consistently upheld local regulations in the form of additional reasonable requirements not in conflict with the provisions of the general law. Mann v. Scott, supra; In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75; In re Iverson, 199

> Cal. 582, 250 P. 681; In re Simmons, 199 Cal. 590, 250 P. 684; Grant, 'Municipal Ordinances Supplementing Criminal Laws,' [1936] 9 So.Cal.L.Rev. 95, 98."

It seems to me that the instant ordinance is so clearly consistent with all relevant general laws that to nullify it would be to disregard and violate section 11 of Article XI of the Constitution of the State of California which provides:

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

The grant of municipal power contained in section 11 of Article XI of our State Constitution "is very broad and liberal." In re Holmes, 187 Cal. 640, 645, 203 P. 398, 400. It has been held in numerous cases that the only limitation upon this constitutional grant of power is that its exercise may not conflict with general laws. Ex parte Lacey, 108 Cal. 326, 328, 41 P. 411, 38 L.R.A. 640; Odd Fellows' Cemetery Ass'n v. City and County of San Francisco, 140 Cal. 226, 230, 73 P. 987; In re Hoffman, 155 Cal. 114, 99 P. 517; In re Iverson, 199 Cal. 582, 250 P. 681; In re Sic, 73 Cal. 142, 14 P. 405; In re Hong Shen, 98 Cal. 681, 33 P. 799; Pasadena School District v. City of Pasadena, 166 Cal. 7, 9, 134 P. 985, 47 L.R.A.,N.S., 892; In re Montgomery, 163 Cal. 457, 460, 125 P. 1070.

I think the general effect of all the California decisions on the subject is quite accurately summarized in the following, from 35 Cal.Jur.2d, pp. 56–57, Municipal Corporations, § 234:

> "Whether the legislature intended to undertake exclusive occupancy of a given field of legislation is determined, not by the language of the statute alone, but by consideration of the facts and circumstances on which the statute was intended to operate. The courts have shown little disposition to hold that action by the legislature in a given field, however extensive, precludes different action in the same field, even of a similar character, by cities. It seems that the only cases that hold that state regulation occupies a field so as to preclude ordinances that do not directly conflict with them are those where the legislature has expressly provided that there shall be no local regulation on the subject. But, as has been seen, a mere prohibition by the legislature of local regulation on a particular subject without any affirmative act on its part to occupy that field is ineffective. *Of course, provisions of state laws declaring that local regulations in the field shall be permitted, though not of themselves authorizing ordinances that actually conflict with state laws, are indicative of the legislative intention not to occupy the field, thus justifying local regulation in it.*" (Emphasis added.)

I conclude that the intended effect of Vehicle Code section 459.1 is to authorize consistent local regulations relating to the conduct of pedestrians in crossing roadways outside crosswalks. The greater power *to prohibit* given conduct, which is expressly conferred by the statute, should be deemed to include the lesser consistent power *to regulate* or to place limitations or qualifications upon the legality of the same conduct. This is but an application of the legal maxim that "the greater contains the less." Civil Code, sec. 3536.

Like the presumption in favor of the constitutionality of legislation, there is a well recognized presumption in favor of the validity of a municipal ordinance. See generally, 35 Cal.Jur.2d 223, sec. 417; 18 Cal. Jur. 933, sec. 218. As stated by this court, "An ordinance must be clearly obnoxious as unreasonable and oppressive to justify nullifying it by judicial decree. Since it is the right of a city to regulate its municipal affairs the courts must uphold such regulations unless it is manifest that the ordinance transcends the power of the municipality. * * *" City of Los Angeles v. Tannahill, 105 Cal.App.2d 541, 546, 233 P.2d 671, 674.

The obvious conclusion from the foregoing is that I would reverse the judgment, not upon the ground stated in the majority opinion, but because of the trial court's error in refusing to instruct upon the doctrine of last clear chance.

August J. BUMB, Assignee for Benefit of Creditors of B. F. Wells & Son, a copartnership composed of B. F. Wells and E. L. Wells, Plaintiff and Respondent,

v.

Minnie M. BENNETT et al., Defendants.

Minnie M. Bennett, Victoria E. Bloch and Leonard Bloch, Appellants. *

Civ. 22999.

District Court of Appeal, Second District, Division 2, California.
June 9, 1958.

Rehearing Denied June 30, 1958.

Hearing Granted Aug. 6, 1958.

Action involving rights arising from a general assignment for benefit of creditors. From a judgment of the Superior Court, Los Angeles County, David Coleman, J., certain parties appealed. The District Court of Appeal, Ashburn, J., held inter alia that a general assignment for benefit of creditors which did not comply with civil code sections dealing with assignments for benefit of creditors was valid at to personalty and void as to realty described therein, and hence the realty assigned was subject to attachment and execution sale by unsecured creditors.

Reversed with instructions.

1. Assignments for Benefit of Creditors 🔑4, 31

A "general assignment for the benefit of creditors" is one which comes within definition, and embraces the elements, of an assignment for benefit of creditors and transfers all, or substantially all, of debtor's property to a trustee for benefit of all his creditors; it is not general where it is intended to apply only to portion of the creditors and a specified fund; it is "partial" where it conveys only a portion of debtor's property and part omitted is substantial rather than trifling; and it is "special" or "specific" where it is for benefit of certain creditors.

See publication Words and Phrases, for other judicial constructions and definitions of "General Assignment for the Benefit of Creditors", "Partial Assignment for the Benefit of Creditors", "Special Assignment for the Benefit of Creditors" and "Specific Assignment for Benefit of Creditors".

2. Assignments for Benefit of Creditors 🔑23

The statement in section 3449 of the Civil Code that an assignment for creditors shall be subject to provisions of the code relative to trusts and fraudulent transfers incorporates as an implied exception to the generality of its language the provisions of section 3432 providing that "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another", the counterpart of which is found in section 3451 providing that the provisions of the act shall not affect the power of insolvent person to transfer property in good faith to particular creditor in trust, so that a partial or special assignment to or for a creditor or creditors is excepted from operation of the statutes dealing with assignments for benefit of creditors. West's Ann.Civ.Code, §§ 3432, 3449–3473.

3. Assignments for Benefit of Creditors 🔑23

The statutes governing assignments for benefit of creditors govern general assignments of all property for benefit of all creditors, not partial or special assignments. West's Ann.Civ.Code, §§ 3449–3473.

4. Assignments for Benefit of Creditors 🔑23, 45

An assignment for benefit of creditors must be a general one in order to fall within purview of statutes governing assignments for benefit of creditors, such general assignment must conform to the statutes or be held void as to nonconsenting creditors, a partial or special assignment is valid though not conforming to statutes, and an assignment which embraces personalty capable of manual delivery is invalid as to such personalty unless accompanied by change of possession or covered by general assignment for creditors. West's Ann.Civ.Code, §§ 3449–3473.

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* Opinion vacated 333 P.2d 23.

5. Courts ⚷89

The language used in any opinion is to be understood in light of facts and issue then before the court, and expressions used in judicial opinions are always to be construed and limited by reference to matters under consideration and they cannot be safely applied in largest and most universal sense to dissimilar cases.

6. Assignments for Benefit of Creditors ⚷45, 159

Under statute invalidating transfers of personalty without change of possession as against transferor's creditors, and providing that prohibition shall not apply to assignment, "statutory or otherwise" for benefit of creditors generally, the statute being confined to transfers of personalty capable of manual delivery, the quoted phrase cannot affect general assignments covering other personalty or realty and cannot be construed as a general validation of all assignments for creditors regardless of their compliance with statutes. West's Ann. Civ.Code, §§ 3440 and subd. (e), 3449, 3458, 3459.

7. Assignments for Benefit of Creditors ⚷23

An assignment of realty for benefit of creditors is as much subject to provisions of the code relating to transfers of realty, and as much within policy of the statute as any other transfer of such property. West's Ann.Civ.Code, §§ 3449–3473.

8. Assignments for Benefit of Creditors ⚷23

A general assignment for benefit of creditors which did not comply with Civil Code sections dealing with assignments for benefit of creditors was valid as to personalty and void as to realty described therein, and hence the realty assigned was subject to attachment and execution sale by unsecured creditors. West's Ann.Civ. Code, §§ 3440 and subd. (e), 3449–3473.

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William Katz, Los Angeles, for appellants.

Harold A. Slane, Harold A. Slane, Jr., and Sidney J. Unickel, Los Angeles, for respondent.

ASHBURN, Justice.

Appeal from judgment resolving conflict between rights arising from general assignment for benefit of creditors and subsequent attachment of certain real property included in the assignment. The court found for the plaintiff assignee. The attaching creditor and the purchaser at execution sale appeal from the judgment.

B. F. Wells & Son, a partnership engaged in the plumbing contracting business, made a general assignment for benefit of creditors to respondent Bumb, as assignee. It became effective on May 29, 1956, at 8:00 a. m. On that same day, at 12:17 p. m., appellant Bennett, as the representative of certain unsecured creditors of B. F. Wells & Son, levied an attachment upon a parcel of real property which constituted a part of the assets included in the assignment for benefit of creditors. Appellant Victoria E. Bloch later purchased this property at execution sale based upon the Bennett attachment and ensuing judgment in her favor. Appellant Leonard Bloch is the purchaser's husband.

No effort was made to comply with the sections of the Civil Code (3449–3473) governing assignments for benefit of creditors, and respondent assignee expressly disclaims any attempt to sustain his title as a statutory assignment, relying upon it as a valid common law assignment for benefit of creditors. Appellants argue that this cannot be so with respect to realty included in the assignment; that the instrument must comply with the statutory requirements so far as realty is concerned or be void as to non-consenting creditors, in which category appellant Bennett stands; that therefore the attachment has priority over the assignment. Appellants make numerous other attacks upon this assignment but it is unnecessary to discuss them because we have concluded that the assignment is void as to appellants for reasons now set forth.

[1] Preliminarily, it is necessary to define certain terms,—general assignments and partial or special assignments for benefit of creditors,—and then throughout the discussion to bear the distinction in mind. "An assignment is a general assignment for the benefit of creditors where it comes within the definition, and embraces the elements, of an assignment for the benefit of creditors and transfers all, or substantially all, of the debtor's property to a trustee for the benefit of all his creditors; it is not general where it is intended to apply only to a portion of the creditors and a specified fund; it is partial where it conveys only a portion of the debtor's property and the part omitted is substantial rather than trifling; and it is special or specific where it is for the benefit of certain creditors." 6 C.J.S. Assignments for Benefit of Creditors § 2, p. 1221.

Title III, Part 2 of Division Fourth of the Civil Code (§§ 3449–3473) was enacted as a part of the 1872 code. A copy of § 3449 as then enacted is set forth in the margin.[1] As last amended in 1895 it is in much more elaborate form, but starts as follows: "An insolvent debtor may in good faith execute an assignment of property in trust for the satisfaction of his creditors, in conformity to the provisions of this chapter; *subject, however,* to the provisions of this Code relative to trusts and fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specific classes or persons. * * *"

The assignment must run to the sheriff, whose duty it is to call a meeting of creditors for the purpose of electing one or more assignees to succeed the sheriff; he assigns the property to the successor so elected. Section 3458 provides that the assignment must be in writing, subscribed by the assignor or an authorized agent; must be acknowledged or proved and certified in the same manner as a deed of conveyance and must be recorded. Section 3459: "Unless the provisions of the last section are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor not assenting thereto." Within 20 days after making the assignment the assignor must file a full and true inventory (§ 3461) showing the names and addresses (so far as known) of all creditors and the amount owing each of them. Subdivisions 6 and 7 of said section require inclusion in the inventory of: "6. All property of the assignor at the date of the assignment, which is exempt by law from execution; and, 7. All of the assignor's property at the date of the assignment, both real and personal, of every kind, not so exempt, and the incumbrances existing thereon, and all vouchers and securities relating thereto, and the value of such property according to the best knowledge of the assignor." The inventory must have attached to it the assignor's affidavit "to the effect that the same is in all respects just and true according to the best of such assignor's knowledge and belief." § 3462. The assignment must be recorded and the inventory filed with the county recorder of the county of assignor's residence, if he be a resident. § 3463. Failure to so record and file renders the assignment "void against creditors of the assignor and against purchasers and incumbrancers in good faith and for value." § 3465. Section 3466 says: "Where an assignment for the benefit of creditors embraces real property, it is subject to the provisions of Article 4 of the Chapter on Recording Transfers, as well as to those of this Title."

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[1] § 3449. "An insolvent debtor may in good faith execute an assignment of property [to one or more assignees], in trust for the satisfaction of his creditors, in conformity to the provisions of this chapter; subject, however, to the provisions of this Code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specific classes or persons."

[2] The statement in § 3449 that an assignment for creditors shall be subject to the provisions of the code relative to trusts and fraudulent transfers incorporates as an implied exception to the generality of its language the provisions of § 3432, which says: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." The counterpart of that section is found in § 3451, which contains this: "[N]or do the provisions of this title affect the power of a person, although insolvent, and whether residing within or without this state, to transfer property in this state, in good faith to a particular creditor, or creditors, or to some other person or persons in trust for such particular creditor or creditors for the purpose of paying or securing the whole or part of a debt owing to such creditor or creditors, whether in his or their own right or otherwise." The Code Commissioners' note to § 3451 of the 1872 code, says: "This makes Secs. 3432 and 3449 perfectly consistent, and harmonizes the authorities cited from California and other Supreme Courts." This seems to mean that a partial or special assignment to or for a creditor or creditors is excepted from the operation of Title III dealing with assignments for benefit of creditors. "By the settled rule of the common law, now expressed in our Code, 'a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another' (Civ.Code, § 3432); but parallel with this principle, and to be construed with it, is the rule of more recent legislative policy, that 'an assignment for the benefit of creditors is void against any creditor of the assignor not consenting thereto, in the following cases: (1) If it give a preference of one debt or class of debts over another'; etc. (Civ.Code, § 3457.) The law virtually says to the embarrassed debtor, 'You may pay or secure any creditor, and thus give him a preference; but your preferential payment or security must not be cast in the form of an assignment for his benefit.'" Sabichi v. Chase, 108 Cal. 81, 85, 41 P. 29, 30.

[3] Fair interpretation of Title III shows that it embraces and governs general assignments of all property for benefit of all creditors, not partial or special assignments. It does not specifically define the phrase "assignment of property in trust for the satisfaction of his creditors," but its requirements are inconsistent with anything other than a general assignment. This clearly appears from the above quoted provisions of § 3461 which require an inventory of all of assignor's real and personal property of every kind which is not exempt from execution; also, from the command of § 3462 that the inventory be supported by affidavit of the assignor. By way of contrast, § 3451 excepts from operation of Title III transfers made "in good faith to a particular creditor, or creditors, or to some other person or persons in trust for such particular creditor or creditors for the purpose of paying or securing the whole or part of a debt owing to such creditor or creditors."

As early as 1886 it was held in Aylesworth v. Dean, 2 Cal.Unrep.Cas. 696, 12 P. 241 (per syllabus): *"An assignment for the benefit of creditors, that is shown not to include all* of the debtor's property, will be held void, unless it is further shown that the omitted property is exempt from execution." That view permeates the more recent decisions. Notwithstanding that fact, a popular misconception has pervaded the ranks of the bar, and sometimes the courts, to the effect that any assignment, general or partial, which does not conform to the statute is good as a common law assignment for creditors. That is too easy a way to dispense with an unpopular law.[2] That the view is fallacious is demonstrated by the Supreme Court decisions.

Jarvis v. Webber, 196 Cal. 86, 236 P. 138, is a leading case. It ultimately turns upon the effect of § 3440, Civil Code, which deals with fraudulent transfers and, like § 3432, must be considered in connection with questions of validity of assignments for benefit of creditors. Of course § 3440 applies only to personal property [3] capable of manual delivery (Shepherd v. Gamble, 95 Cal.App.2d 890, 892, 214 P.2d 403). Excepted from its operation by subdivision (e) (as amended in 1917) is: "The transfer, or assignment, *statutory or otherwise,* made for the benefit of creditors *generally* or by any assignee acting under an assignment for the benefit of creditors *generally,* or to any mortgage or chattel mortgage made for the benefit of creditors *generally.*" (Emphasis added.)[4]

Before considering § 3440 the court in the Jarvis case, supra, had to determine whether the assignment in question was governed by § 3449 et seq. The court upheld a subsequent attachment of certain personal property in preference to an assignment for creditors. This would not have resulted had the assignment been a general one complying with § 3449 et seq. In that instance one D'Egilbert and others transferred all their real and personal property to Jarvis for the benefit of one named creditor and "all other creditors * * * who shall consent to the agreement." 196 Cal. at pages 98–99, 236 P. at page 143. The court said in 196 Cal. at page 90, 236 P. at page 140: "[T]he plaintiff has appealed, presenting for our determination two main questions: (1) Whether or not the deed and the trust agreement, upon which appellant relies as vesting title in him, constitute an assignment for the benefit of creditors within the meaning of sections 3449–3473 of the Civil Code; (2) if the instruments did amount to an assignment, whether or not they were sufficient to vest title in appellant as against the attaching bank, notwithstanding the fact that they were not intended to, and did not, conform to the code sections. There is also presented the question whether or not immediate and continued change of possession was essential to the validity of appellant's claim of title as against the attaching creditor. The appellant contends that the instrument denominated a trust agreement was not a statutory assignment for the benefit of creditors, and that the transfer to Jarvis was not therefore in violation of any of the provisions of the sections of the code relating to such transactions, supra, but that it was in fact a valid, nonstatutory transfer and assignment for the benefit of creditors generally, within one of the exceptions expressed in section 3440, supra

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[2] "It is an obsolete device, however, and for all practical purposes can be ignored. It has not been used for at least 30 years." California Remedies for Unsecured Creditors, p. 418. "[I]t should be borne in mind initially that only the common law assignment for the benefit of creditors is of practical importance in California—this in spite of the existence of detailed provisions in the Civil Code covering statutory assignments". 25 Los Angeles Bar Bulletin, p. 109. See, also, First Nat. Bank v. Pomona Tile Mfg. Co., 82 Cal.App.2d 592, 608, 186 P.2d 693, 703, which says: "The basic distinction between the two is that the former complies with the statutory requirements while the latter does not."

[3] § 3440. "Every transfer of personal property and every lien on personal property made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred, is conclusively presumed fraudulent and void as against the transferor's creditors while he remains in possession and the successors in interest of those creditors, and as against any person on whom the transferor's estate devolves in trust for the benefit of others than the transferor and as against purchasers or encumbrancers in good faith subsequent to the transfer. * * *"

[4] Prior to 1951 the subject of bulk sales and the recording of a prescribed advance notice (now covered by § 3440.1) was within the terms of § 3440.

[of the Civil Code], making immediate and continued change of possession of personal property unnecessary in such cases."

"In order to determine the validity of a transaction purporting to be a statutory assignment for the benefit of the creditors of an assignor, we look to the provisions of the Civil Code, found in the title covering that subject. Watkins v. Wilhoit, 104 Cal. 395, 399, 38 P. 53. It is therein provided that an insolvent debtor may, in good faith, execute an assignment of property in trust for the satisfaction of his creditors (section 3449). Such assignment must conform to the provisions of the code sections." 196 Cal. at page 94, 236 P. at page 141. "There is the further requirement (section 3458) that an assignment for the benefit of creditors must be acknowledged, approved, and certified in the mode prescribed by the chapter on recording transfers of real property, and must be recorded. Unless that be done, the assignment is void against every creditor of the assignor not assenting thereto (section 3459). The trust agreement in this case did not contain a list of the creditors of the grantors, it was not made to a sheriff, and it was not recorded. Considered, therefore, as a general statutory assignment for the benefit of the creditors of D'Egilbert and the two corporations, it was void against the Commercial Bank of Durham, which did not assent thereto. Wilhoit v. Lyons, 98 Cal. 409, 412, 33 P. 325; Garn v. Thorwaldson, 40 Cal.App. 62, 66, 180 P. 9, 11.

"Certain transfers made by insolvent debtors are not affected by the provisions of the title of the Civil Code relating to assignments for the benefit of creditors, and appellant contends that the transaction between his grantors and himself is within the exception. * * * The section bearing on the subject attempted no definition of assignments for the benefit of creditors, and the earlier decisions of the court were not always clear on the question." 196 Cal. at pages 94–95, 236 P. at page 141. The court then reviewed Heath v. Wilson, 139 Cal. 362, 73 P. 182, and explained Sabichi v. Chase, 108 Cal. 81, 41 P. 29, saying that Heath decided that sections 3432 and 3451 of the Civil Code expressly authorize a conveyance for the purpose of paying or securing certain creditors, and that such transfer is not invalid because it does not conform to the provisions of the code (§ 3449 et seq.) relating to assignments for the benefit of creditors generally. Reference was made to the 1903 and 1917 amendments to § 3440, and the 1905 amendment to § 3451, and the opinion continued as follows: "We think it must be conceded, therefore, that two kinds of transfers or assignments for the benefit of creditors generally are recognized in the code sections we have enumerated. One is the statutory assignment for the benefit of creditors, enabling an insolvent debtor, through his assignee, to provide for the immediate conversion of the assigned property, or the disposal thereof, and the distribution of the proceeds ratably among the creditors. Civ.Code, § 3449 et seq. If the debtor adopts this method of satisfying his creditors, it matters not whether the creditors give their consent to the transfer. If the provisions of the code are complied with, the assignment is binding on consenting and nonconsenting creditors alike. The other form of transfer is one which, while containing certain characteristics of an assignment for the benefit of creditors, is, in effect, only a conveyance in trust by way of paying or securing *certain obligations* of the debtor. These transfers are not invalid because they do not conform to the provisions of the sections of the code relating to assignments for the benefit of creditors. Civ.Code, §§ 3432 and 3451; Heath v. Wilson, supra. If made for the benefit of creditors *generally*, such conveyances are protected in their operation as to delivery, and continued *change of possession* of the property transferred, by the exception contained in section 3440 of the code as amended. But in the present case we are unable to agree with appellant that the transaction whereby D'Egilbert and his allied corporation transferred the property to Jarvis resulted in an assignment for the benefit of creditors generally." 196 Cal. at page 98, 236 P. at page 143. Emphasis added. "We are unable to construe the transfer in this case as an assignment for the benefit of creditors generally. It was, therefore, not within the exception provided by section 3440, supra. The question whether or not delivery and change of possession attended the transaction thus becomes a material consideration in the case." 196 Cal. at page 99, 236 P. at page 143. It was then found that there had been no change of possession, that the transaction was not immunized by subdivision (e) of § 3440, and the assignment was void as to the attaching creditor, who acquired the better title.

[4] It is to be noted that this decision supports the view that an assignment for benefit of creditors must be a general one in order to fall within the purview of Title III; that (subject to the effect of § 3440) such a general assignment must conform to the provisions of § 3449 et seq., or be held void as to nonconsenting creditors; that a partial or special assignment is valid though not conforming to § 3449 et seq.; that an assignment which embraces personal property capable of manual delivery is invalid (as to such personalty) unless accompanied by change of possession or covered by a general assignment for creditors, "statutory or otherwise." The meaning of this quoted phrase appears from the decision in Brainard v. Fitzgerald, 3 Cal.2d 157, 44 P.2d 336.

That case involved a general assignment for creditors which embraced a wholesaler's stock in trade, no realty; it preceded an attachment by a few hours. The claim of prior right in the assignee was upheld. The attaching creditor, as appellant, claimed the assignment was void because it did not comply with § 3449 et seq., and was not accompanied by change of possession. Referring to § 3440 the court said: "The italicized words, 'or otherwise,' were added to the section by an amendment thereof in 1917 (Stats.1917, p. 225) and, in our opinion, indicate a definite legislative intention to exempt from the provisions of the section not only statutory assignments for the benefit of creditors generally executed in accordance with sections 3449–3473, supra, but all other assignments, executed in good faith, for the benefit of creditors generally. To conclude otherwise would be to disregard and render meaningless the very language placed in the section by the cited amendment." 3 Cal.2d at pages 159–160, 44 P.2d at page 338. Again, "[t]he assignment here under consideration, as distinguished from that involved in the cited case, was made for the benefit of creditors generally, and is not therefore hedged with the restrictions surrounding an assignment for the benefit of a limited number of creditors, as was the situation in Jarvis v. Webber, supra.

"We also find language in Moore v. Schneider, 196 Cal. 380, 386, 238 P. 81, 83, which, contrary to appellant's contention herein, tends to recognize the existence in this state of common-law assignments for the benefit of creditors generally. In the course of the opinion it is there stated that 'In the case of an assignment for the benefit of creditors, either statutory *or nonstatutory*, the estate passes as the result of some positive act or agreement on the part of the owner of the property. In the one case, the estate of the insolvent "devolves" upon the assignee by operation of law. In the other, the estate is "granted" by the owner.' As in Jarvis v. Webber, supra, but as distinguished from the case at bar, the nonstatutory assignment in Moore v. Schneider, supra, was not made for the benefit of creditors generally." 3 Cal.2d at page 162, 44 P.2d at page 338. The opinion concludes as follows: "In the absence of any conflict with or violation of our statutory law, we are not inclined to interfere with the practice developed by local boards of trade of procuring assignments, executed in good faith, for the benefit of creditors generally. Experience has shown that this practice has much to commend it." 3 Cal.2d at page 163, 44 P.2d at page 339.

[5] The necessary effect of this decision is to establish as valid a general assignment of personal property (capable of manual delivery) for the benefit of creditors, even though not complying with § 3449 et seq.; this because of the words "statutory or otherwise" appearing in subdivision (e) of § 3440. But the ruling goes no further. It does not purport to overrule or modify Jarvis, supra. No question of the effect of § 3440(e) upon personalty incapable of manual delivery or upon real property was suggested by the briefs nor was it before the court in any way. "It is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court." Porter v. Bakersfield & Kern Elec. Ry. Co., 36 Cal.2d 582, 590, 225 P.2d 223, 228. "But it is a familiar rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases." City of Pasadena v. Stimson, 91 Cal. 238, 250, 27 P. 604, 606.

[6, 7] Section 3440, being confined to transfers of personal property capable of manual delivery (cf. Shepherd v. Gamble, supra, 95 Cal.App.2d 890, 892, 214 P.2d 403), the phrase "statutory or otherwise" cannot affect general assignments covering other personal property or real estate. It cannot be construed as a general validation of all assignments for creditors regardless of their compliance with § 3449. Had that been the legislative intention at the time of enacting subdivision (e) of § 3440, it would undoubtedly have pursued the more direct course of repealing § 3459 which declares void as to every nonassenting creditor any assignment not complying with the requirements of § 3458. "An assignment of real property for the benefit of creditors is as much subject to the provisions of the Code relating to transfers of real property, and as much within the policy of the statute as any other transfer of such property." Moore v. Schneider, 196 Cal. 380, 392, 238 P. 81, 85.

[8] We perceive no obstacle to holding that the assignment in question is valid as to the personalty and void as to the realty described in it (cf. Kaye v. Jacobs, 122 Cal.App. 421, 10 P.2d 186). Section 3440 (e) has saved it with respect to the personal property, but not the real estate.

The assignment at bar is a general assignment. It does not comply with the statutory requirements of § 3449 et seq. and is void so far as appellants are concerned with respect to the real property included in it. Hence that realty was subject to attachment and execution sale and the judgment to the contrary is erroneous.

The judgment is reversed with instructions to the lower court to make findings and enter judgment in favor of defendants.

FOX, P. J., and HERNDON, J., concur.

161 Cal.App.2d 189

Arthur M. MAIN, also known as Arthur Mahlon Main, Petitioner and Respondent,

v.

CLAREMONT UNIFIED SCHOOL DISTRICT, a body politic, and Leila S. Pitzer, William F. Montgomery, Jeannette S. Griggs, Albert E. Norton, and Gilbert S. Coltrin, individually and as members of the governing board thereof, Defendants and Appellants.

Civ. 22748.

District Court of Appeal, Second District, Division 2, California.

June 9, 1958.

Rehearing Denied July 3, 1958.

Hearing Denied Aug. 6, 1958.

Superintendent brought mandamus proceeding against school district and members of its governing board to compel his restoration to his position as superintendent and payment of his salary. The Supe rior Court of Los Angeles County, Harold P. Huls, J., entered judgment adverse to the school district and the members of the governing board thereof, and they appealed. The District Court of Appeal, Ashburn, J., held that superintendent of schools is not a "public officer," who can be discharged or removed only on accusation of grand jury under Government Code, or by some other procedure prescribed for removal of a public officer, but is an "employee" of school district, and that his employment can be terminated for good cause.

Judgment reversed with instructions to find on issue whether good cause existed for discharge of superintendent.

1. Schools and School Districts 🔑63(1)

Contract between school board and superintendent for employment of superintendent cannot be unilaterally terminated by the school board.

2. Schools and School Districts 🔑63(1)

Contract between school board and superintendent for employment of superintendent can be terminated by school board only for substantial nonperformance on part of superintendent.

3. Schools and School Districts 🔑63(1)

A school district, which has discharged its superintendent and has prevented him from further performing employment contract, has burden of proving good cause for discharge of superintendent.

4. Mandamus 🔑79

Mandamus is an appropriate remedy for superintendent to pursue to compel restoration to his position as superintendent after school board unilaterally terminates employment contract.

5. Mandamus 🔑172

In mandamus proceeding by superintendent to compel school board to reinstate him to his position as superintendent, issue of breach of contract is properly tried therein.

6. Schools and School Districts 🔑63(1)

Word "employ" as used in section of the Education Code providing that governing board of any school district may "employ" a district superintendent for one or more schools employing eight teachers or more implies the making of a contract. West's Ann.Education Code, § 1301.

7. Schools and School Districts 🔑135(1)

School board, in exercise of its general powers, has right to contract with teachers.

8. Schools and School Districts 🔑133

A teacher does not hold a public office and serves as an employee of school district under an employment contract.

9. Officers 🔑1

Existence of contract of employment is essentially inconsistent with the status of public officer.

10. Schools and School Districts 🔑63(1)

Superintendent of schools is not a "public officer," who can be discharged or removed only on accusation of grand jury under Government Code, or by some other procedure prescribed for removal of a public officer, but is an "employee" of school district, and his employment can be terminated for good cause. West's Ann.Gov. Code, § 3060; West's Ann.Education Code, §§ 1301–1308, 4629.

See publication Words and Phrases, for other judicial constructions and definitions of "Employee" and "Public Officer".

11. Schools and School Districts 🔑63(5)

Where superintendent of schools had been acting as superintendent for two years before he was hired for four-year period, and motion of school board to employ him for four-year period made no mention of salary, and he did not do so when orally accepting proffered employment, and, when written contract for four-year period was drawn up, written contract covering previous two year tenure was copied, so that third and fourth years of four-year period escaped mention salary-wise, it could be implied that superintendent was to receive same salary for third and fourth years, and it was not necessary that contract for four-year period be reformed. West's Ann.Civ. Code, §§ 1655, 1656; West's Ann.Education Code, §§ 1301–1308, 4629.

12. Mandamus ⚷168(2)

Superintendent was entitled to mandamus to compel school board to restore him to position as superintendent, unless school district should bear burden of proving good cause for his dismissal as superintendent. West's Ann.Education Code, §§ 1301–1308, 4629.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, James W. Briggs, Deputy County Counsel, Los Angeles, for appellants.

Beardsley, Hufstedler & Kemble, Los Angeles, for respondent.

ASHBURN, Justice.

Appeal by Claremont Unified School District and members of its governing board from judgment in mandamus ordering restoration of respondent Main to his position as superintendent of said school district and directing payment of his salary at the rate of $750 a month from February 29, 1956, so long as he shall lawfully remain such superintendent.

Respondent was employed as superintendent for said district for a four-year term beginning July 1, 1955 and ending on June 30, 1959. This was done by motion duly adopted on December 14, 1954, "by the terms of which it [the board] approved an offer to petitioner of a four year contract as superintendent and business manager of said school district, said contract to become effective on July 1, 1955; that petitioner thereupon accepted said offer and that said offer and such acceptance thereof were recorded in the official minutes of said meeting." (Finding IV.) This was followed by written contract dated June 13, 1955. Petitioner performed the duties of superintendent from July 1, 1955 until February 29, 1956, when he was discharged as superintendent by action of the board. Since that time he has been prevented from further performing his contract. He petitioned for mandamus, the writ was granted and the district and its board members appeal.

Respondent's brief says "* * * that the large majority of evidence introduced by him in the trial court was devoted to the proof of his full and proper performance of the terms of his contract." The trial judge ruled that a school superintendent is a public officer, can be removed only in a manner prescribed for public officers and "[i]n view of the court's foregoing findings it is unnecessary to pass or make any finding on the issue of whether or not petitioner performed any or all of the provisions of said contract of June 13, 1955."

[1–5] The instant case closely parallels Titus v. Lawndale School Dist., 157 Cal. App.2d 822, 322 P.2d 56, in which this court held that there is no method provided by the Education Code for unilateral termination by the school board of the contract or services of a superintendent who has a four-year contract; like any other agreement it may be terminated for substantial nonperformance; the question of breach of contract by the superintendent is to be determined in an appropriate court action; a district which has discharged its superintendent and prevented him from further performing has the burden of proving good cause for a dismissal; mandamus is an appropriate remedy for the superintendent to pursue and the issue of breach of contract is properly tried therein. The Titus case was reversed because the trial judge had refused to pass upon the issue of good cause for discharge of the superintendent, the court having the evidence upon the subject before it, the court saying, 157 Cal.App. 2d at page 838, 322 P.2d at page 66: "Upon a retrial the court should determine whether good cause existed for discharge of appellant from his position as superintendent of schools."

The instant case is so closely similar to Titus that it must result in like disposition unless there is merit in the contention now earnestly advanced by respondent that a city school superintendent is a public officer and cannot be discharged or removed except upon accusation of the grand jury under Government Code, § 3060 or some other procedure prescribed for removal of a public officer. That question, though presented, was deemed unnecessary to the decision in Titus, supra (see 157 Cal.App.2d at page 837, 322 P.2d at page 65). Upon principle and authority we conclude that a school superintendent is not a public officer but is an employee of the district. To said matter we now address ourselves.

Preliminarily it should be noted that the Claremont Unified School District is a unified district falling within § 4629, Education Code, which declares, "for all purposes the district shall be deemed a city school district governed by a city board of education and the governing board thereof shall be deemed a city board of education." There seems to be no dispute about the fact that appellant district has the status of a city school district. Section 4629[1] thus makes applicable the chapter on superintendents (§§ 1301–1308). Section 1301 says: "The governing board of any school district may *employ* a district superintendent for one or more schools *employing* eight teachers or more."[2] Section 1301.1 provides that the board of any district "*employing* a district superintendent of schools" and having average daily attendance of 1500 or more "may *employ* such deputy and assistant district superintendents of schools as the board deems necessary." Section 1302 provides that in each city school district the board may *employ* a superintendent and such associate and deputy or assistant superintendents as it deems necessary, "and may fix and order paid their compensation, unless otherwise prescribed by law." Section 1303, differentiating between city districts and others, says: "A city superintendent of schools *elected* by a board of education shall be *elected* for a term of four years. Any district superintendent of schools, associate superintendent of schools, or deputy city or district superintendent of schools, or assistant city or district superintendent of schools may be *elected* for a term of four years." The city superintendent must be elected for four years; other district superintendents may be elected for four years or less. In this section the verb shifts from "employ" to "elect." Section 1303.1 reverts to the idea of employment by contract. It authorizes termination "with the consent of the *employee*" of "the term of *employment* of, and any *contract* of *employment* with, the superintendent of schools" and says that the board may "*re-elect* or *re-employ* the *employee*, on such terms and conditions as may be mutually agreed upon by the board and the *employee*, * * *" Likewise, § 1303.2 says that in case the board decides that the superintendent "is not to be *re-elected* or *re-employed*" upon the expiration of his term, he shall be given six months written notice in advance; if the notice is not given the superintendent, even though the board "fails to *re-elect* or *re-employ*" him, "shall be deemed *re-elected*" for a like term and upon like terms, conditions and compensation.[3]

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[1] All code references herein point to the Education Code unless otherwise indicated.

[2] All emphasis found in quotations from the Education Code have been supplied.

[3] At the times here pertinent the above mentioned sections read as follows:

§ 1301: "The governing board of any school district may employ a district superintendent for one or more schools employing eight teachers or more."

§ 1301.1: "The governing board of any school district employing a district superintendent of schools and having an average daily attendance of fifteen hundred or more pupils may employ such deputy and assistant district superintendents of schools as the board deems necessary."

§ 1302: "In each city school district governed by a city board of education, the board may employ a city superintendent of schools and such associate superintendents of schools, and deputy or assistant city superintendents of schools as it deems necessary, and may fix and order paid their compensation, unless otherwise prescribed by law."

§ 1303: "A city superintendent of schools elected by a board of education shall be elected for a term of four years. Any district superintendent of schools, associate superintendent of schools, or deputy city or district superintendent of schools, or assistant city or district superintendent of schools may be elected for a term of four years."

§ 1303.1: "The governing board of any school district, with the consent of the

The word "elect" as used in § 1303 is stressed by respondent as indicative of public office. But §§ 1303.1 and 1303.2 use it as synonymous with "employ." In its strict sense "elect" means selection by the appropriate body of qualified voters; when used with reference to selection by a subordinate body, such as a city council or a school board, it connotes appointment or employment. "The words 'elected' and 'appointed' ordinarily are not synonymous. In its limited sense, the word 'elected' is usually employed to denote the selection of a public officer by the qualified voters of a community. On the other hand the word 'appointed' is generally understood to mean the selection of a public officer by one person who is empowered by law to make the appointment. In its broadest sense, however, the word 'elected' means merely 'selected.' When used in that sense the word 'elected' is synonymous with the word 'appointed'; and where, as in the case at bar, a public officer has been selected by the votes of several members of a city council, it may be truly said, in the broadest sense of the term, that he was elected." Odell v. Rihn, 19 Cal.App. 713, 719, 127 P. 802, 805. "There is a clear and well-understood distinction between appointment and election. In Wickersham v. Brittan, 93 Cal. 34, 28 P. 792, 29 P. 51, 15 L.R.A. 106, this court said: 'The term "election" carries with it the idea of a choice, in which all who are to be affected with the choice participate; whereas from the word "appointment" we understand that the duties of the appointee are for others than those by whom he is appointed. As distinguished from an election, an appointment is generally made by one person, or by a limited number, acting with delegated powers, while an election is the direct choice of all the members of the body from whom the choice can be made.'" Mono County v. Industrial Acc. Com., 175 Cal. 752, 754, 167 P. 377, 378. To the same effect are Carter v. Commission of Qualifications, Etc., 14 Cal.2d 179, 186, 93 P.2d 140; 40 Cal.Jur.2d § 41, p. 676.

[6] The term "employ" implies the making of a contract. Malloy v. Board of Education, 102 Cal. 642, 36 P. 948, makes this clear. In that instance, "the members present regularly proceeded to ballot for the election of a teacher to fill the vacancy" (102 Cal. at page 644, 36 P. at page 948), and thus chose plaintiff. Before he had accepted the board in effect rescinded the resolution. At page 646 of 102 Cal., at page 949 of 36 P. the court said: "The board, as we have seen, was authorized to employ teachers, but in what way the employment might be effected was not prescribed. * * Employment implies a contract on the part of the employer to hire, and on the part of the employee to perform services; and until such a contract is mutually entered into, it can have no binding obligation upon either party. The words 'to employ' teachers can mean nothing more, therefore, than that the board was clothed with power to contract with suitable persons to engage in the work of teaching in the public schools of the city for a fixed salary or compensation.

employee concerned, may at any time terminate, effective on the next succeeding first day of July, the term of employment of, and any contract of employment with, the superintendent of schools, or any associate, deputy, or assistant superintendent of schools of the district, and re-elect or re-employ the employee, on such terms and conditions as may be mutually agreed upon by the board and the employee, for a new term to commence on the effective date of the termination of the existing term of employment."

§ 1303.2: "In the event the governing board of a school district determines the superintendent of schools of the district is not to be re-elected or re-employed as such superintendent upon the expiration of his term, the superintendent of schools shall be given written notice thereof by the governing board at least six months in advance of the expiration of his term. In the event the governing board of a district fails to re-elect or re-employ the superintendent of schools of the district as such superintendent and the written notice herein provided for has not been given, the superintendent of schools shall be deemed re-elected for a term of the same length as the one completed, and under the same terms and conditions and with the same compensation."

* * * The ballots were only an expression of choice on the part of the members casting them, and had no greater force or effect than an oral vote would have had. At most, they amounted only to an offer of employment, which respondent had a right to refuse, and the board had a right to revoke or cancel at any time before acceptance. But when the board refused, then and there, to declare respondent elected, it did in effect revoke and cancel the offer, and leave nothing thereafter for her to accept; and whether, in doing so, the board acted under the supposed requirement of its rule, or by law, or independently of it, is quite immaterial."

[7] Independently of specific authorization of the Education Code (which, as declared in § 2 thereof is a restatement and continuation of previously existing and substantially similar enactments), the school board has a right to contract with teachers as an exercise of its general powers. Marion v. Board of Education, 97 Cal. 606, 608, 32 P. 643, 20 L.R.A. 197; Gould v. Santa Ana High School Dist., 131 Cal.App. 345, 349, 21 P.2d 623. But, as shown by the above quoted sections, the code plainly recognizes the propriety of express contracts. Numerous other sections treat a teacher's status as one created by an employment. Section 12001 provides that only certificated persons shall be *employed* in positions requiring certification qualifications. Section 12008 defines the word "certificate," when used as a verb, as referring to "licensing individuals for *employment* in educational positions." Section 13001: "Governing boards of school districts shall *employ* persons in public school service requiring certification qualifications as provided in this code." Section 13031: "Governing boards of school districts shall *employ* for positions requiring certification qualifications, only persons who possess the qualifications therefor prescribed by law." Section 13081 defines the term "permanent employee." Other examples of recognition of employee status of teachers are found in §§ 12200, 13001.1, 13003.1, 13004, 13031.1, 13034, 13035, 13037, 13038 and 13090.

The word "elected" appears in § 13002, which applies to probationary employees (§ 13101). Section 13002 says: "Persons in positions requiring certification qualifications may be *elected* for the next ensuing school year on or after the first day of May, and each person so *elected* shall be deemed *reelected* from year to year except as provided in this chapter." Section 13003 refers to election or employment in a manner indicating interchangeability of those terms: "Any certificated employee not under permanent tenure who fails to signify his acceptance within 20 days after notice of his *election* or *employment* has been given him * * * shall be deemed to have declined the *employment*."

Section 13032, relating to principals, says: "The governing boards of each school district shall *employ* a principal for each school under their control." Section 13033 authorizes certain districts to unite "in the *employment* of a supervising principal." Section 13089 covers a superintendent, saying: "A person *employed* in an administrative or supervisory position requiring certification qualifications upon completing a probationary period, including any time served as a classroom teacher, in the same district, shall, in a district having an average daily attendance of 850 or more pupils, be classified as and become a permanent *employee* as a classroom teacher. * * *"

Teachers, principals and superintendents must possess qualifications prescribed for a teacher (§§ 1304, 13034). All of them are "elected"—elected for one-year terms, except superintendents (other than city superintendents) who may be "elected" for terms varying from one to four years; city superintendents must be "elected" for four years (§§ 13002, 1303). Although a principal or superintendent cannot acquire tenure with respect to his administrative or supervisory function, he can, after serving the requisite period (three years plus election for a fourth year), revert to permanent status (tenure) as a classroom teacher. Holbrook v. Board of Education, 37 Cal.2d 316, 334, 231 P.2d 853. If a teacher's election be but an employment for a single school year, it seems but a short step to the conclusion that a superintendent's election for one or two or three or four years is but an employment, not a public office.

[8] The law is definitely settled in this state that a *teacher* does not hold a public office and serves as an employee of the district under an employment contract. Leymel v. Johnson, 105 Cal.App. 694, 702, 288 P. 858; Martin v. Fisher, 108 Cal.App. 34, 39, 291 P. 276; Weiser v. Payne, 110 Cal.App. 378, 380, 294 P. 407; Fidler v. Board of Trustees, 112 Cal.App 296, 303–304, 306, 296 P. 912; Gould v. Santa Ana School Dist., supra, 131 Cal.App. 345, 349, 21 P.2d 623; Wood v. Los Angeles City School Dist., 6 Cal.App.2d 400, 402, 44 P.2d 644; Kimball v. Ledford, 13 Cal.App.2d 602, 604, 57 P.2d 163; Board of Education of City of Los Angeles v. Ballou, 21 Cal. App.2d 52, 55, 68 P.2d 389; Taylor v. Board of Education, 31 Cal.App.2d 734, 743, 89 P.2d 148; Marion v. Board of Education, supra, 97 Cal. 606, 608, 32 P. 643, 20 L.R.A. 197; Abraham v. Sims, 2 Cal.2d 698, 709, 42 P.2d 1029; Richardson v. Board of Education, 6 Cal.2d 583, 586, 58 P.2d 1285; Fry v. Board of Education, 17 Cal.2d 753, 759–760, 112 P.2d 229; Kacsur v. Board of Trustees, 18 Cal.2d 586, 591, 116 P.2d 593.

In Leymel v. Johnson, supra, 105 Cal. App. at page 697, 288 P. at page 859, it is said: " 'The words "public office" are used in so many senses that the courts have affirmed that it is hardly possible to undertake a precise definition which will adequately and effectively cover every situation. Definitions and application of this phrase depend, not upon how the particular office in question may be designated nor upon what a statute may name it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the nature of the position and mark its character, irrespective of any formal designation.' " At page 699 of 105 Cal.App., at page 860 of 288 P.: "It would seem, therefore, that one of the necessary characteristics of a public officer is that he perform a public function for the public benefit and that in so doing he be invested with the exercise of some of the sovereign powers of the state. No matter how highly we regard the profession of teaching, we cannot conclude that the teacher is exercising some of the sovereign powers of the state in performing the arduous duties of his profession. * * *" At page 702 of 105 Cal.App., at page 862 of 288 P.: "The conclusion that the status of a teacher is that of an employee is irresistible. The position is secured by selection by the board of trustees, and the terms of the employment are fixed by contract, the authority for which is found in the Political Code (section 1609). Under its general powers the board of education is authorized to enter into contracts with teachers and fix their compensation and terms of employment. * * * The contract of employment of a teacher produces the relation of employer and employee; the first, the board of education, and the second, the teacher." Abraham v. Sims, supra, 2 Cal.2d at page 711, 42 P.2d at page 1035: " 'It is perfectly true, as said in Martin v. Fisher, 108 Cal.App. 34, 39, 291 P. 276, 278, that "the position of a teacher in the public schools of California is not an office." It is strictly an employment and initiated by a contract.' "

[9] Existence of a contract of employment is essentially inconsistent with the status of public officer. Mono County v. Industrial Acc. Com., 175 Cal. 752, 753, 167 P. 377, 378: "Under these sections, the essential condition of the relation of employer and employee is 'service under any appointment or contract of hire, or apprenticeship.' Does this language describe the status of an officer, like a sheriff, holding his office by virtue of an election, taking an official oath, giving an official bond, and having a tenure fixed by law? Certainly such an officer is not in service under any contract. 'It is well settled that salaried public offices, created by the Legislature, are not held by contract.' " Coyne v. Rennie, 97 Cal. 590, 593, 32 P. 578, 579: "It is well settled that the mere appointment or elec-

tion of a municipal officer for a specified time and salary creates no contractional relation, if such officer is at liberty to resign whenever he may elect to do so. 'Neither acts of the legislature nor ordinances of city councils or boards naming terms and salaries are in the nature of contracts with officers. Although the term and salary may be named in the charter, yet there is no contract for a stipulated time or price that is binding on the public.'" To the same effect, see, Martello v. Superior Court, 202 Cal. 400, 408, 261 P. 476; Pacific Finance Corp. v. City of Lynwood, 114 Cal.App. 509, 514, 300 P. 50, 1 P.2d 520; Foucht v. Hirni, 57 Cal.App. 685, 691, 208 P. 362; 40 Cal.Jur.2d § 11, p. 650; § 12, p. 651; § 13, p. 652.

That the same considerations govern the status of supervising or administrative certificated employees appears from Nielsen v. Richards, 69 Cal.App. 533, 542, 232 P. 480, and Holbrook v. Board of Education, supra, 37 Cal.2d 316, 331, 231 P.2d 853. The Nielsen case involved a "supervising teacher." At page 542 of 69 Cal.App., at page 483 of 232 P. the court said: "Neither teachers nor supervising teachers are public officers. This is clear, not only from the duties to be performed, but from the terms of the sections of the Political Code under consideration, which authorize the 'employment' of supervising teachers. Public officers are elected or appointed rather than employed."

It was observed in Titus v. Lawndale School Dist., supra, 157 Cal.App.2d 822, 322 P.2d 56, 59, that: "Correct solution of these questions requires studious recognition of the difference between the superintendent's contract rights and his potential tenure rights under the teachers' tenure act (§§ 13081–13104)." Holbrook, supra, gives emphasis to this thought. It dealt with one who was both business manager and director of adult education. Petitioner, who had no contract other than that following an election for a yearly period, had devoted three-fourths of his time to administrative work and one-fourth to teaching. The school board classified him as a permanent one-fourth time director of adult education and three-fourths time as business manager non-certificated. The board later resolved to discontinue his services as business manager and to employ him for one-fourth time only to direct adult education. He then sought mandate to compel reinstatement to full time employment in the district. The Supreme Court held, 37 Cal.2d at page 333, 231 P.2d at page 862: "Having been elected to a full time position for three consecutive school years, some of the duties of which required certification qualifications, appellant is entitled to permanent full time employment in the district if he was reelected for the fourth year in a position requiring certification qualifications." At page 334 of 37 Cal.2d, at page 863 of 231 P.2d: "while the present statute makes it clear that a principal or other supervisory employee need not perform any teaching services in order to be entitled to tenure, there has been no change in the provision that such persons become permanent employees as classroom teachers after the probationary period is served. See Griffin v. Los Angeles City H. S. Dist., 1942, 53 Cal.App.2d 350, 127 P.2d 939. Accordingly, appellant is entitled to be classified as a permanent classroom teacher. This does not, of course, affect our conclusion that respondent board exceeded its authority in purporting to reduce appellant to part time employment." The citation of the Griffin case shows that this language was intended to mean that tenure does not apply to administrative or supervisory functions, but that one who performs them, having the necessary certificate or certificates, earns in due course a right to tenure as a schoolroom teacher. At page 331 of 37 Cal.2d, at page 861 of 231 P.2d the Holbrook opinion says: "The relationship between respondent board and appellant is that of employer and employee and this relationship is created by contract. Gould v. Santa Ana H. S. Dist., 1933, 131 Cal.App. 345, 349–350, 21 P.2d 623. * * * The result of the tenure statutes 'was not to make the relation any the less one originating in contract, but to annex to contracts of employment when repeated for a sufficient time certain legal consequences.' Abraham v. Sims, 2 Cal.2d 698, 710 [34 P.2d 790], 42 P.2d 1029, 1035. See, also, Kacsur v. Board of Trustees, 18 Cal.2d 586, 591, 116 P.2d 593." This status of director of adult education, a position requiring certification qualifications, so closely resembles that of a superintendent of schools as to make the Holbrook case highly persuasive in the case at bar.

Our exact problem was solved in Stewart v. Eaves, 1927, 84 Cal.App. 312, 257 P. 917, which holds that a city school superintendent is not a public officer but is an employee. The ultimate question there was whether the board and the superintendent could mutually rescind the superintendent's contract and enter into a new one at a higher salary. The objection was that the superintendent was a public officer and therefore his compensation could not be increased after his election and during his term of office; that this would offend Article XI, § 9 of the Constitution. The court rejected this contention, saying at page 320 of 84 Cal.App., at page 920 of 257 P.: "In the case of San Diego v. Dauer, 97 Cal. 444, 32 P. 561, it is assumed, and that assumption has never been questioned or contradicted, that a city superintendent of schools is an employee and not a public officer. The law as hereinbefore set out with respect to the powers and duties of the boards of education, and contained in sections 1609–1741 of the Political Code, and section 56 of the Santa Barbara charter, is comprehensive and would appear to eliminate the vesting of any statutory or charter powers in the city superintendent. His duties apparently are entirely ministerial and not outlined or enumerated by any law. He is not required to give any bond for the faithful performance of his duties nor take any oath of office. The only provision of the law which is usually incident to a public officer, and which governs in the appointment of a city superintendent, is the section of the Political Code fixing a four-year term of office, which section, however, does not fix any specific time either for the beginning or termination of that term. In the absence of any charter provision or statutory law defining the duties of a city superintendent, it may be fairly deduced that neither the state nor the municipality intended to vest this officer with any of the sovereign powers of the state or municipality, except such as are directed by the employing power which, under the statute and the charter, have complete control and government of the city schools. We have found nothing in the statutes nor in the municipal charters, nor in the decisions of the higher courts of this state that define the official status of a city school superintendent. As before indicated, in the case of San Diego v. Dauer, supra, the supreme court said, 'Assuming therefore, that the superintendent of schools of the city of San Diego is an employee of the board of education of that city,' which assumption has been the prevailing opinion with respect to that matter for 34 years and has been and still is being acted upon with the acquiescence of the legislative departments of the state and by every day practical application in the civil municipalities, it would seem that we have reached a stage in this state with respect to city superintendents of schools where it must be held that the Legislature has conclusively determined in sections 1609 and 1793 of the Political Code that these officers are employees and not public officers; otherwise the delegation of power by that body to municipalities to fix such salaries is unwarranted and illegal." At page 321 of 84 Cal.App., at page 921 of 257 P.: " 'Employment arising out of a contract whereby the person employed acts under the direction or control of others, and which employment depends for its duration and extent upon such a contract, is not an office.' " This case was followed in Johnston v. Rapp, 1951, 103 Cal.App.2d 202, 205, 229 P.2d 414, wherein the court decided the same question of power to increase the superintendent's salary during the term of his contract, which in that instance provided that the board reserved the right to increase the salary during the term. The Stewart case, supra, has not been disapproved by the Supreme Court or criticized by any District Court of Appeal so far as research has revealed. Counsel for respondent would distinguish the Stewart case upon the basis of subsequent changes in the statute and through application of certain general definitions of the term "public office."

The contract at bar merely defines the duties of respondent as follows: "The duties of the superintendent shall be to serve as Superintendent in charge of all educational and financial matters pertaining to the operation of the school district and to serve as chief executive officer of the Board of Education."[4] Section 4629 makes §§ 1301 et seq. the governing law in the present instance. Section 1306 (passed in 1943) defines the superintendent's powers and duties as follows: "The superintendent of each school district shall, in addition to any other powers and duties granted to or imposed upon him: (a) [*Chief executive officer.*] Be the chief executive officer of the governing board of the district. (b) [*Preparation and submission of budget.*] Excepting in districts where the governing board has appointed or designated an employee other than the superintendent, or a deputy, or assistant superintendent, to prepare and submit a budget, prepare and submit to the governing board of the district, at such time as it may direct, the budget of the district for the next ensuing school year, and revise and take such other action in connection with the budget as the board may desire. (c) [*Assignment of employees to positions.*] Subject to the approval of the governing board, assign all employees of the district employed in positions requiring certification qualifications, to the positions in which they are to serve." By amendment of 1957 subdivision (d) was added: "[*Contracts.*] Enter into contracts for and on behalf of the district pursuant to Section 18071." Said § 18071, also passed in 1957, authorizes delegation to the superintendent of the board's power to contract, with this proviso: "[P]rovided, however, that no contract made pursuant to such delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, said approval or ratification to be evidenced by a motion of said board duly passed and adopted."

Counsel for respondent stress the language of the Stewart case, supra, 84 Cal. App. 312, 257 P. 917, to the effect that the superintendent's "duties apparently are entirely ministerial and not outlined or enumerated by any law;" also the sentence: "In the absence of any charter provision or statutory law defining the duties of a city superintendent, it may be fairly deduced that neither the state nor the municipality intended to vest this officer with any of the sovereign powers of the state or municipality, except such as are directed by the employing power which, under the statute and the charter, have complete control and government of the city schools." 84 Cal.App. at page 320, 257 P. at page 920. It is insisted that that is the principal basis of the decision and that the foundation has been swept away by the later enactment of § 1306 which does define the duties. In the same connection counsel invoke definitions of "public office," such as found in Leymel v. Johnson, supra, 105 Cal.App. 694, 697, 288 P. 858, 860: "'Of the various characteristics attached to public office by definition, some are regarded as indispensable, and others, while not in themselves conclusive, are yet said to indicate more or less strongly the legislative intent to create or not to create an office. One of the prime requisites is that the office be created by the Constitution or authorized by some statute. And it is essential that the incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public.'" This language was quoted with approval in People ex rel. Chapman v. Rapsey, 16 Cal. 2d 636, 639, 107 P.2d 388, 390, and in Schaefer v. Superior Court, 113 Cal.App.2d 428, 432, 248 P.2d 450. In the last mentioned case Mr. Justice Parker Wood examined the content of "sovereignty" as used in this connection, concluding that exercise of independent power is of the essence, and that it was absent in the case of an auditor of the department of employment there under consideration. At page 432 of 113 Cal.App.2d at page 453 of 248 P.2d the following is quoted from a Missouri case [State ex rel. Pickett v. Truman, 333 Mo. 1018, 64 S.W.2d 105]: "'Illustrative of what is meant by "sovereignty of the state," in the same opinion it is said: "If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state."'"

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[4] This probably was due to a mistaken belief that § 4951 applied to appellant district; that section defines the duties of superintendent as "executive officer and secretary of said governing board." But, as that section is found in a chapter of the code applying only to unified districts formed pursuant to the "optional reorganization" provisions added to the code in 1945, and appellant was formed prior to that year, pursuant to Chapter 14, Division 2 of the code, § 4951 cannot apply to it, and this seems to be conceded by counsel for both sides.

Examination of § 1306 reveals that the superintendent is the chief executive officer of the board, not the district; that he is charged with preparation and submission of the budget at such time as directed by the board unless some one else has been designated by it to perform that function; that the superintendent when he submits the budget must "revise and take such other action in connection with the budget as the board may desire." His assignments of teachers are also subject to approval of the board. Under the 1957 amendment his power to enter into contracts (§ 1306(d)) is limited to those which have been approved or ratified by resolution of the board. In no real sense does the superintendent exercise independent powers. Always he operates under control of the board and hence exercises none of the sovereignty of the state.

Respondent's reliance upon West v. Board of Education, 43 Cal.App. 199, 184 P. 877, is misplaced. The case makes no holding inconsistent with Stewart v. Eaves, supra. The question there considered was not involved. The West dispute was whether the statute or the Pasadena charter provision governed as to term of employment of a superintendent. The closest approach to the Stewart-Eaves problem is found at page 202 of 43 Cal.App., at page 878 of 184 P. in the following language, which is entirely consistent therewith: "The resolution first adopted was sufficient in form to express contractual terms, if accepted by petitioner. The employment as offered was promptly accepted, and upon acceptance being made a binding contract arose, unless by reason of the law the action taken was in some particular unauthorized."

[10] We conclude that Stewart v. Eaves, supra, remains the law of this state and that a city or district superintendent of schools is not a public officer but is an employee of the district. Hence the rules announced in the Titus case, supra, 157 Cal.App.2d 822, 322 P.2d 56, are fully applicable here.

One other point requires discussion, the matter of salary for the last two years of the contract term.

[11] Petitioner had been acting as superintendent for two years before he was hired for the four-year period. The motion to employ him made no mention of salary, nor did he do so when orally accepting the proffered employment. He later handed to his secretary the written contract covering his previous two-year tenure and told

her to adapt it to the new employment. Following its form she designated the employment as that of superintendent for a four-year term, and then copied the former contract as follows: "The salary of the superintendent shall be paid as specified below: The estimated annual salary for the first year of service will be *$9,000.00* payable at the rate of *$750.00* per calendar month for 12 months of service beginning July 1, 1955, and ending June 30, 1956, The salary rate for the subsequent year shall be determined by Board action prior to July 1, and it is stipulated that the salary rate for this year shall not be less than the salary rate paid during the first year of service under this contract." Thus the third and fourth years escaped mention salary-wise. Petitioner was paid $750 a month until his discharge on February 29, 1956. The trial court found: "That it was the intent of the parties prior to February 11, 1956, under the contract of June 13, 1955, and by the election of petitioner that the annual salary of petitioner for each calendar year of said four year term should be not less than $9,000.00, that is to say, not less than $750.00 per calendar month for twelve months each year beginning on July 1, 1955, and ending on June 30, 1959." Appellant says that this is erroneous; that the vacuum in the contract cannot be filled in this manner and that respondent's only remedy is an action for reformation; that the petition for mandate contains no appropriate allegations to that end. We hold that this is not a case for reformation, but one for legitimate implication of an unexpressed term of agreement.

Section 1655, Civil Code, provides: "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention." Section 1656: "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded." Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App.2d 141, 143, 113 P.2d 878, 879: "It may be stated generally that implied covenants are not favored in the law; and courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties to the contract made. Furthermore, implied covenants can be justified only upon the ground of legal necessity arising from the terms of the contract, or the substance thereof, and the circumstances attending its execution; and the implication from the words must be such as will clearly authorize the inference of an imputation in law of the creation of a covenant." Sharpe v. Arabian American Oil Co., 111 Cal.App.2d 99, 102, 244 P.2d 83, 85: "If the parties have omitted from the agreement something that was so clearly a part of their understanding that the agreement would be unworkable without it, and which would have been incorporated without question if either party had requested it, the missing stipulation will be implied as a part of the agreement. But before this may be done justification, and the necessity for it, must be found in the agreement. Nothing may be added by way of implication except that which is necessary to carry out the intentions of the parties, as derived from the agreement itself and not merely from the circumstances under which it was made."

Petitioner had been working in the position of superintendent for two years and receiving a salary of $9,000 per annum. When agreeing upon a new term for four years, without mention of any reduction in compensation, it is inferable only that it should be no less than previously. Employment on a permanent basis implies satisfaction with former services and permits of no inference of a reduction in salary without express mention of the fact. The specific stipulation that the salary rate for the second year should be no less than the first emphasizes this thought. Unless like provision be implied for the third and fourth years the contract is unworkable *pro tanto*. Plainly, a $9,000 salary would have been specified without question if either party had noticed its omission, and justification for this inference is found in the agreement which hires respondent for four years and in express terms fixes his salary for only two. We conclude that such implication of a $9,000 salary for the last two years is likewise justified upon the ground of legal necessity, and that the trial judge was correct in so holding.

[12] Applying the principles settled by the Titus case, supra, 157 Cal.App.2d 822, 322 P.2d 56, it appears that respondent is entitled to mandamus herein unless appellant district has borne, or hereafter bears, the burden of proving good cause for his dismissal as superintendent; but the trial judge having declined to pass upon that controlling issue, the judgment must be reversed.

Accordingly, the judgment is reversed with instructions to the trial court to find upon the issue of whether good cause existed for the discharge of respondent from his position as superintendent of schools, and to take any other appropriate proceedings not inconsistent with the views herein expressed.

FOX, P. J., and HERNDON, J., concur.

Hearing denied; CARTER, J., dissenting.

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161 Cal.App.2d 313

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alex PLATNICK, Defendant and Appellant,

Cr. 6089.

District Court of Appeal, Second District, Division 1, California.

June 13, 1958.

Hearing Denied Aug. 6, 1958.

Defendant was convicted of burglary of the second degree and was found guilty of prior convictions and from the judgment of conviction and order denying his motion for a new trial in the Superior Court, Los Angeles County, John G. Barnes, J., the defendant appealed. The District Court of Appeal, White, P. J., held, inter alia, that it would be presumed in favor of affirming judgment finding defendant guilty of burglary that trier of fact found that witnesses in whose house stolen property was found were not accomplices, and that the evidence was sufficient to sustain the conviction.

Affirmed.

1. Criminal Law 🔑507(5)

That stolen property was found in home of witnesses did not make them accomplices as matter of law so as to require corroboration of their testimony to justify conviction of defendant since while possession of stolen property, shortly after it is stolen, is a circumstance pointing to guilt of accused there must be present in addition to such possession corroborating circumstances, such as acts, conduct or declarations of accused tending to show his guilt. West's Ann.Pen.Code, §§ 31, 1111.

2. Criminal Law 🔑507(1)

To be an accomplice one must knowingly, voluntarily, and with common intent unite with the principal offender in the commission of the crime. West's Ann.Pen. Code, §§ 31, 1111.

3. Criminal Law 🔑507(1)

Statute requiring corroboration of testimony of accomplice does not apply to every person at whom suspicion was directed by investigating officers at the time of discovery of crime, and does not require that such person should necessarily be considered accomplice if called as a witness at time of trial. West's Ann.Pen.Code, § 1111.

4. Criminal Law 🔑742(2)

In burglary prosecution, whether witnesses in whose home stolen property was found were accomplices so as to require corroboration of their testimony was for trial court sitting without jury. West's Ann.Pen.Code, § 1111.

5. Criminal Law ⚷1144

It would be presumed in favor of affirming judgment finding defendant guilty of burglary that trier of fact found that witnesses in whose house stolen property was found were not accomplices. West's Ann.Pen.Code, § 1111.

6. Burglary ⚷41(1)

Circumstantial and corroborative evidence was sufficient to sustain conviction of burglary of the second degree.

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Cary G. Branch, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the crime of burglary, allegedly committed on or about June 16, 1957, in that he entered the office, warehouse and building occupied by E. C. Nesser Company, in the city of Los Angeles, with the intent to commit theft. It was also alleged that defendant suffered three prior felony convictions and served terms of imprisonment therefor in the state prison: burglary, with judgment rendered on or about June 23, 1937; burglary, with judgment rendered on or about April 26, 1945; and petty theft with prior conviction of felony, with judgment rendered on or about April 10, 1952. Defendant pleaded not guilty and denied the prior convictions alleged. Trial by jury was duly waived, and by stipulation the People's case was submitted on the transcript of testimony adduced at the preliminary examination, with each side reserving the right to offer additional testimony. After reading the aforesaid transcript and consideration of additional testimony, the court adjudged defendant guilty as charged and found the offense to be burglary of the second degree. The prior convictions alleged were found to be true. Defendant's motion for a new trial was denied and he was sentenced to state prison. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

Concerning the factual background surrounding this prosecution, the record reflects that the office building of a general contractor, E. C. Nesser, was located at 4822 West Jefferson Boulevard, in the city of Los Angeles; and on Saturday, June 15, 1957, the superintendent of said business closed the premises securely upon leaving. Monday morning, June 17, 1957, it was discovered that the premises had been broken into and that an entry had been made into the building through a back window. A number of articles had been taken from the premises, including a typewriter, an adding machine, and several hand drills. On the afternoon of the 17th of June, 1957, Officer C. W. Bates of the Los Angeles Police Department, received some information from a police officer of the city of Vernon concerning the premises at 649 South Crocker Street, Los Angeles, and upon arriving at said premises, occupied by Mr. and Mrs. Ignacio Lopez, he found most of the property that had been taken from the Nesser Construction office. When Officer Bates arrived at the premises only Mrs. Julie Lopez, the wife of Ignacio Lopez, was present. While the officer was there Ignacio Lopez entered and was placed under arrest. After that, about 2:30 p. m. of the same afternoon, the defendant Alex Platnick arrived at the premises and was placed under arrest. Besides Mr. and Mrs. Lopez and their child, one William Persing lived at the premises at 649 Crocker Street. The defendant did not live at the Crocker Street address. On Friday, June 21, 1957, Ignacio Lopez was released from custody and he became the principal witness against the defendant, who was charged with burglary that same day.

The defendant buys up junk and sells it to dealers and has been an acquaintance of Mr. and Mrs. Lopez for at least a year, and on many occasions has hired Ignacio Lopez to help him in the junking business. On Monday, June 17th, the date of the arrest of Lopez and the defendant, they had been working together on hauling and selling some junk.

Sworn as a witness for the prosecution, the aforesaid Ignacio Lopez testified that on Sunday, June 16, 1957, he met defendant in the vicinity of Broadway and 25th Street about 10 a. m., where the witness had gone to do some repair work on defendant's automobile. About 4:30 p. m. on the same day, Mr. Lopez had a conversation with defendant on 7th Street at the J & B Bar. The latter came in and told Mr. Lopez that he had some items in his automobile; that he wanted to put them in Mr. Lopez's house and that he had already told the person who owned the house about it.

Thereafter, Mr. Lopez and defendant went to see the owner or landlord of the house, Mr. Wendell Persing. Mr. Lopez asked the latter if they could put the items in the house and he said it was all right. Thereupon, Mr. Lopez and defendant went back to the automobile and drove to the house which was at 649 Crocker Street, arriving at about 5:00 p. m. They unloaded the items from the automobile. (As they were finishing the unloading a Mr. Phillips passed by with his automobile.) These items consisted of the property taken in the burglary here under consideration. Mr. Lopez testified he had not seen them in defendant's automobile earlier that day. Thereafter, Mr. Lopez and defendant returned to the aforesaid bar where they had a drink after which defendant departed, stating he was going over to Broadway. About 6:00 p. m. defendant returned to the bar and handed Mr. Lopez a paper sack, telling him to take the package home and that he would pick it up the next day. In the sack was a pair of shoes, marked People's Exhibit No. 2. Mr. Lopez took the shoes to his house and gave them to his wife who put them away.

(These shoes appeared to have cloth tops. They were tried on by both Mr. Lopez and defendant during the proceedings. There appeared to be more than an inch of space between the great toe and the end of the shoe, in the case of Mr. Lopez. In the case of defendant there appeared to be about an inch. The trial judge noted that the appearance of the shoes was such as to indicate that they could have been in the dust outside the window of the burglarized premises.)

The morning of June 17th, defendant came to Mr. Lopez's place. Presently an old man arrived, whom Mr. Lopez had never seen before. This man talked with defendant. The latter told Mr. Lopez to show the man the tools. Mr. Lopez complied. The man also looked at the typewriter and adding machine. He asked Mr. Lopez what the price was on the tools. Mr. Lopez said he did not know anything about it. The man went back and spoke with defendant, then he left.

The shoes marked People's Exhibit No. 3 were the ones defendant was wearing when he gave Mr. Lopez the package containing the shoes marked People's Exhibit No. 2 on June 16th. This was after defendant had gone to Broadway. Prior thereto, defendant had been wearing the shoes marked People's Exhibit No. 2. The shoes marked People's Exhibit No. 3 were brand new.

Mrs. Julie Lopez, wife of the witness Ignacio Lopez, was residing with him at 649 Crocker Street on June 16, 1957. They were renting from Mr. Wendell Persing. Around 4:30 or 5:00 p. m. that day defendant came in and asked Mr. Lopez to help him unload some items he had in his automobile. Mr. Lopez helped defendant unload the merchandise from the automobile and into the house. As Mrs. Lopez recalled, there were adding machines and typewriters, and four or five boxes. Mrs. Lopez noted that defendant was wearing the gray shoes marked People's Exhibit No. 3 and asked him if they were the new shoes he had bought. Defendant said yes. The brown canvas shoes, marked People's Exhibit No. 2, looked like the ones defendant used to wear before he bought the others. She had seen defendant, whom she had known about a year, wearing such shoes prior to the occasion in question.

Edmund Lovold, a Los Angeles City police officer, attached to the Burglary Division, testified he was acquainted with defendant, and had seen him on various occasions prior to June 16, 1957. Officer Lovold had occasion to arrest defendant on April 26, 1957, at which time the officer looked through his house. The officer noticed a pair of shoes similar to those marked People's Exhibit No. 2, in the closet of the bedroom. The officer further testified, "In my experience as a police officer, that is a shoe worn by burglars." He testified he had seen defendant wear such shoes on many occasions.

Alvin Schrier, a photographer employed by the Los Angeles Police Department, examined the exterior of the premises at 4822 West Jefferson Boulevard (the E. C. Nesser Company), on June 17, 1957, and took photographs there. He took the photograph marked People's Exhibit No. 4 directly at the rear of the office building about 18 inches from the wall. This photograph showed an imprint on the ground.

Charles Gabard, police officer for the city of Los Angeles, attached to the Scientific Investigation Division Crime Laboratory, and an expert in the comparison of physical evidence, compared the soles of the shoes marked People's Exhibit No. 2 with the imprint depicted in the photograph marked People's Exhibit No. 4. In his opinion the shoes were of approximately the same size as the imprint, and the imprint was made by a shoe such as one of those marked People's Exhibit No. 2, or one of similar tread. The same pattern appeared on the sole.

George Stockley, a police officer for the city of Los Angeles, testified that he recovered the two pairs of shoes marked People's Exhibits No. 2 and 3. People's Exhibit No. 2 was recovered by the officer on June 18, 1957 at the Lopez residence, 649 South Crocker Street, where at the request of the officer, Mrs. Lopez took them from beside a cabinet. The shoes marked People's Exhibit No. 3 (which were gray canvas) were being worn by defendant when the officer first observed them at the Central Jail. In response to a question, defendant stated he had purchased this pair of shoes at a downtown drug store.

As witnesses for the defendant, Mr. and Mrs. William R. Phillips, both referred to in the testimony of Ignacio Lopez, testified that on June 16th, about 5:30 or 6:00 p. m., there was a Buick automobile in the driveway at Lopez's house which blocked their exit and that they requested witness Lopez to move the car and that they did not see defendant Platnick or Wendell Persing there at the time.

Alex Platnick, the defendant, testified that for some time he had been engaged in the business of collecting metal and junk and selling the same to dealers; that he had known Lopez and his wife for some time and on many occasions had hired Mr. Lopez to help him in the junk business. That on the morning of June 17, 1957, the date of his arrest, the two had worked together collecting and selling copper. On Saturday, June 15th, Lopez had helped defendant remove the latter's automobile from impound near Broadway and 23rd Street. The key was missing and the car could not be started. The next morning about 10 o'clock Lopez met defendant at the car and Lopez, being a mechanic, "hot-wired" the vehicle, which defendant drove away. That about 1:00 p. m. defendant again saw Lopez at the B & J Bar on San Julian Street and gave the car to Lopez to work on because the gear was "jumping out". Lopez took the automobile and left defendant. The latter went to Lopez's house about 5:30 but Lopez had not fixed the car; defendant asked Lopez if he would help him the next morning and agreeing, Lopez came to defendant's premises Monday, June 17th, about 10:00 o'clock. Later that day defendant went to Lopez's house to pay him for helping him with the copper, at which time he was arrested.

When questioned by the officer concerning the stolen articles found in Lopez's kitchen, defendant denied knowing anything about them. He has at all times denied the burglary charge and that he had any knowledge of the stolen articles being in Lopez's house. Defendant denied that the brown shoes (Exhibit No. 2), which were found in Lopez's house, belonged to him and denied he ever owned a pair like them except that a year or so ago he owned a pair similar but of a different color. During the trial defendant tried on the brown shoes in Exhibit No. 2 which shoes did not fit him by about an inch.

[1-3] As his first ground for reversal of the judgment and order, appellant urges that the trial court erred in finding him guilty on the uncorroborated testimony of accomplices. He contends that Mr. and Mrs. Lopez were accomplices as a matter of law and that since their testimony was not corroborated as required by Penal Code, Section 1111, no conviction could be legally based thereon. The code section just cited defines an accomplice as: "* * * one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given". Penal Code, Section 31 defines as principals: "All persons concerned in the commission of a crime * * *, and whether they directly commit the act constituting the offense, or aid and abet in its commission * * *." The question presented is whether, under the foregoing Penal Code sections, the witnesses Mr. and Mrs. Lopez were accomplices *as a matter of law*. Appellant contends in effect that these witnesses were accomplices because the stolen articles were found at their home and in their possession. This is not necessarily true because while possession of stolen property, shortly after it is stolen, is a circumstance pointing to the guilt of the accused, there must be present, in addition to such possession, "* * * corroborating circumstances, such as acts, conduct or declarations of the accused tending to show his guilt" (People v. Carroll, 79 Cal.App.2d 146, 148, 179 P.2d 75, 76). As was said in People v. Lamb, 134 Cal.App.2d 582, 585, 285 P.2d 941, 943: "* * * To be an accomplice one must knowingly, voluntarily, and with common intent unite with the principal offender in the commission of the crime". While it is true, as stated by appellant, that Mr. Lopez was taken into custody and later released nevertheless, as was said in People v. Newman, 127 Cal.App.2d 430, 435, 273 P.2d 917, 920," * * * the Legislature in enacting section 1111 of the Penal Code would not have intended that it should apply to every person at whom suspicion had been directed by investigating officers at the time of the discovery of a crime, or that such person should necessarily be considered an accomplice if called as a witness at the time of the trial."

[4-5] Since it could be inferred under the facts and circumstances present in the case now engaging our attention that Mr. and Mrs. Lopez were not accomplices, as a matter of law the question of whether they were was one for the duly constituted arbiter of the facts, and it will be presumed in favor of affirming the judgment that the trier of fact found that they were not accomplices (People v. Santo, 43 Cal.2d 319, 326, 327, 273 P.2d 249; People v. Brenon, 138 Cal.App.2d 795, 802, 803, 292 P. 2d 645).

[6] Finally, appellant insists that aside from the question of whether Mr. and Mrs. Lopez were accomplices, the evidence in its entirety is insufficient to sustain his conviction in that there is no evidence other than that given by Mr. and Mrs. Lopez which merely showed possession of the stolen property by appellant unaccompanied by any corroborating circumstances. With this contention we cannot agree. There was present in the instant case evidence that appellant had the stolen property in his automobile on June 16th; on that date he prevailed upon Mr. Lopez to put the stolen articles in the latter's residence; on the same date he induced Mr. Lopez to keep for him the shoes he had been wearing marked People's Exhibit No. 2; and an imprint from a shoe similar to one of those marked People's Exhibit

No. 2 was found at the burglarized premises. These facts furnish sufficient circumstantial and corroborative evidence to support the judgment of conviction (People v. Carroll, supra, 79 Cal.App.2d at page 148, 179 P.2d 75; People v. Acosta, 114 Cal.App.2d 1, 2, 4, 249 P.2d 316).

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

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161 Cal.App.2d 270

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas HOUSTON, Defendant and Appellant.

Cr. 3482.

District Court of Appeal, First District, Division 2, California.

June 11, 1958.

Prosecution for robbery. From a judgment of the Superior Court, City and County of San Francisco, C. Harold Caulfield, J., finding the defendant guilty of grand theft, the defendant appealed. The District Court of Appeal, Kaufman, P. J., held that the evidence was sufficient to support the verdict.

Judgment affirmed.

Larceny ⚷65

Evidence with respect to taking of wallet from complaining witness on street and to identification of defendant sustained conviction for grand theft.

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Edward F. Towers, San Francisco, for appellant.

Edward G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Defendant and appellant was charged by information with robbery and a prior conviction for forgery. Appellant entered a plea of not guilty to the crime charged and denied the prior conviction. Appellant properly waived a jury trial. The court found the appellant guilty of grand theft and ordered that the prior conviction charged in the information be dismissed. Appellant's motion for probation was denied and judgment entered, sentencing him to the State Prison for the term prescribed by law.

The appeal is based entirely on the sufficiency of the evidence. The only witnesses were the appellant, the arresting officer and the complaining witness, Walter Behncke.

The complaining witness testified that: On May 7, 1957, he was alone in the vicinity of Third and Minna Streets in San Francisco. He had had four or five drinks and was somewhat intoxicated. The appellant and two other men gathered around him. There was no violence. One of the three men reached into Behncke's inside coat pocket and took out a wallet. There was no money in the wallet, only identification cards. Behncke chased the three men but did not know in what direction. Shortly after he had given up the chase, Behncke saw a police officer and stated that he had been robbed. Behncke was able to identify the appellant as one of the three men because the appellant wore glasses and a trench coat.

The arresting officer, Lloyd Enmark, was directing traffic at Third and Mission Streets on May 7th. He saw the appellant running down Minna Street from Third Street to New Montgomery Street. He ran down Minna after the appellant who ran across the street and then came back towards the officer. The officer apprehended the appellant and found Behncke's wallet in the appellant's right hand coat pocket. The appellant was wearing glasses and a trench coat. The officer took the appellant back to Third and Minna Streets, where Behncke was talking to three Inspectors from the Pawn Shop Detail. As the officer brought the appellant up, Behncke said, "There's one of them."

The appellant testified that he had found the wallet on the street, and was about to turn it in at the Examiner Building when he was grabbed from behind by the officer. He handed the wallet to the officer saying, "I haven't done anything. I just found this wallet down the street." He further testified that when he got to the corner, "Mr. Behncke was standing there with two or three police officers and so I immediately wanted to know who it was that got robbed." The appellant further testified that he could not run. He admitted two prior convictions.

It is clear from the above that the evidence is sufficient to support the verdict.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

Matthew J. FINE, Plaintiff and Respondent,

v.

S & C FINANCE, Defendant and Appellant.

No. 17645.

District Court of Appeal, First District, Division 1, California.

June 11, 1958.

Hearing Granted Aug. 7, 1958.*

Action for conversion of station wagon. The Superior Court, City and County of San Francisco, Preston Devine, J., rendered judgment for plaintiff, and the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that where conditional sales contract for station wagon stated that contract balance included as the total insurance premium the sum of $157.50, which was the amount of the first year's premium, and on the back of the contract, and hence below the signature of the buyer, there was a fine print clause purporting to make the premium for the second year of the contract an additional part of the obligation of the buyer, there was a violation of the statute requiring conditional sales contract to contain all the agreements between the buyer and the seller and to designate "the cost to the buyer of any insurance, the premium for which is included in the contract balance", and consequently the clause on the back of the contract was void and seller's assignee could not repossess the wagon for buyer's non-payment of the insurance premium for the second year.

Affirmed.

1. Sales 🔑461

Where conditional sales contract for station wagon stated that contract balance included as the total insurance premium the sum of $157.50, which was the amount of the first year's premium, and on the back of the contract, and hence below the signature of the buyer, there was a fine print clause purporting to make the premium for the second year of the contract an additional part of the obligation of the buyer, there was a violation of the statute requiring conditional sales contract to contain all the agreements between the buyer and the seller and to designate "the cost to the buyer of any insurance, the premium for which is included in the contract balance", and consequently the clause on the back of the contract was void and seller's assignee could not repossess the wagon for buyer's nonpayment of the insurance premium for the second year. West's Ann. Civ.Code, § 2982(a), par. 4.

2. Appeal and Error 🔑878(2)

Plaintiff who did not appeal from judgment that defendant had converted station wagon could not complain, on defendant's appeal, that trial court found that plaintiff was obligated to defendant in a certain amount.

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* Dismissed on courts own motion Oct. 22, 1958.

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Eugene S. Clifford, Heller, Ehrman, White & McAuliffe, San Francisco, for appellant.

George V. Curtis, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff purchased a station wagon from defendant's assignor pursuant to the provisions of a conditional sales contract, making a down payment and agreeing to pay 24 monthly installments of $75.93 each. After plaintiff had paid all of these monthly installments defendant seized the car under the purported authority of a repossession clause of the contract, claiming that plaintiff owed it the amount of a premium it had paid for insurance of the car during the second year of the contract.

Plaintiff brought this action for conversion of the car and the court gave judgment in his favor, finding that, having made all the monthly payments, plaintiff owned the car and defendant had no right to repossess it. Defendant has appealed.

Item 4 of the contract read as follows: "4. Total Premium included in contract balance ....$157.50" There is no dispute as to this sum of money. It is itemized, showing the amount of premium for the several kinds of coverage. It represents the premium, including automobile club dues, upon insurance for the first year (1953–54, the contract having been executed in June, 1953). Nor are *other items* upon the face of the contract (and, thus, above the plaintiff's signature) in dispute.*

The contract balance ($1,822.32) included as insurance premiums only the sum of $157.50 (designated "Total Premium").

There was further mention of insurance, upon the back of the contract, hence below the signature of the plaintiff, and in fine print, a clause to the effect that if "the total price payable hereunder does not include a charge for insurance to be procured by Seller (or if insurance * * * expires before the contract shall have been paid in full)", purchaser shall upon request furnish evidence of such insurance as seller may request. Upon failure of purchaser so to do, seller may procure such insurance and purchaser agrees to pay the premium therefor upon demand, "as an additional part of the obligation hereunder." Another clause in fine print on the back of the contract authorized immediate repossession if the purchaser "defaults on any payment due under this contract or fails to comply with any condition or provision of this contract."

There is some question whether plaintiff defaulted in respect to the procurement of insurance for the second year. An employee of defendant called plaintiff and asked him if he would like to renew his policy for the second year and he said he would do so after the commencement of the policy year. The insurance, apparently, was placed. After he had made his last monthly payment he phoned defendant and was told that he owed $407 for one year's insurance and was told to come in to defendant's office. He said he had to go to San Jose for two weeks on business. Asked where the car was stored, he told them where it was in Hayward. In about 10 days the car was repossessed. Upon his return he went to defendant's office. He was first told he owed $407 and then that it was $414. He demanded return of the car, which was refused. A representative of defendant than stated that he would take $270 in full payment, which offer plaintiff refused. Later it appeared from the 1954–55 policy when produced that the total premium for that year amounted to $123.40. Plaintiff did not receive a copy of the 1954–55 policy until he had gone to defendant's office after the car had been repossessed.

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* Item 1, the cash selling price, including sales tax, $1,863.00; 2, the down payment, $500.00; 3, the amount unpaid on cash selling price, $1,363.00; 5, fees paid, $1.00; 6, amount of unpaid balance to be financed, including insurance, $1,521.50; 7, amount of time price differential (financing charge) $300.82; 8, amount of contract balance, $1,822.32; and 9, the contract balance is payable in 24 monthly installments of $75.93 each, commencing July 25, 1953.

[1] A more serious question is whether or not the provisions of section 2982, Civil Code, authorize a seller to provide for insurance coverage and repossession in the manner in which this seller did. This statute as it read in 1953 declared that every conditional sales contract "shall be in writing and *shall contain all of the agreements between the buyer and the seller* relating to the personal property described therein. * * * *It shall recite the following separate items as such, in the following order,*" designating nine numbered items, the same as set forth in the contract in suit. In respect to Item 4, the statute specified as follows: "4. The cost to the buyer of any insurance, the premium for which is included in the contract balance." Here, it will be observed, the only insurance premiums mentioned in Item 4 of the conditional sales contract were for coverage during the first year of the contract, correctly stated therein as amounting to $175.50 and labelled "Total Premium."

Obviously, in respect to the insurance premium here involved, there was a failure to comply with the form and requisites of section 2982, rendering unenforceable the clause on the back of the contract which purports to make the amount of that premium "an additional part of the obligation" of the buyer under this conditional sales contract. Our Supreme Court held in Carter v. Seaboard Finance Co., 33 Cal.2d 564, 573, 203 P.2d 758, 764, that "[t]he form and requisites [of § 2982] must * * be held to be required and the statute in these respects to be mandatory," in respect to a contract which failed to recite the full contract price of each of the trucks and trailers, the amount of the down payment credited toward each, the total cost of insurance to the buyer, itemization of fees to be paid the Motor Vehicle Department, the correct time price differential, or the amount of the final installment. The rationale of the Carter case was followed in Estrada v. Alvarez, 38 Cal.2d 386, 240 P.2d 278, 279, holding that in the second count of his complaint plaintiff stated a cause of action for recovery of money paid under a void contract because of lack of compliance with section 2982. Said the court: "The contract here violates section 2982 in the following respects: It does not recite the price at which the seller would have sold for cash (Civ.Code, § 2982, par. (a), subd. 1). It does not recite the amount of the 'time price differential' or the 'contract balance' (Civ.Code, § 2982, par. (a), subds. 7 and 8). Furthermore, subdivision 2 of paragraph (a) of section 2982 requires that the contract recite 'The amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for cash and for such property.' The contract here incorrectly recites that the down payment was $3,500 'in cash,' whereas, plaintiffs allege, the down payment which they actually made was a Buick automobile of the reasonable value of $3,800.

"According to the Carter case, 'The obvious purpose of the statute is to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of cost' (at page 573 of 33 Cal.2d, at page 776 of 203 P.2d); the form and requisites prescribed by the statute are mandatory; a contract which does not substantially conform thereto is unenforceable; and a buyer who has made payments to the seller under such a contract may recover them because 'A member of the class for whose protection the statute was enacted is ordinarily not considered *in pari delicto* with those who violate the statute' (at page 574 of 33 Cal.2d, at page 765 of 203 P.2d)." 38 Cal.2d at pages 388 and 389, 240 P.2d at page 279.

In our case there was no such extensive variance from the "form and requisites" of section 2982 as in the Carter and the Estrada cases and no one is contending that the contract in this case was void as a whole. However, the variance here involved, in respect to insurance premiums, is a clear violation of a positive mandate of the statute on that subject. To the extent of that variance this contract is void. Accordingly, we deem void that clause, appearing on the back of the contract, which purported to make the premium for the second year of the contract "an additional part of the obligation" of the purchaser under the contract.

Defendant says that the second year's insurance premium was "admittedly not included" in the "contract balance"; hence, is not within the purview of Item 4 of subdivision (a) of section 2982, Civil Code, when it says the contract shall recite the "cost to the buyer of any insurance, the premium for which is included in the contract balance." This, in effect, amounts to an argument that if a person writes his conditional sales contract in noncompliance with the "form and requisites" of section 2982, the mandates of that section do not apply. Defendant quotes from Millick v. Peer, 130 Cal.App.2d Supp. 894, 279 P.2d 212, 214, a statement to the effect that the insurance there involved was issued after the expiration of an existing policy and the charge therefor was "not included in the amounts to be paid under the contract and consequently was not subject to the provisions of subdivision (b) of said Section 2982." 130 Cal.App.2d Supp. at page 896, 279 P.2d at page 214. It is not entirely clear what was meant by that statement. Was there a subsequent, distinct, and separate agreement concerning the policy which was later obtained? Or, is that statement directly connected with the statement in the immediately following sentence, to the effect that "unenforceability for failure to comply with * * * section 2982 applies only to the requirements set forth in Subdivisions (c) and (d), and not to those set forth in * * * (a) and (b) of that Section * * *"? The latter statement was expressly disapproved and withdrawn by the same court in the later case of Baum v. Aleman, 139 Cal.App.2d Supp. 929, 932, 293 P.2d 162. See, also, Williams v. Caruso Enterprises, 140 Cal.App.2d Supp. 973, 975–976, 295 P.2d 592. We find no merit in this point.

Somewhat inconsistently with the last argument defendant contends that the clause (on the back of the contract and in fine print) which it here invokes was a "prime consideration" of the contract, pursuant to which defendant's asserted right to reimbursement for advancement of the second year's premium "became 'an additional obligation' thereunder" precedent to the vesting of title. Here, again, defendant loses sight of the mandatory character of the "form and requisites" of section 2982 of the code.

We find nothing in Zeff v. Harvey Smith Oldsmobile Co., 154 Cal.App.2d 1, 315 P.2d 371, persuasive of a different view of the contract now before us. There the court in effect held it was competent for the parties to agree that title to the thing sold would not pass until paid for in cash. So, too, in our case, the trial court correctly found that plaintiff paid in cash in full and that thereupon title passed. We note in passing that the opinion in the Zeff case does not indicate that any question concerning compliance or noncompliance with the "form and requisites" of section 2982 had been raised or was involved.

[2] We observe that the trial court found plaintiff herein obligated to defendant for the amount of the second year's insurance premium. The soundness of such a finding is not presented to us for decision. Defendant-appellant, naturally, is not complaining. Plaintiff-respondent is not complaining and, of course, could not complain, he not having appealed.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

161 Cal.App.2d 321

Ethel Marie RUSS, Plaintiff and Appellant,

v.

Ralph F. RUSS, Defendant and Respondent.

No. 17725.

District Court of Appeal, First District, Division 1, California.

June 16, 1958.

Action for divorce. From a decree of the Superior Court, City and County of San Francisco, Clarence W. Morris, J., granting wife a divorce but allotting husband certain real property, the wife appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained finding that property had been purchased in part with community funds and in part with wife's separate funds which were comingled with community funds, that property was managed with intent that it would be community property, that title to property was taken in name of wife to prevent husband's judgment creditors from executing thereon, that husband was entitled to property and that wife was entitled to an offset representing value of her separate funds which were used in part for acquiring and repairing the property.

Judgment affirmed.

1. Divorce ⚷253
Husband and Wife ⚷264

In action by wife for divorce, evidence sustained finding that certain property had been purchased in part with community funds of parties and in part with wife's separate funds which were comingled with community funds, that property was managed with intent that it would be community property, that title to property was taken in name of wife to prevent husband's judgment creditors from executing thereon, that husband was entitled to property and that wife was entitled to an offset representing value of her separate funds which were used in part for acquiring and repairing the property.

2. Appeal and Error ⚷1097(1)

Decision entered upon former appeal was law of case and binding upon court on subsequent appeal even if it did not concur in views expressed in prior opinion.

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Walter H. Duane, San Francisco, for appellant.

Leonard A. Worthington, San Francisco, for respondent.

FRED B. WOOD, Justice.

[1] The interlocutory decree, awarding plaintiff a divorce, allotted defendant certain real property known as the El Granada property. Plaintiff appealed, claiming the record demonstrated that this was her separate property.

Because there was no finding as to the character of this property (whether community or separate) and the evidence would support a finding either way, the reviewing court reversed that portion of the judgment with directions to the trial court "to amend, modify and clarify the findings, with leave to the trial court to take further evidence if in its discretion such is required." Russ v. Russ, 144 Cal.App.2d 723, 727, 301 P.2d 600, 602.

In response to these directions, the trial court ascertained and determined that the evidence adduced at the first trial was sufficient to enable it to amend, modify and clarify the findings, and then found, among other facts: (1) the community property of the parties includes the El Granada real property and the household equipment, furniture and fixtures there located; (2) during the 18 years the parties lived together (from date of marriage to date of separation) practically all of the community wages earned by each were deposited in one or more of three bank accounts maintained by them in plaintiff's name in order to prevent defendant's former creditors from executing on his funds, it being clearly the intent of the parties that as between themselves these accounts should always retain the status of community property; (3) the El Granada real property was purchased in part with community funds of the parties and in part with plaintiff's separate funds which were co-mingled with their community funds; (4) the El Granada real property was purchased and for 15 years thereafter and until the trial of this action, was managed with the intent that it would be community property and was maintained, repaired and all taxes paid either through the efforts of defendant or from community funds; (5) title to this real property was taken in the name of plaintiff to prevent defendant's judgment creditors from executing thereon but it was always the intent of the parties that it should be joint or community property and their conduct during said 15-year period further substantiates this finding; (6) defendant is entitled to the El Granada property because it has been his place of residence for a long time and the tools of his trade and his shop are maintained there, and plaintiff has her own property in San Francisco in which to live and has indicated she has no intention of living on the El Granada property; and (7) in view of the award of said property to defendant, plaintiff is entitled to an off-set representing the value of her separate funds which were used in partly acquiring and repairing it, and the court has taken this factor into consideration in making its awards.

[2] These findings are supported by the evidence, which we need not here recite in detail because it was sufficiently indicated in the decision rendered upon the former appeal. Moreover, that decision, a well-considered opinion written by Mr. Justice Draper, is now the law of the case (Berry v. Maywood Mut. W. Co. No. One, 13 Cal.2d 185, 186, 88 P.2d 705; Wells v. Lloyd, 21 Cal.2d 452, 455, 132 P.2d 471; Boomer v. Abbett, 154 Cal.App.2d 218, 225, 315 P.2d 924; 4 Cal.Jur.2d 608–610, § 703), binding upon us even if we did not concur in the views therein expressed but we do fully concur therein and adopt those views as our own upon this appeal.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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161 Cal.App.2d 254

Jacinto SIQUIG, Plaintiff and Respondent,
v.
WEST COAST PICKLE CO., a corporation, and Missouri Pickle Co., a corporation, Defendants and Appellants.

Bart ROJAS, Plaintiff and Respondent,
v.
WEST COAST PICKLE CO., a corporation, and Missouri Pickle Co., a corporation, Defendants and Appellants.

Larry CRISTOBAL, Plaintiff and Respondent,
v.
WEST COAST PICKLE CO., a corporation, and Missouri Pickle Co., a corporation, Defendants and Appellants.

Guadencio LAJON and Anacieto Lajon, Plaintiffs and Respondents,
v.
WEST COAST PICKLE CO., a corporation, and Missouri Pickle Co., a corporation, Defendants and Appellants.

A. UNDAJON and M. Undajon, Plaintiffs and Respondents,
v.
WEST COAST PICKLE CO., a corporation, and Missouri Pickle Co., a corporation, Defendants and Appellants.

M. S. MIGUEL, Plaintiff and Respondent,
v.
WEST COAST PICKLE CO., a corporation, and Missouri Pickle Co., a corporation, Defendants and Appellants.

John CATABLAN, Plaintiff and Respondent,
v.
WEST COAST PICKLE CO., a corporation, and Missouri Pickle Co., a corporation, Defendants and Appellants.

Civ. 17623.

District Court of Appeal, First District, Division 2, California.

June 11, 1958.

Hearing Denied Aug. 6, 1958.

Consolidated actions for breach of contracts by which plaintiffs were to plant, grow, harvest and sell peppers to defendants. The Superior Court, City and County of Santa Clara, W. W. Jacka, J., rendered judgments for the plaintiffs, and the defendants appealed. The District Court of Appeal, Dooling, J., held that there was sufficient evidence to support an award of damages.

Affirmed.

1. Sales ⚷181(11)

In action for breach of contracts by which plaintiffs were to plant, grow, harvest and sell peppers to defendants, evidence warranted finding that defendants, who negotiated the contracts through their agent, refused further deliveries, despite defendants' letter advising plaintiffs that defendants would perform the obligations of the contract, by failing to notify agent of the letter and by permitting agent to continue to represent to plaintiffs that defendants would not accept further deliveries and by not notifying plaintiffs of the discharge of the agent. West's Ann.Civ.Code, § 2356.

2. Principal and Agent ⚷151(1)

Where defendants negotiated, through their agent, the contracts by which plaintiffs were to plant, grow, harvest and sell peppers to defendants, and defendants failed to notify plaintiffs of the discharge of the agent, the agent continued to be at least the ostensible agent of the defendants in their dealings with the plaintiffs. West's Ann.Civ.Code, § 2356.

3. Sales ⚷383

In action for breach of contracts by which plaintiffs were to plant, grow, harvest and sell peppers to defendants, evidence relating to the acreage planted to the peppers, the defendants' acceptance of some deliveries of the crop, which would mature progressively, the plaintiffs' loss of the sale of balance of crop by defendants' refusal to accept further deliveries, the cost of harvesting and the yield per acre was sufficient to support award of damages.

4. Damages ⚷6

One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness.

5. Evidence ⚷13

Judicial notice should not be taken of growing and soil conditions and probable crop yield in a particular area.

6. Appeal and Error ⚷1047(1)

In action for breach of contracts by which plaintiffs were to plant, grow, harvest and sell peppers to defendants, where defendants' witness testified as to yield of crops of peppers grown in other areas of county in former years and no attempt was made to prove that climate, soil or growing conditions were similar to the area in which the plaintiffs grew their peppers, the testimony was of slight probative value and consequently there was no prejudice on part of trial judge when he expressed himself that because of his personal knowledge of growing and soil conditions in the several areas he would take judicial notice that the areas testified to by the witness would give a smaller yield.

7. Sales ⚷381

In action for breach of contracts by which plaintiffs were to plant, grow, harvest and sell peppers to defendants, the burden of proving failure to mitigate damages was on defendants.

8. Trial ⚷395(5)

Generally, it is sufficient if the court finds on the ultimate facts alleged in the pleadings, and it is not necessary to find the probative facts upon which the ultimate facts depend.

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DeMarco & DeMattei, Victor A. Chargin, Jr., San Jose, for appellants.

Peter Anello, San Jose (Cyril Viadro, San Francisco, of counsel), for respondents.

DOOLING, Justice.

In these seven consolidated actions the defendants appeal from judgments for the plaintiffs.

Plaintiffs are farmers in Santa Clara County. Early in 1954, through one Joseph Di Napoli, who was employed as their agent, buyer and field-man in Santa Clara County, the two corporate defendants, appellants herein, entered into separate written contracts with plaintiffs to plant, grow, harvest and sell to said appellants yellow Cascabella peppers at the price of 9½ cents per pound. The contracts were negotiated by Di Napoli and signed by him in appellants' names as "buyer's agent" on forms furnished to him for that purpose by appellants.

After several deliveries had been made to appellants, some of which were paid for at the contract price of 9½ cents, and some later deliveries by voluntary action of appellants at 10½ cents per pound because the market price had increased, appellants began to pay on further deliveries less than the contract price, the lowest price so paid being 3½ cents per pound. The growers complained to Di Napoli that they could not make a profit at these lower prices since their harvesting cost was 5 cents per pound and they were informed by Di Napoli under authorization of one Root, president of appellant West Coast Pickle Co., that appellants could not use the peppers and to plow them under.

Respondents consulted their attorney and on September 17, 1954, the attorney wrote to appellants stating that respondents had been informed by their agent Di Napoli that appellants were no longer desirous of accepting delivery of the peppers in accordance with their contracts. The attorney's letter concluded with a statement that respondents were ready, willing and able to comply with their contract and if they sustained damages by appellants' failure to comply "they expect to hold you legally responsible for any and all damages."

Appellants replied that if Di Napoli had made such representations he was not authorized to do so and stated further that "we are ready, able and willing to perform all of our obligations under the contract or contracts * * * according to the terms thereof, and that we intend to do so."

Despite this reply of appellants, which was dated September 20, 1954, appellants did not notify Di Napoli of this letter nor countermand their previous instruction to him that they could not use any more of these peppers and Di Napoli continued to act under the belief that appellants did not wish to accept any further deliveries of these peppers and in the latter part of September Di Napoli informed respondents' attorney that appellants were refusing to accept any further deliveries of respondents' peppers. Di Napoli at the request of some of the respondents then attempted to sell their peppers elsewhere without success.

[1, 2] Appellants' first contention is that in view of their letter of September 20 the finding of the trial court that they refused to accept delivery is without support in the evidence. The trial court, however, was entitled to weigh appellants' subsequent conduct against the expressed intention in their letter of September 20 to continue to perform their contracts. Di Napoli continued to be their general agent, a part of whose duties had been to receive, weigh and ship, the peppers. They not only failed to notify Di Napoli of their letter of September 20, but they also permitted him to continue to believe and to represent to respondents and their attorney that appellants would not accept any further deliveries. Di Napoli was discharged by appellants some time in the autumn of 1954, but respondents were not notified of that fact and, as to them, he continued to be at least an ostensible agent. Civ.Code § 2356; 2 Cal. Jur.2d, Agency, § 23, p. 670; Restatement Agency, § 129. On the evidence the trial court could reasonably find that the conduct of their agent Di Napoli constituted a refusal of further deliveries, despite their letter of September 20.

[3, 4] Appellants argue that there was not sufficient evidence to support an award of damages. Respondents lost the sale of the balance of their crop after the early part of September. There was evidence of the acreage planted to these peppers and of the deliveries made to respondents. The

evidence showed that these peppers mature progressively and that they would continue to be harvested until the frosts in late November. The cost of harvesting was established as 5 cents per pound. There was evidence that Di Napoli represented to several of respondents before their contracts were signed that the peppers would yield a harvest of 10 tons per acre, and one grower testified that in a previous year on the same land he obtained 6 tons from ¼ acre. A calculation shows that at 4½ cents per pound, anticipated profit over cost of harvesting, the judgments represent an anticipated total yield of slightly over 8½ tons per acre. "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness." Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 297–298, 149 P.2d 177, 181; Stott v. Johnston, 36 Cal.2d 864, 876, 229 P.2d 348, 28 A.L.R.2d 580.

[5, 6] Appellants produced a witness who testified that he was familiar with several crops of Cascabella peppers grown in other areas of the county in former years and that they had not yielded over 5 tons per acre. No attempt was made to prove that climate, soil or growing conditions were similar to those involved here. The trial judge admitted this evidence for what it was worth but expressed himself that because of his personal knowledge of growing and soil conditions in the several areas he would take judicial notice that the areas testified to by this witness would give a smaller yield. It is doubtful that judicial notice may properly extend to matters of this character, but in view of appellants' failure to prove similarity of conditions the evidence was of slight probative value and we can find no prejudice.

[7] The burden of proving failure to mitigate damages is on appellants. (14 Cal. Jur.2d, Damages, § 113, p. 734.) Such evidence as was produced on this subject was produced by respondents. Some of them showed an unavailing effort by Di Napoli to market their peppers elsewhere and appellants made no showing that respondents could have found other buyers.

[8] The findings were of the ultimate facts alleged in the complaint. The damages were found in a lump sum for each plaintiff. This was sufficient. Klegman v. Moyer, 91 Cal.App. 333, 345–347, 266 P. 1009. Generally it is sufficient if the court finds on the ultimate facts alleged in the pleadings, and it is not necessary to find the probative facts upon which the ultimate facts depend. (24 Cal.Jur., Trial, § 203, pp. 968–969.) We have examined the findings in the light of these rules and find them sufficient.

Judgments affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

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161 Cal.App.2d 346

Clair A. HILL, Plaintiff and Appellant,

v.

Robert C. KIRKWOOD, State Controller of the State of California; Frank B. Durkee, Director of Public Works of the State of California; George T. McCoy, Chief of Division of Highways and State Engineer; Hycon Mfg. Company, a Delaware Corporation, Defendants and Respondents.

Civ. 9290.

District Court of Appeal, Third District, California.

June 16, 1958.

As Modified June 25, 1958.

Rehearing Denied July 9, 1958.

Hearing Denied Aug. 13, 1958.

Taxpayer's suit to enjoin certain officers of the state from paying a company performing aerial survey work, the contract price for furnishing photogrammetry contour maps and other related work as called for by its contract to the Department of Public Works. The Superior Court, Sacramento County, Jay L. Henry, J., entered judgment for defendants, and taxpayer appealed. The District Court of Appeal, Warne, J. pro tem., held that contract requiring company performing aerial survey work to furnish photographic map prepared by a process known as aerial photogrammetry was not illegal because company engaged in the work was not registered as a civil engineer or licensed as a land surveyor under applicable provisions of the Business and Professions Code, even though the mapping required under the contract did require use of conventional land surveying methods for the ascertainment of ground control data.

Judgment affirmed.

1. Licenses ⚷39.40

Contract requiring company performing aerial survey work to furnish aerial photographic maps prepared by a process known as aerial photogrammetry was not illegal because company engaged in the work was not registered as a civil engineer or licensed as a land surveyor under applicable provisions of the Business and Professions Code, even though the mapping did require use of conventional land surveying methods for the ascertainment of ground control data. West's Ann.Bus. & Prof.Code, §§ 6731, 8725, 8726.

2. Constitutional Law ⚷208(6)
Licenses ⚷7(2)

Section of Business and Professions Code providing that photogrammetry not involving determination of any property line did not constitute surveying within meaning of chapter of Business and Professions Code regulating the practice of land surveying was not unconstitutional as discriminatory class legislation, since the skills and learning necessary to photogrammetric mapping are intrinsically different from those necessary to perform mapping by conventional surveying methods, and thus are a proper basis for classification. West's Ann.Bus. & Prof.Code, § 8727.

Rowland & Paras, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Leonard M. Friedman, Deputy Atty. Gen., Robert E. Reed and Warren P. Marsden, Sacramento, for respondent State departments.

Tuttle, Tuttle & Taylor, Los Angeles, Henry P. Buckingham, for defendant and respondent Hycon Mfg. Co.

WARNE, Justice pro tem.

This is an appeal from a judgment entered for defendants in a taxpayer's suit to enjoin the defendant officers of the State of California from paying codefendant, Hycon Manufacturing Company, the contract price for furnishing to the Department of Public Works, Division of Highways, photogrammetry contour maps and other related work as called for by the terms of their contract.

After notice to bidders requesting proposals the Division of Highways, Department of Public Works, awarded Hycon Manufacturing Company, a Delaware corporation, Aerial Survey Contract No. 96 for the sum of $6,111. Plaintiff as a taxpayer brought this action to enjoin payments under said contract by the defendant officers of the state, and alleged that said contract was illegal and void for the reason that Hycon Manufacturing Company was not registered as a civil engineer or licensed as a land surveyor under the applicable provisions of the Business and Professions Code; that the specifications, particularly sections 8 and 9, for said contract, were embraced within the definitions of land surveying and civil engineering as defined in sections 6731, 8725 and 8726 of said code; and that said contract was not exclusively for aerial photography or photogrammetry.

The contract called for the furnishing of photogrammetry, contour maps and other related work in Humboldt County from Fortuna northerly a distance of about 7.5 miles, scale 1″ equals 100′, 5′ contours. Section 2 provided that the work was to be done in accordance with the Revised General Specifications for Photogrammetry of the Department, dated February, 1954, and in accordance with general specifications, special provisions, and a set of maps incorporated therein. Section 8 of the special provisions for said contract required the contractor to prepare and furnish contour maps laid out in rectangular coordinates expressed on the California Coordinate System, to label the coordinate values on the margin of the map sheets, to identify on the maps all grid positions, horizontal control monuments, bench marks, contours, the grid system, and all topographic and planimetric features, together with the north points, magnetic declinations, grid declinations and the location of building and spot elevations. Section 9 of said special provisions required said contractor to do certain ground control work, including the establishment of all necessary and required horizontal and vertical controls in the field, and to make ground surveys necessary to fulfill the horizontal and vertical accuracy requirements for the contour maps to be furnished, and further required the contractor to furnish certain data on ground control, including field survey notebooks, calculation and tabulation of control data and a control diagram.

The pertinent findings of fact were as follows:

(1) Defendant Hycon Manufacturing Company is neither a registered civil engineer nor a licensed land surveyor.

(2) That said contract required defendant Hycon Manufacturing Company to furnish topographic maps prepared by the process known as aerial photogrammetry. The maps actually compiled and furnished by it were entirely prepared by means of said process. The principal portion of said process consists of aerial photography of the terrain to be mapped and a map compilation from said aerial photographs through the use of photogrammetric plotting machinery. A map compilation through the use of said machinery does not, and in the case of said contract did not, require the measurement of any angles or the application of principles of trigonometry except to the extent necessary to supply "ground control" data as hereinafter found. In the compilation of said topographic maps, the optical and mechanical design of the photogrammetric plotting machinery and the operation of optical and mechanical controls and mechanical tracing devices rendered unnecessary the conventional method of measuring lines and angles and of applying trigonometric principles.

(3) That the photogrammetric mapping required under said contract did require the use of conventional land surveying methods for the ascertainment of "ground control" data, except to the extent to which such data is furnished by or is available from previous recognized surveys, such as those made by the United States Coast and Geodetic Survey. As required by said contract, defendant Hycon Manufacturing Company established control monuments and bench marks by conventional land surveying methods and prepared and furnished field survey notebooks, calculation and tabulation control data, and control diagrams; but the activities and operation of Hycon Manufacturing Company necessary to perform such work were and are an integral and necessary part of the "ground control" phase of preparing topographic maps from aerial photographs through photogrammetry; that all such ground control work was exclusively for photogrammetry and did not involve or require the determination of any property line.

(4) In the preparation of said maps under said contract defendant Hycon Manufacturing Company was not required to and did not do any of the acts constituting land surveying as provided in Section 8726, subdivisions (a), (b), (c), (d), (e) or (f) of the California Business and Professions Code.

(5) That defendant Hycon Manufacturing Company did determine information to be shown on certain documents prepared and furnished in connection with the function of determining the position of fixed objects on the earth's surface by means of measuring lines and angles and applying the principles of trigonometry, but all such determinations were made exclusively for aerial photography and photogrammetry

and did not involve the determination of any property line.

Section 8726 of the Business and Professions Code provides:

> "A person practices land surveying within the meaning of this chapter who, either in a public or private capacity, does or offers to do any one or more of the following:
>
> "(a) Locates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land or any road, right of way, easement, alignment or elevation for any of the fixed works embraced within the practice of civil engineering, as described in Chapter 7, Division 3 of this code.
>
> "(b) Makes any survey for the subdivision or resubdivision of any tract of land.
>
> "(c) By the use of the principles of land surveying determines the position for any monument or reference point which marks a property line, boundary or corner, or sets, resets or replaces any such monument or reference point.
>
> "(d) Determines the configuration or contour of the earth's surface or the position of fixed objects thereon or related thereto, by means of measuring lines and angles, and applying the principles of trigonometry.
>
> "(e) Geodetic or cadastral surveying.
>
> "(f) Determines the information shown or to be shown on any map or document prepared or furnished in connection with any one or more of the functions described in subsections (a), (b), (c), (d) and (e).
>
> "(g) Indicates, in any capacity or in any manner, by the use of the title 'Land Surveyor' or by any other title or by any other representation that he practices or offers to practice land surveying in any of its branches.
>
> "(h) Procures or offers to procure land surveying work for himself or others.
>
> "(i) Manages, or conducts as manager, proprietor, or agent, any place of business from which land surveying work is solicited, performed or practiced."

Under the provisions of section 6787 of the same code it is unlawful for any person "Who, unless he is exempt from registration under this chapter, practices or offers to practice civil engineering in this State according to the provisions of this chapter without legal authorization."

And under the provisions of section 8731:

> "A registered civil engineer and a civil engineer exempt from registration under Chapter 7 of Division III of this code are exempt from licensing under this chapter and may engage in the practice of land surveying with the same rights and privileges, and the same duties and responsibilities of a licensed land surveyor."

[1] It is plaintiff's first contention that since the photogrammetry contract called for and required the doing of conventional surveying by conventional methods and instruments, it constituted land surveying which could only legally have been done by a licensed surveyor or civil engineer. We do not agree with this contention. There is substantial evidence to sustain the court's findings. Section 8 of the Special Provisions of the contract heretofore quoted did not require the practice of land surveying under subdivisions (a), (c), and (d) of section 8726, other than the ground control work under section 9, and the ground control work under section 9 was exclusively for and an integral part of the production of aerial photographs and photogrammetry. It did not involve the determination of any property line and is clearly exempt under the provisions of section 8727 of said code, which provides:

> "Surveys, made exclusively for geological or landscaping purposes or aerial photography or photogrammetry and not involving the determination of

any property line, do not constitute surveying within the meaning of this chapter."

Neither the general specifications nor the special provisions of the contract in question require any deviations from photogrammetric mapping procedures and techniques. It appears that the ground control phase in the process of the photogrammetric method of mapping involves the determination of horizontal and vertical positions of a defined set of control points in the area which is to be photographed with an aerial camera. Such control points must be of such a nature that they can be positively identified in the aerial photographs. Ground control ordinarily utilizes the basic and accepted techniques of land surveying through the use of field crews employing such surveying instruments as the transit and stadia, level, plane table and similar devices. The control points must be selected in consultation with the photogrammetrist since they must be so located as to appear within the narrow limit in the aerial photographs. However, the photogrammetrist's selection of control points has nothing to do with the ascertainment of the elevations and distances between control points. After the ground control phase, no trigonometric or geometric calculations are involved in the process. As pointed out by respondents section 8727 obviously contemplates that a contract for photogrammetry and not involving the determination of any property line, may provide for or require "Land Surveying" as defined in section 8726. Otherwise, there is no situation to which the exemption could apply. In other words, if a contract for photogrammetry and not involving the determination of any property line cannot provide for land surveying, the statutory exemption is meaningless.

[2] The contention that section 8727 is unconstitutional as discriminatory class legislation is also without merit. As stated in Sacramento Municipal Utility District v. Pacific Gas & Electric Co., 20 Cal. 2d 684, 693, 128 P.2d 529, 534:

> "* * * None of those constitutional principles is violated if the classification of persons or things affected by the legislation is not arbitrary and is based upon some difference in the classes having a substantial relation to the purpose for which the legislation was designed. [Citing cases.] A law to be general in its scope need not include all classes or individuals in the state. Nor is a classification void because it does not embrace within it every other class which might be included. [Citing cases.] Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [Citing cases.] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it."

Applying those rules to section 8727, it cannot be said that the classification provided by the Legislature was palpably wrong and had no reasonable basis in providing that a survey made exclusively for aerial photography or photogrammetry and not involving the determination of any property line does not constitute surveying within the meaning of Chapter 15 of the Business and Professions Code, since the skills and learning necessary to photogrammetric mapping are intrinsically different from those necessary to perform mapping by conventional surveying methods and are a proper basis for classification. We conclude that the contract was neither void nor illegal.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

161 Cal.App.2d 289

In the Matter of the ESTATE of Alice Catherine BOURQUIN, also known as Alice C. Bourquin, Deceased.

SUNLAND HOME FOUNDATION, Inc., and Second Church of Christ Scientist of San Diego, California, Proponents and Appellants,

v.

Paul Eugene BOURQUIN, Contestant and Respondent.

Civ. 5824.

District Court of Appeal, Fourth District, California.

June 12, 1958.

Rehearing Denied July 2, 1958.

Hearing Denied Aug. 6, 1958.

Probate proceeding. The Superior Court, San Diego County, C. M. Monroe, J., admitted prior will to probate on ground that testatrix was mentally incompetent and unduly influenced at time of execution of subsequent will, and beneficiaries under subsequent will appealed. The District Court of Appeal, Mussell, J., held that evidence sustained the trial judge's finding of incompetency and undue influence.

Judgment affirmed.

1. Wills 🔑386

Question as to whether testatrix is competent to execute later will is one of fact for trial judge, not the district court of appeal.

2. Wills 🔑384

Reviewing court's function upon appeal from judgment denying probate of will because of mental incompetency is no different than in any other case, and all conflicts in evidence must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict, if possible.

3. Appeal and Error 🔑996

Where two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial judge or jury.

4. Wills 🔑55(5)

In probate proceeding in which prior will was admitted to probate and admission of subsequent will denied, evidence sustained trial judge's finding that testatrix was not competent to make subsequent will because of her extreme mental and physical weakness.

5. Wills 🔑166(1)

In probate proceeding in which subsequent, rather than prior, will was admitted to probate, evidence sustained trial judge's finding that subsequent will was result of undue influence.

6. Wills 🔑155(1)

Indicia of undue influence exists where will provisions are unnatural, dispositions of will are at variance with decedent's intentions as expressed before and after execution of will, relationship between chief beneficiaries and decedent afford to beneficiaries opportunity to control the testamentary act, decedent's mental and physical condition permit subversion of his freedom of will, and chief beneficiaries are active in procuring execution of the instrument.

7. Wills 🔑157

Where, from date of her admission to a rest home until her death in the rest home nine days later, patient was subjected to religious teachings by nurses in the home, by a practitioner, and by loudspeaker system in patient's room, the practitioners who attended the patient and the agents of the home and of the particular church involved, which was named as a beneficiary in patient's will along with the home, held a confidential relationship to the patient as religious counselors.

8. Evidence 🔑183(3)

Question of sufficiency of preliminary proof of loss of document, before testimony as to its contents may be received, is addressed to trial judge's sound discretion.

9. Wills 🔑384

In probate proceeding in which earlier will was admitted to probate over subsequent will on ground that testatrix was mentally incompetent and unduly influenced at time of execution of subsequent will, trial judge's determination that substantial evidence had been introduced to show destruction of letter written by testatrix to her son, as prerequisite to testimony as to its contents, would not be disturbed on review, in absence of showing that proof of destruction was manifestly insufficient.

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Charles E. Burch, Jr., and John Mason Jeffrey, San Diego, for appellants.

David H. Thompson, San Diego, for respondent.

MUSSELL, Justice.

This is an appeal from a judgment and order denying admission to probate of a will executed by the decedent on June 13, 1956, and admitting to probate a will executed by her on July 19, 1944. The trial judge found that the testatrix was incompetent to make the will of June 13, 1956, due to her mental and physical condition and that she was subjected to restraint and undue influence on the part of the agents, employees, officers and members of the Sunland Home Foundation, Inc. and the Second Church of Christ Scientist of San Diego, appellants herein.

Alice Catherine Bourquin, aged 65, died June 13, 1956, leaving surviving her as her sole heir at law a married son, Paul Eugene Bourquin, 39 years of age, contestant herein. Her husband, Albert Georges Bourquin, died on July 5, 1955, after a heart attack. Mrs. Bourquin left an estate appraised at $32,992.14. It consisted of bank accounts totaling $1,798.69, corporate stock valued at $13,593.96, a 1950 Chevrolet automobile, household furniture and furnishings, real property valued at $16,000, and miscellaneous personal property.

In her will of June 13, 1956, the testatrix gave the sum of $3,000, certain cemetery lots, and miscellaneous personal property to her son, Paul. Her car was given to her friend, Jeanne Belanger. The sum of $2,000 was given to the Second Church of Christ Scientist of San Diego. The rest and remainder of her estate was given to the Sunland Home Foundation and the will further provided that in the event that distribution could not be made to said church, the remainder of her estate was given to the San Diego State College, a state institution. This latter provision was inserted in the will by the attorney who drew it to validate the bequest to the Sunland Home Foundation in the event the testatrix died within thirty days from the date of the execution of the will.

In the summer of 1954 Mrs. Bourquin suffered a heart attack and was hospitalized at Paradise Valley Sanitarium in Chula Vista, California. Her condition improved and she returned to her home, although she had a greatly enlarged heart. On May 29, 1956, she suffered a major heart attack at her home and was taken to Villa View Hospital in San Diego where she was placed under the care of Dr. Harvey Gassman, an internist specializing in cardiology. The doctor found her to be in a critical condition. "She was orthopneic and cyanotic. Her lips were blue. She had a rapid respiratory rate. The heart was tremendously enlarged and dilated. There was evidence of congestion in both lungs and there was impairment as far as her ability to talk and give concise history due to gasping respirations." She had pitting of the extremities and "the urinary analysis showed evidence of albumen, which meant there was some evidence of arteriosclerosis in the arteries of the kidney." An electrocardiogram was taken which "showed a left bundle branch block with hypertrophy and strain, which means it shows a heart that has been tremendously strained for a period of years due to hypertension and coronary insufficiency." Dr. Gassman's diagnosis was "one of arteriosclerotic heart disease" and he prescribed bed rest, digitalis, low salt diet and mercuhydrin, together with oxygen when necessary. In this connection the doctor testified that the result of this treatment, while at Villa View Hospital, was that the congestion which was found at the time of initial examination had disappeared and that the dyspnea, orothopnea and cyanosis had subsided, and the pitting edema of her extremities had also disappeared.

On June 4, 1956, Mrs. Bourquin had improved and Dr. Gassman authorized her to be taken to the Bel-Air Terrace, an adjoining hospital, where she could be given her medication and diet. On that date the doctor made the following entry on the Villa View Hospital record: "Patient has improved but is in need of convalescent care and must be taking her digitalis every day in order to prevent recurrent heart failure."

On June 4, 1956, the testatrix, in the company of a Christian Science practitioner and a Christian Science nurse, went to the Sunland Home, a Christian Science rest home operated by Sunland Home Foundation, Inc., and from that date until her death on June 13, 1956, she received no medication or medical services. The record shows that doctors were not permitted to treat patients in the Sunland Home.

Mrs. Bourquin was found dead in her room at 3:45 p. m. on June 13, 1956, by one of the nurses at the home. The coroner of San Diego county, after an investigation by one of his autopsy staff, reported the cause of her death to be acute pulmonary edema due to cardiac failure, due to arteriosclerotic heart disease.

Mrs. Gillard, who was manager of the Sunland Home, stated in her deposition that one day when she went to Mrs. Bourquin's room Mrs. Bourquin asked her to call a lawyer and stated that she did not have one and did not know anyone, and that she wished to change her will. At the trial Mrs. Gillard testified that Mrs. Bourquin asked her what lawyer she and her husband used and Mrs. Gillard told her that she knew of two attorneys who belonged to her church and named Mr. John Jeffrey, who had provided legal services for the home on several occasions.

On June 12, 1956, Mr. Jeffrey received a call from Mrs. Gillard at about 8:00 or 9:00 p. m. in which she asked him to come to the home to draw a will for a lady. He agreed to go and asked if there were any urgency about it, to which Mrs. Gillard replied, "None that she knew of, but that, of course, it was a heart case." Mr. Jeffrey arrived at the home at about 8:30 a. m. on June 13, 1956, discussed the terms of the will with Mrs. Bourquin for about fifteen minutes, and then typed it on his own portable typewriter which he had brought with him for that purpose. The will was then signed and witnessed and taken by Mr. Jeffrey to his office.

The principal question on this appeal is whether there is substantial evidence in the record supporting the finding of the trial court that the testatrix was incompetent to make her will of June 13, 1956. There is a conflict in the evidence in this connection. The witnesses to the will and others connected with the Second Church of Christ Scientist or the Sunland Home testified that Mrs. Bourquin was competent at all times from June 4 until the time of her death and that they saw no evidence of any change in her condition or any particular breathing difficulties. However, Mrs. Jeanne Belanger, a close friend of decedent, visited her at 3:00 p. m. on June 13, 1956, and testified as to her condition as follows:

> "Q. Now would you describe very carefully to the Court the condition Mrs. Bourquin was in when you saw her at 3:00 o'clock that afternoon? A. Well, she was sick, very, very sick. And she just can't breathe. Her lips was purple. Skin very white and—she would take about twenty seconds before she could say a word, you know, just try to talk. So she said, the first word she said, she says, 'I wish I be in my home,' she says. 'I need oxygen.' So I said, 'I going to call the doctor for you.' She then told me, 'They don't want to let any doctor come in here.'"

The record shows that Mrs. Bourquin had consulted Mr. Hussey, an attorney in Lemon Grove, on two occasions, on September 1 or 2, 1955, at which time she inquired as to the necessity of probating her husband's will and again in March, 1956, to inquire whether it would be necessary for her to make a will more recent than the one which she had made on July 19, 1944. This was the will which was admitted to probate herein by the trial court. Mr. Hussey asked her if she wanted her property to go to her son, Paul, and when she answered in the affirmative, he advised her that no additional will would be necessary.

It further appears that Mrs. Bourquin requested Mr. Jeffrey to provide in her will that all her cemetery lots at Valley Forge, Pennsylvania, approximately twelve in number, be bequeathed to her son, when in fact she owned twenty-one cemetery lots at Valley Forge; that she did not inform Mr. Jeffrey that her estate included corporate stock of a value in excess of $13,500; that she did not tell him that there were 100 shares of Investment Company of America stock standing in her name, and that these shares belonged to Mrs. Belanger; and that she did not inform him that she had previously made a will leaving all her property to her son, Paul. Mrs. Belanger testified in this connection that at about 3:00 p. m. on June 13, 1956, Mrs. Bourquin asked her to go and get one of her stocks, that she thought she didn't have enough money in her savings account to pay the bill. The record shows that Mrs. Bourquin had $1,798.69 in the bank at that time and that her total outstanding bills amounted to $380.24.

The testimony also indicates that Mrs. Bourquin read the will when it was presented to her for signature and failed to observe that her middle name was misspelled in the caption and in the first sentence of the will. In furnishing information for her admission to the Sunland Home, Mrs. Bourquin stated that she was born on March 2, 1881, when in fact her birthdate was ten years later. She also stated that her son had attended Christian Science Sunday School for a period of seven years, when in fact he had attended said school for a period of eight months only. The record further shows that the testatrix had made the statement to one of the witnesses that her son had lied to her and that this statement was not true.

Mildred Dilley, one of the decedent's neighbors, testified that after Mr. Bourquin's death in 1955, Mrs. Bourquin became physically weaker; that her mental outlook changed; that she became irritable; that she became critical of other people and dissatisfied with everybody and everything; that she visited Mrs. Bourquin at the Sunland Home and observed that she was very tired and was gasping for breath. Lillian Nachison, another neighbor, testified that after 1955 she noticed a change in Mrs. Bourquin; that she became more irritable with everyone around her.

Mr. Blanc, who had known the decedent for many years, testified that he visited her at the Sunland Home on June 6, 1956; that Mrs. Bourquin was then very ill; that she could not get her breath; that she could hardly talk without gasping for breath; that her lips were purple and her face and neck were swollen. Mrs. Blanc testified that she was present on this occasion and that Mrs. Bourquin was much worse than she was when she was at the other hospital; that she was perspiring, talked nervously, and was short of breath; that her hands were clammy and her face very white.

Evidence was also introduced to the effect that Mrs. Bourquin's condition became worse after June 8, 1956; that she had spells of heavy coughing and vomiting and that a special nurse was in attendance.

Dr. Gassman, basing his testimony upon that of the contestant's witnesses concerning the physical and mental condition of Mrs. Bourquin prior to May 29, 1956, his examination of the Paradise Valley Hospital records of her hospitalization in 1954, his own examination and treatment of the decedent from May 29, 1956, to and including June 4, 1956, his examination of the nurses' records and other hospital records of the Sunland Home covering the period from June 4 to and including June 13, 1956, and upon the testimony of contestant's witnesses concerning their observations of her physical condition during a portion of the latter period, and the coroner's report, testified unequivocally that Mrs. Bourquin could not have had sufficient mental ability at 10:00 a. m. on June 13, 1956, to understand the nature of the act of making a will, to understand the extent and character of her property, and to understand her relation to the persons who had claims on her bounty or whose interests were affected by such act. He further testified that this would have been true for a period of at least twelve hours prior to her death. He further testified as follows:

> "Judging from the complexity of the will that was just read to me and concentrating as much as I was possibly able to do so, try to understand everything, judging from the evidence that was given to me as far as the patient's condition and the time she expired in relationship to this will with the time she expired, I would say she was not mentally competent enough to comprehend the contents of that will."

In this connection, Dr. Edgar, who was called as a witness for the proponents, in testifying as to the cause of Mrs. Bourquin's death, stated as follows:

> "Well, I think from my examination of these records that it can be very little doubt that she did die of the cause as stated in the autopsy report, namely, complication of *atherosclerotic* heart disease. Dr. Gassman had indicated that in his opinion, this is when she left the hospital, if she did not continue her medication she would certainly suffer a relapse, and I think he was correct, I think that is what happened."

[1–3] It is not within our province to here decide whether the testatrix was competent to execute the will dated June 13, 1956. That question is one of fact for the trial judge. As was said in Re Estate of Frank, 102 Cal.App.2d 126, 226 P.2d 767, 768:

> "The function of an appellate court is no different on an appeal from a judgment denying probate of a will because of mental incompetency than in any other case. 'All conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge or jury. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384.' In re Estate of Trefren, 86 Cal.App.2d 139, 142, 194 P.2d 574, 575."

It was further said in that case that

> "While it is true that the critical inquiry in determining the mental capacity of a person to execute a will is his condition of mind at the time of its signing, nevertheless, proof of the unsoundness of mind of a testator and of the facts upon which his state of mind depends is not necessarily confined to the exact time of the execution of the will. Evidence of the testator's mental status, together with his appearance, conduct, acts, habits and conversation, both before and after the execution of the will, are admissible so long as they have a reasonable tendency to indicate his mental condition at the time the will was executed. (Citations.)"

and that

> "The testimony of witnesses who were present at the time of the execution of a will as to the soundness of mind of the testator is not conclusive against the testimony of other witnesses who saw the testator within a few days of the execution of the will and the other circumstances in the case."

In Re Estate of Sexton, 199 Cal. 759, 764, 251 P. 778, 780, it is said:

> "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to under-

> stand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument."

In Re Estate of Fosselman, 48 Cal.2d 179, 185, 308 P.2d 336, 340, it is held that "Testamentary incompetency on a given day, however, may be proved by evidence of incompetency at times prior to and after the day in question."

[4] A review of the entire record herein under the rules stated leads us to the conclusion that we cannot hold as a matter of law that there is no substantial evidence to support the finding of the trial judge that the testatrix was not competent to make a will on June 13, 1956, because of her condition of extreme mental and physical weakness.

Appellants assert that the testimony of Dr. Gassman does not amount to substantial evidence of incompetency of the testatrix to make a will. Citing In re Estate of Bullock, 140 Cal.App.2d 944, 295 P.2d 954, 297 P.2d 633, wherein it was held that the conclusion of a doctor that the testatrix was incompetent to make a will amounted to no more than his belief that she was of unsound mind in the medical sense. However, as the court remarked, the doctor was not asked whether or not the testatrix was capable of recalling the nature and extent of her estate, the natural objects of her bounty, and of understanding the nature of the act she was doing, and in the absence of evidence to the contrary, it must be presumed that she did. In the instant case, the legal question referred to was asked of Dr. Gassman and answered by him. He was thoroughly aware of the serious condition of the testatrix while she was in the Villa View Hospital under his care a few days before her death. He testified that in his opinion Mrs. Bourquin was suffering from cerebral anoxia during her entire stay at the Sunland Home; that she suffered from an impaired oxygenation due to decreased circulation and pulmonary congestion and that her speech and judgment was impaired; that her condition became more acute and that her judgment was reduced sufficiently to make her mentally incompetent to comprehend the act of making a will for at least twelve hours before her death. Dr. Edgar, appellant's own witness, agreed with Dr. Gassman in the opinion that if Mrs. Bourquin did not continue her medication when she left the hospital, she would certainly suffer a relapse, and that that is what happened.

[5, 6] There is also substantial evidence to support the findings and judgment of the trial judge that the will involved was the result of undue influence. The indicia of undue influence have been stated as follows: In re Estate of Lingenfelter, 38 Cal.2d 571, 585, 241 P.2d 990, 999,

> "'(1) The provisions of the will were unnatural. * * * (2) The dispositions of the will were at variance with the intentions of the decedent, expressed both before and after its execution. (3) The relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control the testamentary act. (4) The decedent's mental and physical condition was such as to permit a subversion of his freedom of will. And (5) the chief beneficiaries under the will were active in procuring the instrument to be executed.' In re Estate of Yale, 214 Cal. 115, 122, 4 P.2d 153, 155. These, coupled with a confidential relationship between at least one of the chief beneficiaries and the testator, altogether were held 'sufficient to shift the burden to the proponents of the will to establish an absence of undue influence and coercion and to require the issues to be determined by the jury.' Estate of Yale, supra, 214 Cal. at page 123, 4 P.2d [153] at page 156."

In the instant case the record shows that the testatrix, having previously willed all her property to her only son, gave the bulk of her estate to the Sunland Home Foundation by the will involved and to the San Diego State College in the event that distribution could not be made to the Second Church of Christ Scientist.

[7] The record shows that from June 4, 1956, until the date of her death the testatrix was subjected to Christian Science teachings by nurses in the Sunland Home or by a Christian Science practitioner and also by a loud speaker system in her room. The record indicates that the Christian Science practitioners who attended the testatrix and the agents, employees and/or officers of the Sunland Home Foundation and Second Church of Christ Scientist held a confidential relationship to the testatrix as religious counselors. There is evidence that those in charge of the testatrix at the home did not advise her son of her dangerous condition and that the switchboard operator at the home was instructed by the manager to allow the testatrix no visitors or telephone calls after about June 10, 1956. There is evidence that Mrs. Bourquin's mental and physical condition while at the Sunland Home was such as to permit subversion of her freedom of will and in this connection Dr. Edgar testified that Mrs. Bourquin's disease was one that made her more susceptible to influence than if she did not have the disease and that a suggestion coming from a person occupying a dominant position, such as an attorney, a doctor, a teacher, or close friend, would influence her more than a stranger would.

There is evidence that the chief beneficiaries under the will were active in procuring its execution. Mrs. Gillard recommended and called the attorney, Mr. Jeffrey, who was a member of the Christian Science Church, to prepare the will and it was prepared under his direction. In Re Estate of Pellegrini, 138 Cal.App.2d 143, 145, 291 P.2d 558, 559, it was held that

> "'* * * [w]here one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the testamentary document was not induced by coercion or fraud. When proof of the existence of a confidential relationship between the testator and such a beneficiary (one who unduly profits by the will), coupled with activity on the part of the latter in the preparation of the will, is offered, a presumption of undue influence arises therefrom.' (Citations.) 'The rule is firmly established in California that when the contestant has shown that the proponent of a will sustains a confidential relationship toward the testator, and actively participates in procuring the execution of the will, and unduly profits thereby, the burden then shifts to the proponent to prove that the will was not induced by his undue influence. (Citations.)'"

In Re Estate of Anderson, 185 Cal. 700, 708–709, 198 P. 407, 411, it is said:

> "'Evidence must be produced that pressure was brought to bear directly upon the testamentary act; but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. * * *'"

Under the facts and circumstances here shown we cannot say as a matter of law that the finding of undue influence is not supported by substantial evidence.

[8, 9] Appellants claim that the court erred in permitting the introduction of secondary evidence of a letter written by the testatrix to her son, Paul. This letter was destroyed by him and he testified in general as to its contents. However, his testimony in this connection indicates that the letter was destroyed prior to any knowledge on his part of the existence of the will in question and it does not appear that there was any prejudicial error in the admission of oral testimony as to the contents of the

letter. As is said in Hausen v. Goldman, 124 Cal.App.2d 25, 30, 267 P.2d 852, 855:

> "The rule is established in California that the sufficiency of the preliminary proof of the loss of a document before testimony as to its contents is received is addressed to the sound discretion of the trial judge (Citation.), and that the determination of the trial judge that substantial evidence has been introduced to show the loss or destruction of the original document will not be disturbed by an appellate court, in the absence of a showing that the proof of loss or destruction was manifestly insufficient (Citations)."

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

161 Cal.App.2d 224

Herman E. HETZEL, Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD, Defendant and Respondent.

John O. Paulston, amicus curiae.

Civ. 22876.

District Court of Appeal, Second District, Division 2, California.

June 10, 1958.

Rehearing Denied July 2, 1958.

Hearing Denied Aug. 7, 1958.

Suit by taxpayer to recover an amount paid on account of the principal of additional personal income taxes for the calendar year 1951. From a judgment of the Superior Court, Los Angeles County, Leon T. David, J., dismissing the complaint, the plaintiff appealed. The Court of Appeal, Kincaid, J., pro tem., held that statute providing that in computation of net income no deduction should be allowed on gross income derived from specified illegal activities nor on income from activities tending to promote the specified illegal activities does not violate equal protection of law clause of the Fourteenth Amendment or state constitutional provisions requiring that laws shall have a uniform operation, that they shall have but one subject to be expressed in the title and prohibiting local and special laws and that the statute was not otherwise invalid.

Judgment affirmed.

1. Taxation 🔑1040

In view of illegality of bookmaking, wagering losses sustained by bookmaker in 1951 were not deductible in computation of bookmaker's personal income tax. West's Ann.Pen.Code, § 337a; West's Ann. Rev. & Tax.Code, § 17297.

2. Taxation 🔑2

A state has inherent power to levy taxes without special constitutional grant.

3. Taxation 🔑957

Legislature had power in taxing income derived from wagering transactions to disallow any deduction for losses sustained in defined illegal activities. West's Ann.Rev. & Tax.Code, § 17297; West's Ann.Const. art. 13, § 11.

4. Constitutional Law 🔑229(1)
Statutes 🔑74(1), 95(1), 121(1)
Taxation 🔑957

Statute providing that in computing net income no deduction should be allowed on gross income derived from specified illegal activities or from activities tending to promote the specified illegal activities does not deny equal protection of the laws or violate state constitutional provisions requiring laws of a general nature to have uniform operation, prohibiting passage of local or special laws in certain enumerated cases and requiring acts to embrace but one subject to be expressed in title. West's Ann.Rev. & Tax.Code, § 17297; U.S.C.A. Const. Amend. 14; West's Ann.Const. art. 1, § 11; art. 4, §§ 24, 25.

5. Constitutional Law ⚿283

Taxation ⚿957

Statute providing that in computing net income no deduction should be allowed on gross income from specified illegal activities or from activities tending to promote the specified illegal activities is not invalid on ground that it constitutes a penalty for violation of state law rather than a tax, and it does not deprive taxpayer of property without due process of law. West's Ann. Rev. & Tax.Code, § 17297.

◆

Riley & Hall, and B. H. Neblett, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondents.

John O. Paulston, Los Angeles, for amicus curiae.

KINCAID, Justice, pro tem.

Appellant (hereinafter called Hetzel) sues for a refund of $500 paid to the Franchise Tax Board (hereinafter called the Tax Board) on account of the principal of additional personal income taxes of $14,330.11 for the calendar year 1951.

The appeal is on the judgment roll from a judgment dismissing the complaint. The record consists of the complaint, answer, appellant's motion for judgment on the pleadings, and respondent's countermotion for judgment on the pleadings. Appellant's motion was denied and respondent's motion granted, dismissing the complaint.

The undisputed material facts are as follows:

[1] During the year 1951 Hetzel was engaged in the bookmaking business in the city of San Diego, California. Bookmaking in 1951 was illegal in the State of California under the provisions of section 337a of the Penal Code. Except for an item of income from a trust amounting to $18.68 his bookmaking activities were his only source of income. Hetzel on his California personal income tax return for 1951 reported the amount of $15,859.49 as net profit from his bookmaking business. On a supporting schedule attached to the return he reported winnings of $482,829.60, losses of $466,970.11, and a net profit of $15,859.49. No deductions other than the wagering losses were claimed on the return.

The Tax Board, in auditing Hetzel's return for 1951, recomputed his net income by disallowing all wagering losses sustained subsequent to the effective date of section 17359 of the Revenue and Taxation Code Personal Income Tax Law, effective May 3, 1951. This adjustment increased his income to $257,905.63 and resulted in additional assessment against him in the amount of $14,330.11.

Hetzel filed a protest with the Tax Board as to the proposed additional assessment, which protest was denied and thereafter he filed an appeal with the State Board of Equalization. Hetzel's contentions were rejected by that board. On October 27, 1955, he paid $500 on account of the principal of the additional tax assessed in the amount of $14,330.11 for the taxable year 1951 which said amount was then and there accepted by the Tax Board. Thereafter, on December 27, 1955, he filed with the Tax Board a claim for refund in the amount of $500. The Tax Board failed to take action on the claim within six months after it was filed. Hetzel considered the claim disallowed, as prescribed in section 19085 of the Revenue and Taxation Code, and filed this action.

In considering the principal questions presented by this appeal, we have before us certain provisions of the personal income tax law contained in the Revenue and Taxation Code of the State of California. Chapter 4 provides: "Deductions from Gross Income. Article 1. Items Deductible * * * § 17308. Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions."

The statute was adopted following the 1934 congressional enactment of the provision which became section 23(h) of the

Internal Revenue Code of 1939, 26 U.S.C.A. § 23(h) and is in the identical language of such enactment.

In 1951 section 17359 was added by the Legislature as a part of chapter 4 under article 2. "Items not Deductible * * * § 17359. * * * In computing net income no deductions shall be allowed to any taxpayer on any of his gross income derived from illegal activities as defined in Chapters 9, 10, or 10.5 of Title 9 of Part 1 of the Penal Code of California; nor shall any deductions be allowed to any taxpayer on any of his gross income derived from any other activities which tend to promote or to further, or are connected or associated with, such illegal activities." (Added by Stats. 1951, p. 496, effective May 3, 1951.)[1]

As many of the provisions of the federal and California income tax laws are identical, the latter being in large part based upon the former, we may first consider the pertinent federal provision and thereafter the California statutes.

Prior to the enactment of section 23(h) in 1934 the Board of Tax Appeals had decided that gains from illegal wagering constituted income only to the extent that they exceeded wagering losses. James P. McKenna, 1925, 1 B.T.A. 326; Mitchell M. Frey, Jr., Ex'rs, 1925, 1 B.T.A. 338.

The effect of the enactment of section 23(h) was determined in Humphrey v. Commissioner of Internal Revenue, 5 Cir., 162 F.2d 853, 175 A.L.R. 363, certiorari denied, 1947, 332 U.S. 817, 68 S.Ct. 157, 92 L.Ed. 394. In that case the taxpayer was not a professional gambler but had engaged in three wagering transactions. On two winning bets he had made $2,140, but on a losing bet he had lost $3,000. The court held that the $2,140 was gross income and that $2,140 of the $3,000 loss constituted an allowable deduction under section 23(h). The court said (162 F.2d at page 855): "* * * We need not go behind Section 23 as it appears therein. It reads: 'In computing net income there shall be allowed as deductions * * * (h) Wagering Losses. Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions' * * *. Wagering losses are made a class to themselves and 'shall be allowed as deductions', but 'only to the extent of gains from such transactions.' No longer need it be inquired whether the wagers were illegal so that the loss need not have been paid; nor what the state of mind of the taxpayer was as respects his purpose to win a profit. All wagers are by Par. (h) gathered into a class of their own and dealt with as the paragraph states."

It is apparent, accordingly, that by the enactment of section 23(h), Congress overruled the McKenna and Frey cases and specifically changed the definition of gross income there utilized. Thus, gambling losses up to the amount of gambling winnings, formerly considered as *exclusions* from gross income under the McKenna and Frey cases, were now by statutory mandate to be treated as *deductions* from gross income. Moreover, the gambler's use of losses as deductions was limited to his gambling winnings under section 23(h). We find no basis of distinction in applying the rule of the Humphrey case to a professional gambler such as Hetzel as well as to the casual gambler.

Section 17308 of the Revenue and Taxation Code of California, having been taken verbatim from section 23(h) of the federal income tax law, the same rule applies for the imposition of income taxes in this State. Accordingly, wagers lost by gamblers must be regarded as deductions rather than as exclusions from gross income. Following the adoption of section 17308 and prior to May 3, 1951, the effective date of section 17359 of the Revenue and Taxation Code, the winnings and losings of all gamblers, whether such wagers were made at legally licensed establishments or by bookmakers or other illegal means, were treated accordingly for income tax purposes.

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[1] By virtue of Statutes 1955, chapter 939, effective June 6, 1955, section 17308 was renumbered as section 17206(d) and section 17359 was renumbered as section 17297 of the Revenue and Taxation Code.

By the enactment of section 17359 the Legislature of this State manifestly has expressed its intention to segregate from items deductible, another class of income for income tax purposes. In computing net income it proscribes the allowance of deductions to a taxpayer on any of his gross income derived from certain defined illegal activities or from any other activities which tend to promote or to further or are connected or associated with, such activities. Those defined illegal activities are set forth in chapter 9 (lotteries), chapter 10 (gaming, including bookmaking), and chapter 10.5 (touting and unlicensed acts relating to horse racing), of title 9, part 1 of the Penal Code of California.

By enacting section 17359 the Legislature has expressed its clear intention not only that that portion of the gross income of a bookmaker which represents his illegal winnings is the total of such winnings without exclusion of bets lost, but also that bets lost by a bookmaker are not deductible from his gross income for income tax purposes. There is no provision comparable to section 17359 in the federal income tax law.

No question is raised here as to the power of both the Congress and the State Legislature to set apart wagering losses as a separate class of income deduction.

[2] We are here concerned with the power of a state to levy a tax which is inherent and requires no special constitutional grant. Thus, it was said of the California Constitution in Roth Drug, Inc., v. Johnson, 1936, 13 Cal.App.2d 720, 740, 57 P.2d 1022, 1031: "The Constitution is deemed to be a reservation of authority rather than a delegation or grant of power, and, consequently, the Legislature may be authorized to enact laws which are otherwise valid, when the Constitution fails to prohibit such enactments."

Apart from the inherent power of the Legislature to tax, section 11 of article XIII of the California Constitution buttresses the power of the Legislature to levy income taxes in extremely broad language as follows: "Income taxes may be assessed to and collected from persons, corporations, joint-stock associations, or companies resident or doing business in this State, or any one or more of them, in such cases and amounts, and in such manner, as shall be prescribed by law."

[3] Thus the Legislature has the power in taxing income derived from wagering transactions to disallow any deduction for losses sustained in defined illegal activities. As said by Mr. Justice Douglas in the recent United States Supreme Court Case of Commissioner of Internal Revenue v. Sullivan, 356 U.S. 27, 78 S.Ct. 512, 514, 2 L.Ed. 2d 559: "Deductions are a matter of grace and Congress can, of course, disallow them as it chooses." He then points out that under the Treasury Regulations adopted pursuant to the United States Internal Revenue Code normal deductions of rent and wages necessary to operate an alleged illegal gambling enterprise are deductible unless it is clear that the allowance is a device to avoid the consequences of violations of a law or otherwise contravene the federal policy expressed in a statute or regulation as in Textile Mills Sec. Corp. v. Commissioner of Int. Rev., 314 U.S. 326, 62 S.Ct. 272, 86 L.Ed. 249.

In the latter case the court upheld a regulation forbidding the deduction of expenses for lobbying purposes. It was cited with approval in Tank Truck Rentals v. Commissioner, 356 U.S. 30, 78 S.Ct. 507, 2 L.Ed.2d 562, decided by the United States Supreme Court in conjunction with Commissioner v. Sullivan, supra, and Hoover Motor Express Co. v. U. S., 356 U.S. 38, 78 S.Ct. 511, 2 L.Ed.2d 568.

In the Tank Truck Rentals case the court was considering the question as to whether fines paid by interstate motor carriers for violation of state maximum weight laws were deductible business expenses for federal tax purposes. In holding that, even without a prohibitory statute, such fines were not properly deductible, the court, speaking through Mr. Justice Clark, said [356 U.S. 30, 78 S.Ct. 509]: "It is clear that the Congress intended the income tax laws 'to tax earnings and profits less expenses and losses, (citation)', carrying out a broad basic policy of taxing 'net, not * * * gross, income * * *.' (Citation.) Equally well established is the rule that deductibility under § 23(a) (1) (A) is limited to expenses that are both ordinary and necessary to carrying on the taxpayer's business. (Citation.) A finding of 'necessity' cannot be made, however, if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof. Commissioner v. Heininger, 1943, 320 U.S. 467, 473, 64 S.Ct. 249, 253, 88 L.Ed. 171; see Lilly v. Commissioner, 1952, 343 U.S. 90, 97, 72 S.Ct. 497, 501, 96 L.Ed 769. This rule was foreshadowed in Textile Mills Securities Corp. v. Commissioner, 1941, 314 U.S. 326, 62 S.Ct. 272, 86 L.Ed. 249, where the Court, finding no congressional intent to the contrary, upheld the validity of an income tax regulation reflecting an administrative distinction 'between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction.' 314 U.S. at page 339, 62 S.Ct. at page 280. Significant reference was made in Heininger to the very situation now before us; the Court stated, 'Where a taxpayer has violated a federal or a state statute and incurred a fine or penalty he has not been permitted a tax deduction for its payment.' 320 U.S. at page 473, 64 S.Ct. at page 253.

"Here we are concerned with the policy of several States 'evidenced' by penal statutes enacted to protect their highways from damage and to insure the safety of all persons using them. Petitioner and its drivers have violated these laws and have been sentenced to pay the fines here claimed as income tax deductions. It is clear that assessment of the fines was punitive action and not a mere toll for use of the highways: the fines occurred only in the exceptional instance when the overweight run was detected by the police. Petitioner's failure to comply with the state laws obviously was based on a balancing of the cost of compliance against the chance of detection. *Such a course cannot be sanctioned, for judicial deference to state action requires, whenever possible, that a State not be thwarted in its policy. We will not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State. To allow the deduction sought here would but encourage continued violations of state law by increasing the odds in favor of noncompliance.* This could only tend to destroy the effectiveness of the State's maximum weight laws.

"This is not to say that the rule as to frustration of sharply defined national or state policies is to be viewed or applied in any absolute sense. 'It has never been thought * * * that the mere fact that an expenditure bears a remote relation to an illegal act makes it nondeductible.' Commissioner v. Heininger, supra, 320 U.S. at page 474, 64 S.Ct at page 253. Although each case must turn on its own facts (citation), the test of nondeductibility always is the severity and immediacy of the frustration resulting from allowance of the deduction. The flexibility of such a standard is necessary if we are to accommodate both the congressional intent to tax only net income, *and the presumption against congressional intent to encourage violation of declared public policy.*

"*Certainly the frustration of state policy is most complete and direct when the expenditure for which deduction is sought is itself prohibited by statute.* (Citation.)" (Italics supplied.)

The State of California, by adopting section 17359, has specifically declared a policy against allowance by way of income tax deductions, of income derived from defined illegal activities. Such income is received by way of winnings and paid out as losses in direct violation and contravention of the statutes contained in chapter 10, title 9, part 1 of the Penal Code of this State.

Judicial deference requires that the State not be thwarted in its policy of discouraging continued violations of the State law by refusing the allowance by way of income tax deductions of income received from such defined illegal activities. As indicated by Mr. Justice Clark such an allowance would but encourage continued violations of the law by increasing the odds in favor of noncompliance.

[4] We find no merit in the argument of appellant that section 17359 is violative of the equal protection clause of the 14th Amendment of the Constitution of the United States or of article I, section 11, or article IV, sections 24, 25, of the Constitution of California.

[5] Hetzel argues that section 17359, as construed and applied by respondent, is not a true tax but is a penalty for a violation of state law and as such is beyond the power of the Legislature to impose in an income tax statute. In contending that such a tax deprives him of his property without due process of law as that term is used and understood in the state or federal Constitutions he relies strongly on United States v. Constantine, 296 U.S. 287, 56 S. Ct. 223, 80 L.Ed. 233.

In United States v. Smith, D.C., 106 F. Supp. 9, the federal statute imposing an annual occupation tax on persons engaged in wagering was upheld as not contravening constitutional provisions. We are in accord with Chief Judge Yankwich in that case when he said (at pages 12–13): "We believe that whatever force the Constantine case has is gone, and that it is no longer binding authority on this court.

"In the light of the principles just declared, there is no infirmity in the tax under attack. The tax was enacted after the extensive hearings of the Kefauver committee showed the nefarious activities of some of the persons engaged in wagering. If the Congress by taxing the activity sought to discourage it, it acted within its constitutional powers. For, as amply appears, the Congress may use the power to tax in order to bear more heavily on certain activities as it has done in taxing state bank issues of circulating notes, dealings in narcotics, firearms and even the sale of harmless oleomargarine.

"The wise words of Mr. Justice Cardozo's dissent in United States v. Constantine, *represent correctly the law as it is today*:

"'Congress may have held the view that an excise should be so distributed as to work a minimum of hardship; that an illegal and furtive business, irrespective of the wrongdoing of its proprietor, is a breeder of crimes and a refuge of criminals; and that in any wisely ordered polity, in any sound system of taxation, men engaged in such a calling will be made to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful.

"'Thus viewed the statute was not adopted to supplement or sanction the police powers of the states or of their political subdivisions. It was adopted for anything disclosed upon its face or otherwise, as an appropriate instrument of the fiscal policy of the nation. * * *'"

So here the record discloses that section 17359, enacted at the 1951 legislative session, had its origin in a study by and recommendation of the Special Crime Study Commission on Organized Crime created by executive order of the Governor. This commission was directed to include in its reports "the measures considered by the commission to be appropriate for recommendation to the executive, legislative and judicial departments of the State, with the object of eradicating groups organized for unlawful purposes from this State and providing increased protection for the people of the State against the inroads of organized crime." From the study and the direct recommendations of the commission it is clear that the Legislature intended not only to bring increased revenue into the treasury of the State by way of income tax but, incidentally in so doing to discourage and blight the nefarious activities of some persons who were directly and knowingly violating the penal statutes of the State. In so doing it acted within its constitutional powers.

We have considered the other incidental points raised by appellant and by *amicus curiae* but deem them of no merit and that further discussion as to them is unnecessary.

The judgment is affirmed.

FOX, P. J. and HERNDON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

161 Cal.App.2d 137

Application of Barbara Ann BURNS, for a Writ of Habeas Corpus.

Cr. 6279.

District Court of Appeal, Second District, Division 3, California.
June 6, 1958.

Proceeding in habeas corpus to secure release from custody of minor, who was adjudged in contempt of court for being late in her appearance as a witness at an adjourned session of the superior court. The District Court of Appeal, Shinn, P. J., held that there was no evidence of willful disobedience of court order.

Order annulled and petitioner discharged from custody.

1. Contempt 🔑6, 20
Obstructing Justice 🔑6

Tardy appearance in court if not willful is not a criminal offense nor does it, alone, constitute a contempt of court, even if it falls short of prompt compliance with process or orders of court. West's Ann. Pen.Code, § 166; West's Ann.Code Civ. Proc. §§ 177, subd. 2, 178, 1991.

2. Contempt 🔑20

Word "willful" as pertaining to contempt would not be construed as meaning only a deliberate intention to disregard court order, but rather as encompassing an indifferent disregard of duty to obey it promptly. West's Ann.Pen.Code, § 166; West's Ann.Code Civ.Proc. §§ 177, subd. 2, 178, 1991.

See publication Words and Phrases, for other judicial constructions and definitions of "Willful".

3. Contempt 🔑40, 60(1)

Proceeding in contempt is essentially criminal in character and accused has the benefit of presumption of innocence. West's Ann.Pen.Code, § 166.

4. Contempt 🔑2, 61(1)

Intent to commit forbidden act resulting in contempt is as essential to guilt as in case of criminal offense and accused must be accorded the same opportunity to defend against charge of indirect contempt, as in a criminal prosecution for contempt as a misdemeanor or any other criminal offense. West's Ann.Pen.Code, § 166.

5. Contempt 🔑20, 30, 61(1)

Power to punish for contempt is a drastic remedy to be employed only when necessary to proper and orderly conduct of judicial proceedings, and charge of contempt of court must be considered as judicially as question of guilt of any criminal offense must be and judge may not punish for contempt merely because he has suffered some annoyance through failure of some order he has made to receive instant observance. West's Ann.Pen.Code, § 166.

6. Habeas Corpus 🔑85.4(5)

In proceeding for habeas corpus to secure release of minor who had been adjudged to be in contempt of court for being late in her appearance as a subpoenaed witness at an adjourned session of the superior court, there was no evidence of willful disobedience of court's order. West's Ann.Pen.Code, § 166.

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Harry E. Weiss, Los Angeles, for petitioner.

William B. McKesson, Dist. Atty., of Los Angeles County, Los Angeles, Ralph F. Bagley, Deputy Dist. Atty., Glendale, for respondent Sheriff.

SHINN, Presiding Justice.

Barbara Ann Burns, a minor, was adjudged to be in contempt of court for being late in her appearance as a witness at an adjourned session of the Superior Court, and she was sentenced to serve five days in jail.

We issued habeas corpus; a return was filed by the sheriff; the cause came on for hearing; it was stipulated that the petition be deemed a traverse to the return. Argument was heard and the matter was submitted.

The record discloses the following facts. On April 3, 1958, there were pending in the Superior Court two actions in which David James Mack was a defendant, one a prosecution for violation of the narcotic laws, the other a hearing relative to alleged violation of probation. These matters were continued to April 28. Barbara Ann Burns was under subpoena as a witness for the People. Some time before April 28 she was ordered to show cause why she should not testify in the trial of Mack, a proceeding authorized by Section 1324 of the Penal Code. The matters before the court on April 28 were continued to May 12 at 9 a. m. Miss Burns, present with her counsel, Mr. Weiss, and all other witnesses were instructed to return at that time without further order, notice or subpoena. May 12 at 9:35 a. m., the court called People v. Mack, stating "This is the time set for the hearing on the Order to Show Cause as to why Barbara Burns should not testify in these proceedings. Is Miss Burns present?" The prosecutor stated that she was not present and that the hearing had been set for 9 a. m. "The Court: That is correct. It is now 9:35 o'clock." A bench warrant was ordered issued for the arrest of Miss Burns and bail was fixed at $500. Then followed a discussion with respect to a continuance. Present at the time were Mr. Ray Howard, guardian of the person of Miss Burns, and Mr. Weiss, her attorney. The court addressed Mr. Howard: "Do you know where she is?" to which he replied "She lives close in town. I saw her Saturday afternoon late. She was going to talk to Mr. Weiss [her attorney] over the week-end, but I have no idea where she is or why she is not here now." There was further discussion with respect to a continuance. The court then stated: "To keep the record straight, I will set aside the order fixing bail at $500, and instead I will fix bail at $2,000." The matter was ordered continued to May 19 at 9 o'clock. At 9:45, Miss Burns appeared; at 10:02 the court reconvened; the proceedings which followed are set out in the margin.[1]

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[1] "The Court: People of the State of California versus David James Mack. In that matter, this is the time set for the hearing on the Order to Show Cause why Barbara Burns should not testify in these proceedings. This case was called early this morning. Barbara Burns was not present. The clerk informs me that Barabara Burns is now present. Where were you this morning, Miss Burns? Stand up, please. (Miss Burns arose.)

"Miss Burns: (Sobbing out loud while addressing the court) I was home, your Honor, I was supposed to have a ride down from my home. Some friends were to take me down. I thought it was 9:30 o'clock. The people never came after me. So I called my attorney and my guardian. They told me to take a cab and they would pay for it when I got here. The cab is still downstairs.

"The Court: You were here last Monday, were you not?

"Miss Burns: Yes, sir.

"The Court: You heard me order you back here at 9:00 o'clock this morning, did you not?

"Miss Burns: I was so confused.

"The Court: Did you hear me order you back?

"Miss Burns: I heard you order me back, but I don't recall the time, sir. I thought it was 9:30.

"The Court: I told you at 9:00 o'clock. You were present with your counsel. The court finds you in contempt for failing to comply with the court's order.

The court ordered Barbara into the custody of the sheriff, whereupon Mr. Weiss addressed the court and the court responded as follows:

"Mr. Weiss: Your Honor, may counsel respectfully be heard?

"The Court: You may.

"Mr. Weiss: This is not to justify her tardiness to this court but to explain what this girl has been going through. She has been going to doctors and she has been taking treatments. She has been listening to everybody.

"The Court: Everybody but the court.

"Mr. Weiss: I agree with your Honor. She has no money. She called both our numbers, Mr. Howard's and mine. By the time the messages got to us we told her 'Take a cab. We will meet you.' Mr. Howard was looking for the cab. I was looking for the cab. The cab is still waiting downstairs, your Honor. I don't believe this has the element of contempt for this court. She is frightened. She is scared. She would not disregard the court's order. She is a sick girl. It is part of her whole problem, your Honor. I respectfully urge your Honor to withdraw your order sentencing her to five days. She is going to go for treatment with Dr. Knox now. She has undergone a lot and she is trying to rehabilitate herself. If I were of the opinion she was deliberately trying to defy this court, I would be the last to speak up for her. I have not been able to get in touch with her. She has no phone. She lives with someone else. It's been quite a problem all around. She has no family to help her, only her guardian, who tried strenuously to help her as well as he could. If I thought the five days were due her because she intentionally showed disrespect to this court, or any court, I would not stand before your Honor and ask that courtesy. I do not believe it was done intentionally. She is a confused, sick girl. In the future, I will personally send someone for her and pick her up, your Honor.

"The Court: I am trying to dispose of this matter this morning. So we will take your argument under submission."

In the hearing that ensued it appeared that Miss Burns was under prosecution in the State court as a narcotic addict and in the Federal court for failing to register as a narcotic addict in crossing the Mexican border at Tijuana. Miss Burns refused to testify in People v. Mack upon the ground that her testimony would tend to incriminate her, and the court ruled that, due to the pending action in the Federal court, she was justified in her refusal to testify, and excused her from giving any testimony.

After the court announced its ruling, further proceedings were had as follows:

"Mr. Weiss: Your Honor, with all humbleness now, I once again in all deference and respect to this court ask your Honor to see fit within you to recall your five-day sentence.

"The Court: No, I think it should stand. I think she should serve five days for violating the court's order. She takes orders from everybody else but the court. It's about time we taught her and other persons who have no regard for court orders, who go around the street and do as they please, and then they come in and ask the court to excuse them because they didn't see fit to come in here at the proper time. That order was made. It was explicit and definite, and she understood it. She was represented by counsel at the time. There was no reason why she should not have been here. We waited until almost a quarter of 10:00 o'clock this morning before she came into this courtroom. The order will have to stand."

[1, 2] The willful failure to comply with a valid order of court may be punished as a misdemeanor. Pen.Code, § 166. Every judicial officer has the power to punish for

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You are sentenced to five days in the County Jail for failing to comply with the court's order. The bench warrant issued by the court is ordered withdrawn. You may proceed with the hearing on the Order to Show Cause at this time."

contempt the disobedience of his orders. Code Civ.Proc. §§ 177, subd. 2, 178, 1991. It is an essential element of contempt that the conduct of an accused must be willful in the sense that it is inexcusable. A tardy appearance in court, if not willful, is not a criminal offense nor does it, alone, constitute a contempt of court, even if it falls short of prompt compliance with the process or orders of the court. If the rule were otherwise, guilt could be fastened upon persons whose failure to make a prompt appearance in court was unavoidable and without the slightest intention of disobeying an order of the court. The circumstances in which a tardy arrival would be excusable and without any breach of duty to the court are too numerous to mention. With our departments of the Superior Court widely scattered throughout the county and with traffic and transportation conditions as they are, we cannot approve as a precedent a practice under which a latecomer would be adjudged in contempt without a fair judicial inquiry and decision as to the validity of any excuse he might offer. We would not construe "willful" as pertaining to contempt as meaning only a deliberate intention to disregard a court order, but rather as encompassing an indifferent disregard of the duty to obey it promptly.

Our sole question, therefore, is whether there was substantial evidence before the Superior Court to justify a determination that Barbara was guilty of contempt. Bridges v. Superior Court, 14 Cal.2d 464, 94 P.2d 983.

It appears from the minutes of the court, as shown in the return, that on May 12 the court peremptorily declared Barbara to be in contempt and remanded her to the custody of the sheriff under a sentence of five days in jail. The clerk's minutes of that date recite these facts and nothing more. We issued our writ May 13. Barbara was released on bail May 14. on May 15, the court signed an order reciting the proceedings and finding that Barbara "did willfully and unlawfully and without valid excuse disobey said order and unlawfully interfere with the proceedings in said trial etc." From these and other facts it appears that the court regarded mere failure of Barbara to appear at 9 o'clock as a contempt of court, and a serious offense at that, warranting imposition of the maximum term of imprisonment, unaccompanied by a fine.

[3, 4] It seems scarcely necessary to say that a proceeding in contempt is essentially criminal in character. Hotaling v. Superior Court, 191 Cal. 501, 504, 217 P. 73, 29 A.L.R. 127, and cases cited. The accused has the benefit of the presumption of innocence. In re Lake, 65 Cal.App. 420, 427, 224 P. 126. An intent to commit the forbidden act is as essential to guilt as in the case of a criminal offense. Uhler v. Superior Court, 117 Cal.App.2d 147, 255 P.2d 29, 256 P.2d 90. And, of course, the accused must be accorded the same opportunity to defend against a charge of indirect contempt, that is to say, where the facts are unknown to the court, as in a criminal prosecution for contempt as a misdemeanor under Section 166, Penal Code or any other criminal offense. 17 C.J.S. Contempt §§ 62, 85, pp. 77, 116.

The learned deputy district attorney says: "* * * the conclusion of the court that said failure to appear was willful is a conclusive determination and the writ of habeas corpus should not lie." The statement is subject to the qualification that the determination is conclusive if it is based upon substantial evidence at a hearing in which the accused is afforded a fair opportunity to defend. There was no such opportunity afforded Barbara or her counsel. At the very inception of the proceeding the court announced its judgment. Barbara's statement was in response to the court's question: "Where were you this morning, Miss Burns? Stand up please." The People say her statement was not made under oath. She cannot be blamed for that omission. The court asked for her unsworn statement and immediately upon receiving it, ruled against her. Her answers should have been treated as a statement of the facts which were relied upon to excuse her tardiness and which could be proved, if necessary. Her counsel were given no opportunity to address the court until Barbara had been sentenced to jail. One whose counsel has been given no opportunity to produce evidence, or even to be heard in a trial until after the court has pronounced judgment can justly complain that he has been denied due process of law.

In our opinion the only reasonable conclusion from the evidence is that Barbara was not guilty of a willful disobedience of the order to return to court at 9 o'clock. She is a minor. Mr. Howard, a respected and experienced attorney at the Los Angeles bar, is the guardian of her person. He was not appointed to that position by the court without good reason. The fact that he was appointed guardian implies a degree of incompetency of his ward. Her conduct was to be judged in the light of that fact. Barbara stands accused of being a narcotic addict and of failing to register as such. She had every reason not to affront the court. At the first opportunity which, unfortunately, was after judgment had been pronounced, reputable and respected members of the bar assured the court of the truth of Barbara's statements respecting her efforts to make a timely appearance in court. When they learned of her dilemma, the failure of her friends to call for her and the fact that she had no money to pay for a cab, both gentlemen promised to pay her cab fare and went downstairs to await her arrival in a cab. Even the cooperative and indulgent cabbie waited outside; and Barbara arrived in less than ten minutes after the case was called.

[5] The power of the court to punish for contempt is indeed broad, but it is not unlimited. It is a drastic remedy, to be employed only when necessary to the proper and orderly conduct of judicial proceedings. A charge of contempt of court must be considered judicially as the question of guilt of any criminal offense must be, and a judge may not punish for contempt merely because he has suffered annoyance through the failure of some order he has made to receive instant observance.

[6] We are convinced that the trial judge, although with the best of motives, acted hastily, without due deliberation and without consideration of the gravity of the decision he had to make. He did not question the truth of Barbara's statements; he did not doubt the word of the attorneys who described Barbara's efforts to reach court. As a result, the unfortunate young woman was found guilty of contempt peremptorily, and without giving her or her counsel an opportunity to present a defense by the introduction of evidence of the facts they asserted. Moreover, there was an entire want of evidence to justify a conclusion that Miss Burns had any intention whatsoever to disobey the order of the court to attend upon an adjourned session of the hearing. The conclusion that she willfully disobeyed the order of the court is contrary to the evidence, direct and circumstantial, and to the presumption that she was not guilty of willful disobedience. We think the efforts put forth by Barbara would have been quite sufficient to excuse the tardiness even of one who was sui juris. The facts were not in dispute. No fact, circumstance or inference indicated an intention on the part of Barbara to disregard the court's order. A finding of guilt is not justified in the absence of affirmative evidence of guilt. Here there was none. The court concluded that being late to court was, itself, a contempt, and that the explanation given, if true, did not constitute a defense. We are unable to agree.

The order must be annulled for the reason that there was no evidence of willful disobedience of the court's order and for the further reason that Barbara was given no opportunity to present evidence in her defense. There was, in reality, no trial of the issue.

The order adjudging petitioner in contempt is annulled; the petitioner is ordered discharged from custody.

VALLÉE, J., and PATROSSO, J. pro tem., concur.

161 Cal.App.2d 172

Remo SABATINI, Plaintiff and Respondent,

v.

Clyde C. HENSLEY and Hensley Equipment Co., Inc., a corporation, Defendants and Appellants.

Civ. 17911.

District Court of Appeal, First District,
Division 2, California.
June 9, 1958.

Rehearing Denied July 9, 1958.
Hearing Denied Aug. 6, 1958.

Action by former employee against employers on common count for work and labor performed for employers based on employers' alleged promise to pay employee bonuses over and above his salary. The Superior Court, County of Alameda, Thomas J. Ledwich, J., rendered judgment for employee, and employers appealed. The District Court of Appeal, Draper, J., held that where employers, after employment of employee, promised to pay bonuses to employee, who had not contracted to serve for a fixed term, for purpose of inducing him to remain an employee, employers' promise was enforceable.

Affirmed.

1. Master and Servant 🔑72

Where employers, after employment of employee, promised to pay bonuses to employee, who had not contracted to serve for a fixed term, for purpose of inducing him to remain an employee, employers' promise was enforceable.

2. Master and Servant 🔑80(10)

In action by former employee against employers on common count for work and labor performed for employers on ground that employers promised to pay employee bonuses over and above his salary, evidence supported implied finding that employers' promise in 1954 of a bonus induced employee to remain in employers' employ during 1955.

3. Contracts 🔑9(2)

Failure of employers to specify amount or formula for determining amount of bonus to be paid employee did not render agreement to pay bonus too indefinite to be enforced.

4. Master and Servant 🔑72

Where employers pay and employee accepts a fixed salary, the normal implication is that all services are compensated for thereby, but where parties expressly agree that an additional amount shall be paid, such agreement, if supported by consideration consisting either of employee's entry upon service, or his continuing therein when not otherwise bound to continue, is enforceable, and if agreement does not specify amount to be paid, the law will imply an agreement to pay reasonable value of services and will permit recovery of excess of such amount over salary paid. West's Ann. Civ.Code, §§ 1610, 1611.

5. Appeal and Error 🔑882(12)

A party could not complain of an instruction in language of his stipulation.

6. Master and Servant 🔑80(7)

In action by former employee against employers for amount of bonuses over and above his salary allegedly due from employers on basis of agreement made after employee entered employment, requiring employers, over their objection, to produce and admitting in evidence, the net profit of employing corporation and its two affiliates and salary paid to principal stockholder and his wife, was not an abuse of discretion.

7. Evidence 🔑99

Trial judge has broad discretion in determining the relevancy of offered evidence.

8. Trial 🔑260(1)

Refusal of offered instructions, even if such instructions accurately stated the law, was not prejudicial where essential material was covered in instructions given.

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Quaresma & Rhodes, Fremont, for appellants.

Stark & Champlin, John F. Wells, Oakland, for respondent.

DRAPER, Justice.

Plaintiff employee brought this action on a common count for work and labor performed for defendant employers. Jury verdict was for plaintiff in the sum of $6,500. Defendants appeal. All the stock of appellant corporation is owned by the individual appellant, his wife and his children. He will be referred to as appellant.

Respondent went to work for appellant September 15, 1952, at a salary of $400 per month. This was increased from time to time until it reached $525 per month. Respondent's theory is that appellant promised to pay him bonuses over and above his salary, and he seeks only such excess in this action. He does not contend that any agreement for payment of bonus was made before the employment began, but he did testify that at the time of employment appellant acknowledged that the salary was low and stated this would be made up at a later date, saying "I starve, you starve; I prosper, you prosper."

There is evidence that "early in 1954" the parties discussed respondent's compensation. Appellant said he realized he had promised respondent a new car, but would like to postpone its purchase because of needs for expansion of the business. In July or August, 1955, appellant said it was time to purchase the car. Respondent turned in his old car, took title in his own name to the new, and appellant made the monthly payments on it until respondent left his employ. Respondent also testified that in October or November, 1954, appellant told him that effective January 1, 1955, he would receive, in addition to salary, a bonus or commission. Respondent left the employment January 11, 1956. The jury found that respondent was entitled to a bonus of $4,000 for services rendered during the year 1955, and to $2,500 as the value of the "car bonus for previous years."

[1, 2] In attacking the award of $4,000 for the year 1955, appellant argues that an express contract is necessary to overcome the normal rule that salary paid and accepted is in full compensation for all services rendered, and that no such express contract is here shown because no fixed amount or formula for determining a fixed amount was agreed upon. This argument mistakes the rule applicable. When an employer promises a prospective employee a fixed salary and an indeterminate bonus, each promise is made to induce undertaking of the employment. Acceptance of the employment is consideration for the promise of a bonus, and this promise thus is enforceable. Hunter v. Ryan, 109 Cal.App. 736, 293 P. 825. We see no distinction where, as here, the promise is made after employment but is made to an employee who has not contracted to serve for a fixed term, and for the purpose of inducing him to remain an employee. Here no period of employment was specified. The jury was instructed that a verdict for respondent for the 1955 bonus was returnable only if it found that respondent rendered services in reliance upon the promise of a bonus in addition to his regular salary. There is evidence to support the implied finding that the 1954 promise of a bonus induced respondent to remain in appellant's employ during 1955. Continuing an employment to which one is not bound by contract is as clearly consideration as is entering the employment in the first place.

[3] The failure to specify the amount or a formula for determining the amount of the bonus does not render the agreement too indefinite for enforcement. It is not essential that the contract specify the amount of the consideration or the means of ascertaining it. Civ.Code, § 1610. Where no standard is specified, the consideration shall be the reasonable worth. Civ. Code, § 1611. Under an agreement to pay a fixed salary and an unspecified bonus, the amount of the bonus is the excess, if any, of the reasonable value of the services over the agreed salary. Hunter v. Ryan, supra, 109 Cal.App. 736, 293 P. 825; see, also, Brown v. Crown Gold Milling Co., 150 Cal. 376, 89 P. 86; Frebank Co. v. White, 152 Cal.App.2d 522, 313 P.2d 633; Carney

v. Hayter, 62 Cal.App.2d 792, 145 P.2d 712; Nave v. Taugher, 49 Cal.App. 308, 193 P. 508.

[4] Appellant argues, somewhat confusingly, that the trial court has confused express contract and quasi-contract. The rule is clear that, where the employer pays and the employee accepts a fixed salary, the normal implication is that all services are compensated for thereby. However, where the parties expressly agree that an additional amount shall be paid, such agreement, if supported by consideration consisting either of the employee's entry upon the service, or his continuing therein when not otherwise bound to continue, is enforceable. If the agreement does not specify the amount to be paid, the law will imply an agreement to pay the reasonable value of the services and will permit recovery of the excess of such amount over the salary paid.

[5] Appellant contends that the allowance of $2,500 as a bonus for services rendered in 1954 and earlier is improper. The argument is that the evidence does not show that appellant's claimed promise to give such a car as a bonus was made before 1955. Of course, if such a promise were made only after performance of the services of 1954 and earlier, it would be unenforceable because no consideration was given for it. But the evidence is susceptible of the view that appellant, early in 1954, acknowledged previous promises to give a car as a bonus. In 1955, the parties reduced these promises to definite agreement upon a specified automobile. It is true that the instructions upon the requirement that the promise precede the service are not as clear upon the bonus for 1954 and earlier as they are upon that for 1955. However, the parties at trial agreed:

> "* * * it is stipulated that if the jury finds that defendant * * * and the plaintiff agreed that the automobile purchased in plaintiff's name in September, 1955, was a bonus or extra compensation for services rendered prior to the year 1955, the plaintiff is entitled to receive the stipulated sum of $2500 as extra compensation for such services."

The court's instruction was in accord with this stipulation. Appellant cannot complain of an instruction in the language of his stipulation.

[6, 7] Over objection, the trial court required appellant to produce, and admitted in evidence, the 1955 net profit of defendant corporation and its two affiliates, and the salary paid to appellant Hensley and his wife. Appellant asserts error in the admission of this evidence. But it appears relevant to the issue of the reasonable value of respondent's services for the year 1955. There was evidence that appellant repeatedly told respondent, in discussing compensation: "I starve, you starve; I prosper, you prosper." Appellant, his wife, and respondent were the directors of the three corporations. There was much evidence that respondent was second only to appellant in the management of the business. There was testimony that, when the bonus was promised, the parties discussed net profits as a possible basis for computation of the bonus. The trial judge has broad discretion in determining the relevancy of offered evidence. Spolter v. Four-Wheel Brake Serv. Co., 99 Cal.App.2d 690, 699, 222 P.2d 307. Under all the circumstances, we cannot say that this discretion was abused here.

[8] Appellant also complains of the refusal of instructions offered. We question that the offered instructions accurately state the law upon which the action is based. Even if they were accurate, their refusal was not prejudicial, since the essential material was covered in the instructions given.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

161 Cal.App.2d 177

Edward Clyde LEWIS and Advance Truck Co., a corporation, Plaintiffs and Appellants,

v.

Charles W. FRANKLIN and Bayard Industries, a corporation, Defendants and Respondents.

BAYARD INDUSTRIES, a corporation, Cross-Complainant and Respondent,

v.

ADVANCE TRUCK COMPANY, a corporation, Ernest L. Johnson, and Edward Clyde Lewis, Cross-Defendants and Appellants.

Civ. 22735.

District Court of Appeal, Second District,
Division 2, California.
June 9, 1958.

Cross actions arising out of collision which occurred when tractor-trailer driver was attempting to pass two other tractor-trailers which had been proceeding ahead of his vehicle on the highway and, after he had passed one of them and was attempting to go by the other, it was turned to the left, in an effort to drive it into intersecting road, and the passing tractor-trailer collided with it. The Superior Court of Los Angeles County, Henry M. Willis, J., rendered judgment on the jury verdict in favor of the owner and operator of the passing tractor-trailer and against the owner of the two trucks being passed and their respective operators, and the defendants appealed. The District Court of Appeal, Fox, P. J., held that the court committed error prejudicial to the defendants when it charged that the law placed upon the duty of a driver contemplating turning upon the highway to ascertain if such movement could be safely made, in that the charge conveyed the concept of an absolute duty rather than a duty merely to use reasonable care.

Judgment reversed.

1. Judgment 🔑199(3.10)

A defendant's motion for judgment notwithstanding verdict may properly be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, result is determination that there is no evidence sufficiently substantial to support verdict rendered.

2. Trial 🔑139(1)

A defendant may be granted a directed verdict only when there is no evidence to sustain plaintiff's case.

3. Automobiles 🔑245(39)

In cross actions arising out of collision which occurred when tractor-trailer driver was attempting to pass two other tractor-trailers which had been proceeding ahead of his vehicle on the highway and, after he had passed one of them and was attempting to go by the other, it was turned to the left, in an effort to drive it onto road which intersected highway, and the passing tractor-trailer collided with it, evidence on issue of whether the driver of the tractor-trailer which was so turned to the left had been negligent in failing to signal his intention to turn and in failing to notice the approach of the passing tractor-trailer was sufficient for the jury.

4. Automobiles 🔑245(60)

In cross actions arising out of collision which occurred when tractor-trailer driver was attempting to pass two other tractor-trailers which had been proceeding ahead of his vehicle on the highway and, after he had passed one of them and was attempting to go by the other, it was turned to the left, in an effort to drive it onto road intersecting highway and the passing tractor-trailer collided with it, evidence on issue of whether the collision was proximately caused by the assertedly negligent conduct of the overtaking tractor-trailer driver in driving on the left-hand side of the highway within 100 feet of an intersection in violation of statute was for the jury. West's Ann.Vehicle Code, § 530(b), par. 2.

5. Automobiles 🔑245(43)

In cross actions arising out of collision which occurred when tractor-trailer driver was attempting to pass two other tractor-trailers which had been proceeding ahead of his vehicle on the highway and, after he had passed one of them and was attempting to go by the other, it was turned to the left, in an effort to drive it into intersecting road, and the passing tractor-trailer collided with it, evidence on issue of whether the driver who was attempting to pass had driven more than 40 miles per hour was for the jury. West's Ann.Vehicle Code, § 515.

6. Automobiles ⚷246(2)
Trial ⚷296(3)

In vehicle collision case, instruction stating that driver contemplating turning upon the highway is under duty to ascertain whether such movement can be safely made was prejudicially erroneous as conveying idea that duty was an absolute one rather than a duty to use reasonable care, and its error was not cured by other instructions given. West's Ann.Vehicle Code, § 544.

7. Automobiles ⚷169

The statute providing that no person shall turn a vehicle from a direct course or move right or left upon a highway unless such movement can be made with reasonable safety does not require the driver to know that a turn can be made with safety but only requires that he exercise reasonable care to see that it may be done. West's Ann.Vehicle Code, § 544.

8. Automobiles ⚷246(17)

An instruction, in an automobile collision case, under the statute providing that no person shall turn a vehicle from a direct course or move to the right or left upon a highway until such movement can be made with reasonable safety, must make it clear that a driver who is about so to turn must exercise such care as would a reasonably prudent man under similar circumstances, no more and no less. West's Ann.Vehicle Code, § 544.

9. Trial ⚷243

The giving of conflicting or contradictory instructions on a material point is error.

10. Trial ⚷296(1)

The giving of an erroneous instruction cannot be cured by the giving of another correct instruction where the effect is simply to produce a clear conflict so that the jury cannot know which instruction was correct.

11. Automobiles ⚷168(2)

Under the statute providing that no person shall operate a motor truck or tractor-trailer having a gross weight in excess of 25,000 pounds at a speed in excess of 40 miles an hour, the driving of a tractor-truck and semi-trailer, weighing in excess of the stated amount and at a speed greater than that specified, is negligence per se. West's Ann.Vehicle Code, § 515.

12. Appeal and Error ⚷1064(1)
Trial ⚷241

In cross actions arising out of collision between tractor-trailers, court committed error prejudicial to the parties against whom the verdict was returned when it, in a single instruction, quoted first the statute providing that no tractor-trailer having a stated gross weight shall be operated in excess of 40 miles per hour, followed by the provision that no person shall drive at a speed greater than is reasonable and prudent, as it was not made clear to the jury that, regardless of what the prima facie speed limit might have been where the accident occurred, a tractor-trailer driver was negligent if he was driving in excess of 40 miles an hour. West's Ann.Vehicle Code, §§ 510, 515.

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Frank W. Woodhead, Robert E. Morrow and Reed, Callaway, Kirtland & Packard, and Henry F. Walker, Los Angeles, for appellants.

Wyman & Finell, Saul Grayson, Beverly Hills, Mariana VanDerhoof, Los Angeles, for respondents.

FOX, Presiding Justice.

This case arises out of a collision between two trucks and semitrailers. The plaintiffs are Lewis, the driver of one of the trucks, and Advance Truck Co., his employer. The defendants are Franklin, the driver of the second truck, and Bayard Industries, his employer. Bayard Industries filed a cross-complaint, naming as cross-defendants Lewis, Advance Truck Co., and Johnson, a second employee of Advance Truck Co. who was driving another company truck behind Lewis when the accident occurred. The jury returned a verdict for Bayard Industries on the cross-complaint, and judgment thereon was entered accordingly.[1] The motion of the cross-defendants for judgment notwithstanding the verdict was denied (their motion for directed verdict having been denied previously). Plaintiffs (Lewis and Advance Truck Co.) have appealed from the judgment in favor of defendants on the complaint, and the cross-defendants (Lewis Advance Truck Co. and Johnson) have appealed from the judgment against them on the cross-complaint and from the order denying their motion for judgment notwithstanding the verdict.

The accident occurred at about 10:30 p. m. on January 12, 1955, at the intersection of Highway 65 and James Road in Kern County, California. Highway 65 is a two-lane highway running north and south. James Road intersects it from the east but does not continue on the west—the intersection is thus in the form of a "T." It was dark at the time of the accident and there was no lighting in the area except for the lights of the three vehicles here involved. Lewis, in a 55 foot truck and semitrailer, was traveling south on Highway 65. He was being followed in a similar truck operated by Johnson. Franklin, in a 58 foot truck and semitrailer weighing a total of approximately 71,000 pounds, was also traveling south on Highway 65. Approximately 600 feet before reaching the intersection Lewis saw the sign indicating the James Road turnoff and began slowing down; he had been traveling 30 to 35 miles per hour. In the meantime Franklin had approached the two trucks from the rear, and he began to pass them on the left side of the highway. Lewis slowed down to 20 or 25 miles per hour as he approached James Road. As Franklin began to draw alongside Lewis, the latter commenced his left turn onto James Road. Franklin was unable to avoid striking the Lewis truck and the two trucks collided at the intersection and skidded into the field east of Highway 65 and south of James Road.

Lewis testified that about 300 feet from the intersection he put up his turning signal device and put on his brakes, thus lighting up his stop lights; that he saw Johnson through his mirrors about 400 or 500 feet behind; that he saw no other vehicle; that he last looked in the mirrors when about 50 feet from the intersection, at which time he saw only one set of lights about 200 feet behind, which he believed to be Johnson's; that as he was turning at the intersection and just a split second before being hit he heard an engine noise; that he did not hear any horn nor see any flickering of headlights.

Johnson testified that he was driving about 600 feet behind the Lewis truck; that when Lewis passed the sign 600 feet from the intersection he began to slow down; that 300 feet from the intersection the stop lights on the Lewis truck came on and the arm signal was up indicating a left turn was to be made; that when about 200 or 250 feet from the intersection he heard a noise at the side of his truck and, looking in that direction, he saw a truck alongside; that he put on his brakes and moved closer to the right side of the road; that the truck which passed him was traveling about 60 miles per hour; that it kept up that approximate speed and collided with the Lewis truck at a speed of 50 to 55 miles per hour; that he was 200 feet behind the Lewis truck when the other truck passed him; that he never saw the Franklin truck before it was passing him; that he never heard any horn signal nor saw any flickering lights in his windshield or mirrors.

Franklin testified that he began to pass the Johnson truck about 1,200 feet from the intersection, although he did not know there was any intersection ahead at the time; that he did not observe any sign on the right side of the road indicating an intersection ahead because he was passing the Johnson truck in the area where the sign was situated; that before passing Johnson he flickered the headlights of his truck from low beam to high beam and back to low beam; that upon flickering his lights he observed that the two trucks ahead of him commenced slowing down; that when he pulled abreast of Johnson he observed that the distance between the front of the Johnson truck and the rear of the Lewis truck was only about 75 or 80 feet; that there was not sufficient clearance to pull between the two trucks; that because of this and because the trucks were slowing down and there was no oncoming traffic, he continued to pass the Lewis truck; that the Lewis truck began to pull to the left about 80 feet from the intersection; that for the first time he realized that there was an intersection ahead; that at this time he was traveling about 40 miles per hour and was about 15 feet behind the Lewis truck; that Lewis did not at any time give any signal indicating an intention to turn left; that upon observing the Lewis truck moving to the left he sounded his horn and applied his brakes; that he moved to the left and went over on the shoulder of the highway as far as he could; that despite the fact he flickered his lights and sounded his horn the Lewis truck continued to cross the center line; that when it was about 20 feet from the intersection the Lewis truck made a sharp turn to the left and the two trucks collided.

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[1] Although the verdict and judgment make no reference to the complaint, we will treat them as being in favor of defendants for the purposes of this appeal.

A highway patrol officer testified that after the accident Lewis stated that as he was preparing to turn left he looked in his rearview mirror and saw another truck coming up from behind and thought that it was the truck which was traveling with him. The officer also testified that he observed a skid mark 162 feet in length leading to the point of impact. This mark was partially on the dirt and improved shoulder and partly on the paved portion of the highway. The officer was unable to determine the speed of the vehicle from this skid mark. There was a distance of approximately 117 feet from the point of impact to the place where the rear end of the Franklin truck came to rest (and about 175 feet to the front end). Photographs taken after the accident revealed that the signal device on the Lewis truck was in the "down" position; however, Johnson testified that "the impact was heavy enough to knock the signal arm handle out of its notch."

[1–5] Appellants' initial contention is that their motions for directed verdict and judgment notwithstanding the verdict on the cross-complaint should have been granted. This contention is without merit. A defendant's motion for judgment notwithstanding the verdict "may properly be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is a determination that there is no evidence sufficiently substantial to support the verdict." Devens v. Goldberg, 33 Cal.2d 173, 177–178, 199 P.2d 943, 946; Champion v. Bennetts, 37 Cal.2d 815, 820, 236 P.2d 155. And a motion for directed verdict must be denied if there is any evidence to sustain plaintiff's case. Trainor v. Maus, 126 Cal.App.2d 295, 301, 271 P.2d 957, and cases cited therein. In the instant case there was substantial evidence which, if believed by the jury, would support a verdict in favor of respondent Bayard Industries. Franklin's testimony indicated that Lewis was negligent in failing to give a signal of his intention to turn left and in failing to notice the approach of Franklin's vehicle on his left. The fact that this testimony was contradicted by the testimony of Lewis and Johnson is of no importance when considering the propriety of denying motions for directed verdict and judgment notwithstanding the verdict. Appellants argue that the evidence shows without contradiction that Franklin was violating Vehicle Code section 530(b) (2) (driving on the left side of the highway within 100 feet of an intersection). Even conceding that this was so, whether such violation was a proximate cause of the accident was a question for the jury to determine. The jury reasonably could conclude that such violation was not the proximate cause of the collision. Appellants also argue that the evidence shows that Franklin was exceeding 40 miles per hour at the time of the accident, thus establishing a violation of Vehicle Code section 515.[2] But Franklin testified that at no time did he exceed 40 miles per hour. This evidence was sufficient to support an implied finding by the jury on this question in favor of Bayard Industries. It is therefore clear that appellants' motions were properly denied.

Appellants contend that certain instructions given by the court were prejudically erroneous, confusing and misleading. We have concluded that their position is sound.

[6] The court gave the following instruction:

> "The Vehicle Code of the State of California clearly places a duty upon the driver who contemplates turning upon the highway to first ascertain if such movement can be safely made, with reference to both front and rear, and if not to wait until it can be made in safety."

By this instruction the jury was told that before making the turn here in question, Lewis had to "ascertain" that it could be made in safety. The effect of this was to place upon Lewis the absolute duty to determine before turning that the turn could be made with safety. This does not represent a correct statement of the law. In Spear v. Leuenberger, 44 Cal.App.2d 236, 112 P.2d 43, 50, the court had before it an instruction very similar to the one here involved. There the instruction told the jury that if the defendant made a left turn "without knowing that such movement could be made with reasonable safety," then he was guilty of negligence as a matter of law. In holding that this instruction was prejudicially erroneous, the court stated (44 Cal.App.2d at page 247, 112 P.2d at page 50): "We do not understand it to be the rule that a person is required to know that the turning movement can be made with safety. All that is required is that he take the precautions which a reasonably prudent person would take under the circumstances reasonably appearing to him at the time." This principle was also announced in Sunseri v. Dime Taxi Corp., 57 Cal.App.2d 926, 933, 135 P.2d 654, and Chambers v. Spada, 133 Cal.App.2d 231, 236, 283 P.2d 1067.

[7] The Vehicle Code provision which is referred to in the instruction now under consideration is section 544. That section provides in part that "no person shall turn a vehicle from a direct course or move right or left upon a highway unless and until such movement can be made with reasonable safety * * *." "This provision does not require the driver to know that a turn can be made with safety but only that he must exercise reasonable care * * *" (Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500, 503; see, also, Washam v. Peerless Automatic Staple Machine Co., 45 Cal.App.2d 174, 177, 113 P.2d 724.) This interpretation of section 544 should have been made clear to the jury. The instruction which was given does not even use the word "reasonable"; it fails to make clear that the duty of care imposed upon Lewis was something less than an absolute one. Under such circumstances the giving of the instruction constitutes prejudicial error. Spear v. Leuenberger, supra.

[8] Respondents rely upon Young v. Cerrato, 2 Cal.App.2d 421, 424, 37 P.2d 1063, in support of the instruction here in-

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[2] At the time of the accident here involved Vehicle Code section 515 read as follows:

"(a) No person shall operate upon any highway any of the following vehicles when equipped entirely with pneumatic tires at any speed in excess of 40 miles per hour:

"(1) Any motor truck and trailer.

"(2) Any motor truck alone or truck tractor with semi-trailer having a gross weight, of vehicle and load or of such vehicle and load of 25,000 pounds or more * * *."

Since the date of the accident here involved, the provisions of section 515 have been materially altered.

volved. In fact, the language in the instruction was taken from that opinion. While the language used in that case might be perfectly clear to members of the legal profession, such language could easily mislead members of a jury who are not accustomed to reading into it the so-called "reasonable man test" which is to be applied in negligence cases. The Young case was referring to the provisions of section 130(a) of the California Vehicle Act (which was the predecessor of Vehicle Code section 544). In Ruperto v. Thomas, 113 Cal.App. 523, 298 P. 851, it was pointed out that the language of section 130(a) must receive a reasonable construction. The court stated (113 Cal.App. at page 526, 298 P. at page 853,): "The language * * should be construed to mean that the driver of a vehicle upon a public highway, before starting, turning or stopping such vehicle must use such precaution as would satisfy a reasonably prudent person acting under similar circumstances that he could do so safely." It is thus clear that the "reasonable man test" was read into section 130 (a) just as it is now read into section 544 (Butigan v. Yellow Cab. Co., supra). An instruction to a jury concerning Vehicle Code section 544 must make it clear that the driver who is about to turn must exercise such care as would a reasonably prudent man under similar circumstances, no more and no less. The language in the Young case is not appropriate in such an instruction unless the above qualification is included. (See note preceding BAJI[3] No. 142.)

[9, 10] Respondents apparently argue that the instruction under consideration was saved because BAJI No. 142[4] was given. However, BAJI No. 142 was given in connection with, and immediately following, an instruction which used the exact language of Vehicle Code section 544. These two instructions were given before the instruction in question, and several other instructions intervened. It is clear from what we have already said that an instruction in the language of section 544 should be followed by a qualifying instruction such as BAJI No. 142. The two instructions to that end were correct. But the instruction in question, which was far removed from the other two instructions, was incorrect because it was given without qualification. Since this instruction in effect imposed upon the driver an absolute duty to determine that his turn could be made with safety, it was in conflict with the other two above mentioned instructions. It is well settled that the giving of conflicting or contradictory instructions on a material point is error. Smith v. Makaroff, 149 Cal.App.2d 655, 658, 308 P.2d 912; Finley v. City & County of San Francisco, 115 Cal.App.2d 116, 122, 251 P.2d 687, and cases cited therein. The giving of an erroneous instruction is not cured by the giving of other correct instructions where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict. Eslick v. Leach, 135 Cal.App.2d 455, 457, 288 P.2d 38; Akers v. Cowan, 26 Cal.App.2d 694, 699, 80 P.2d 143, and cases cited therein; see, also, Miller v. Schell, 149 Cal.App.2d 346, 351–352, 308 P.2d 445. In the instant case it is clear that the error in the instruction in question was not cured by the other instructions relating to the same subject.

Respondents also seem to argue that the phrase "safely made" in the instruction under consideration was the equivalent of "reasonably safely made." They rely upon

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[3] Book of Approved Jury Instructions (California Jury Instructions, Civil), 3d revised edition, West Publishing Company, 1943.

[4] "The words just quoted from the Vehicle Code, namely, that 'no person shall turn a vehicle unless and until such movement can be made with reasonable safety,' do not mean that the driver of a motor vehicle, before making a turn, must know that there is absolutely no possibility of accident. They mean that before starting to turn a vehicle on a public highway, and while making the turn, the driver of the vehicle must use such precaution as would satisfy a reasonably prudent person, acting under similar circumstances, that the turn can be made safely."

Popejoy v. Hannon, 37 Cal.2d 159, 168, 231 P.2d 484, and Jones v. Bridges, 38 Cal.App. 2d 341, 345–346, 101 P.2d 91. Both of those cases upheld instructions where the word "reasonable" was omitted. But the omission was not approved; in each case it was held merely that the omission could not have misled the jury.

The instruction in the instant case, as previously pointed out, in effect imposed on Lewis a duty greater than that of reasonable care under the circumstances in turning safely. The failure to use the word "reasonable" anywhere in the instruction served to accentuate this error and made it all the more likely that the jury would be misled by the instruction.

Another instruction given by the court recited the pertinent portion of Vehicle Code section 515 as it existed at the time of the accident here involved:

> "Speed Law Based on Weight and Tire Equipment. (a) No person shall operate upon any highway any of the following vehicles when equipped entirely with pneumatic tires at any speed in excess of 40 miles per hour:
>
> "(1) Any motor truck and trailer.
>
> "(2) Any motor truck alone or truck tractor with semi-trailer having a gross weight, of vehicle and load or of such vehicles and load of 25,000 pounds or more."

Immediately following the above instruction the court gave this instruction:

> "The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care.
>
> "Whether that rate of speed is a negligent one is a question of fact, the answer to which depends on all the surrounding circumstances.
>
> "The basic speed law of this state, as provided by Section 510 of our Vehicle Code, is as follows:
>
> "'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.'
>
> "A violation of this basic rule is negligence.
>
> "From the law just stated to you, it follows that although a vehicle is being driven upon a highway at a speed not greater than the prima facie limit fixed by law, such speed, nevertheless, might be negligent in the then existing circumstances; also, although a vehicle is being driven upon a highway at a speed in excess of the prima facie limit, such speed, nevertheless, might be within the exercise of ordinary care under the conditions then existing."

[11, 12] Taken together these two instructions gave the jury the impression that (1) proof that Franklin was traveling in excess of 40 miles per hour did not, by itself, establish negligence on his part, and (2) speed in excess of 40 miles per hour in a loaded truck and semi-trailer weighing more than 25,000 pounds might be "within the exercise of ordinary care" under the circumstances. The law in this regard is otherwise, and the concomitance of these instructions was misleading. "The driving of a loaded tractor truck and semi-trailer, weighing 25,000 pounds or more at a speed greater than 40 miles per hour is negligence *per se.*" Fortier Transp. Co. v. Union Packing Co., 96 Cal.App.2d 748, 752, 216 P.2d 470, 473; see, also, Wood v. Moore, 64 Cal.App.2d 144, 149, 148 P.2d 91.[5] The reason for this rule is adequately explained in the Fortier case. The evidence disclosed that Franklin's equipment and load weighed 71,000 pounds. There was also evidence that he was traveling in excess of 40 miles per hour. If the jury believed this testimony, then Franklin was guilty of negligence as a matter of law, and it was error to instruct otherwise. It was not made clear to

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[5] It should be noted that the legislature has changed the speed limitation in section 515 to 45 miles per hour.

the jury that, regardless of what the prima facie speed limit might have been in the area where the accident occurred, Franklin was neverthless negligent if he was driving in excess of 40 miles per hour.

Respondents argue that the court did instruct the jury that violation of the provisions of the California Vehicle Code constituted negligence per se. The instruction to which they refer reads as follows:

> "Conduct which is in violation of provisions of the California Vehicle Code just read to you constitutes, in itself, negligence. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he or she was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable, and such as might reasonably have been expected from a person of ordinary prudence.
>
> "In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induced him, without moral fault, to do otherwise.
>
> "To prove that a violation of a statute, such as that charged in this case, was excusable and justifiable so as to overcome the presumption of negligence, the evidence must support a finding that the violation resulted from causes or things beyond the control of the person charged with the violation."

After giving the instructions on speed previously discussed, the court then instructed the jury on the definition of an intersection, the requirement of a horn on a motor vehicle, the limitations concerning overtaking on the left, the failure of respondents to plead contributory negligence on Johnson's part, the impropriety of imputing Johnson's negligence to Lewis, driving on the left side of the highway near an intersection, and brake requirements. The record discloses that in none of these instructions did the court specifically mention the Vehicle Code; nor was the Vehicle Code mentioned in the instruction concerning the speed limitations on trucks with trailers. After instructing on the above mentioned subjects the court repeated the instruction which we have already quoted on the subject of speed in terms of miles per hour and the basic speed law, stating therein that "the basic speed law of this state, as provided by section 510 of our Vehicle Code, is as follows * * *." It was then that the court gave the instruction to which respondents refer (which we will call the negligence per se instruction).

It is unlikely that the jury understood that the negligence per se instruction referred back to the instruction covering the speed limit imposed on a loaded truck and semitrailer. In the first place, the jury was instructed on a number of other subjects between the giving of these two instructions. Moreover, the instruction regarding the speed limitation on a loaded truck and semitrailer was not identified by reference to any Vehicle Code section. Yet, the negligence per se instruction refers to violation of "provisions of the California Vehicle Code just read to you * * *." The Vehicle Code section "just read to" the jury was section 510, which appeared in the instruction immediately preceding the negligence per se instruction. It was only natural for the jury to understand that the negligence per se instruction referred only to section 510 mentioned in the immediately preceding instruction, and not to the other preceding instructions which did not mention any Vehicle Code section. It is thus apparent that the negligent per se instruction added confusion to the situation instead of clarification.

Respondents point out that the court also instructed the jury that "the order in which the instructions are given has no significance as to their relative importance," and that "any certain sentence, or any individual point or instruction" should not be singled out to the exclusion of others. Such generalizations, however, cannot ameliorate the erroneous impressions that were conveyed to the jury.

We are convinced that the erroneous, confusing and misleading character of the instructions had a prejudicial effect on appellants' case. Therefore, there must be a new trial.

The order denying the motion for judgment notwithstanding the verdict on the cross-complaint is affirmed. The judgment is reversed.

ASHBURN and HERNDON, JJ., concur.

Anthony L. WELCH, a minor, through his guardian ad litem, Gladys A. Welch, Plaintiff and Respondent,

v.

DUNSMUIR JOINT UNION HIGH SCHOOL DISTRICT, a political subdivision, Defendant and Appellant.

Civ. 9363.

District Court of Appeal, Third District, California.

June 9, 1958.

Hearing Granted Aug. 7, 1958.

Action by student, through his guardian, for personal injuries sustained while participating in a high school football scrimmage. The Superior Court, Shasta County, Richard B. Eaton, J., entered judgment adverse to school district and denied its motion for new trial, and district appealed. The District Court of Appeal, Warne, J. pro tem., held that even if an attorney-client relationship existed between plaintiff's counsel and one of the jurors, within one year prior to filing of the complaint, and was ground for challenge for cause, nevertheless, defendant was not entitled to a new trial on such ground in view of fact affidavits in support of motion for new trial merely showed defendant's counsel was unaware of the facts constituting the alleged misconduct or irregularity prior to rendition of the verdict, but failed to show that defendant had no such knowledge prior to rendition of the verdict.

Purported appeal from order denying defendant's motion for new trial dismissed, judgment affirmed.

1. Appeal and Error 🔑110

An order denying a new trial is not appealable. West's Ann.Code Civ.Proc. § 963.

2. New Trial 🔑54

In personal injury action, even if an attorney-client relationship existed between plaintiff's counsel and one of the jurors, within one year prior to filing of the complaint, and was ground for challenge for cause, nevertheless, defendant was not entitled to a new trial on such ground in view of fact affidavits in support of motion for new trial merely showed defendant's counsel was unaware of the facts constituting the alleged misconduct or irregularity prior to rendition of the verdict, but failed to show that defendant had no such knowledge prior to rendition of the verdict. West's Ann.Code Civ.Proc. § 602, subd. 3.

3. New Trial 🔑140(3)

If a school district had no knowledge, prior to rendition of verdict, of facts constituting alleged misconduct or irregularity due to an attorney-client relationship having existed between plaintiff's counsel and one of the jurors, within one year prior to filing of a complaint, president or secretary or an authorized officer of the governing board of defendant school district could and should have executed an affidavit to such effect on behalf of the district, in support of its motion for new trial on ground of such alleged misconduct.

4. Affidavits 🔑2

When an affidavit is required of a corporation, and no particular officer is designated as the person who shall make it, it may be made by any one of the officers or agents in its behalf.

5. Appeal and Error 🔑290

Where issue of alleged misconduct of plaintiff's counsel in connection with alleged misconduct of a juror was not tendered to trial court in defendant's motion for new trial, such issues could not be reviewed by District Court of Appeal.

6. Statutes 🔑223.2(24)
Trial 🔑339(2)

Statute pertaining to polling of a jury, and statute providing that when verdict is announced, if it is insufficient, it may be corrected by the jury under advice of the court, or jury may be again sent out, should be read together, and polling of the jury does not preclude the court from exercising its powers to correct an incorrect or insufficient verdict, but court retains control over such proceeding with power to procure correction of an informal or insufficient verdict until the verdict is recorded and the jury finally discharged. West's Ann.Code Civ. Proc. §§ 618, 619.

7. Trial 🔑339(3)

In civil action, trial court did not err in not sending jury out for further deliberation, notwithstanding fact that one juror answered in the negative question of whether it was her verdict, where it was apparent from second poll and third poll of the jury that such juror answered contrary to what she had in fact intended upon the first poll. West's Ann.Code Civ.Proc. § 619.

8. Schools and School Districts 🔑122
Trial 🔑251(8)

In action by student, through his guardian, for personal injuries sustained while participating in a high school football scrimmage, trial court did not err in failing to give instructions including certain statutory language pertaining to duty of a school district to equip the school with a first aid kit, in view of fact that presence or absence of contents of a first aid kit was not pertinent to any issue or theory developed by the evidence. West's Ann.Education Code, §§ 24501–24503, 24501(a).

9. Trial 🔑251(1)

An instruction should be given only when it is applicable to the issues raised by the pleadings or it is pertinent to some issue or theory developed by the evidence.

10. Schools and School Districts 🔑122

In action by student, through his guardian, for personal injuries sustained while participating in a high school football scrimmage, instruction that because of great danger involved in moving an injured human a person of ordinary prudence will exercise extreme caution when engaged in such an activity, was not improper on theory that it set up a false standard of conduct and placed upon defendant a burden of more than ordinary care under the circumstances.

11. Trial 🔑251(8), 252(8), 260(8)

In action by student, through his guardian, for personal injuries sustained while participating in a high school football scrimmage, trial court did not err in failing to give requested instruction that if a doctor attended student after the accident and before he was moved, responsibility of coach to render first aid ended when doctor's responsibility began, and a further instruction on agency, in view of fact court correctly instructed jury on concurrent negligence, and under the evidence in the case, jury could have inferred that both the doctor and coach were negligent in removal of student from field to the sidelines, and in view of fact there was no pleading and no evidence introduced on issue of doctor's agency.

12. Interest 🔑3

Insofar as section of Educational Code limits rate of interest on a judgment against a school district to four per cent per annum, it is unconstitutional. West's Ann.Education Code, § 1008 and subd. (b); West's Ann.Const. art. 20, § 22.

Tebbe & Correia, M. Harris Messner, Yreka, and Floyd Merrill, Siskiyou County Dist. Atty., Yreka, for appellant.

Barr & Hammond, Yreka, and Halpin & Halpin, Redding, for respondent.

WARNE, Justice pro tem.

Anthony L. Welch, a minor, brought this action through his guardian ad litem against the defendant Dunsmuir Joint Union High School District to recover damages for personal injuries received while participating in a high school football scrimmage between the Dunsmuir High School team and the Enterprise High School team on September 10, 1955. The jury returned a verdict in favor of the plaintiff in the sum of $325,000, and judgment was entered thereon with interest at the rate of seven per cent per annum. Appellant filed its motion for a new trial on all of the statutory grounds set forth in section 657 of the Code of Civil Procedure, and after a hearing thereon the motion was denied upon condition that plaintiff remit the sum of $118,196 from the judgment. Plaintiff remitted said amount within the specified time and judgment was reduced accordingly.

[1] Defendant appeals from the judgment and the order denying a new trial. Since the order denying a new trial is not appealable, the purported appeal therefrom must be dismissed. Section 963, Code of Civil Procedure; Jensen v. Minard, 44 Cal. 2d 325, 326, 282 P.2d 7.

A few days prior to September 10, the respective coaches of the schools arranged for an inter-school scrimmage between the two teams on that date at Tiger Field in Redding. Prior to the opening of school on August 29, plaintiff was given a physical examination by a Doctor Reynolds and found to be physically fit. The coaches were on the field directing or supervising the play and there were no "game officials" there. The teams alternated in carrying the ball, and after each sequence of plays the coaches stopped the activity and instructed the players. No downs were called and no score was kept. Plaintiff was a T-formation quarterback and directed the play of his team while they were on offense. Plaintiff took the ball on a "quarterback sneak" and was tackled shortly after he went through the line. As he was falling forward another player was coming in to make the tackle and fell on top of him. After this play plaintiff was lying on his back on the field and unable to get to his feet. Coach Reginato of the Dunsmuir school suspected that plaintiff might have a neck injury and had him take hold of his hands to see if there was any grip in them. Plaintiff was able to move his hands at that time.

The evidence was conflicting as to whether or not Doctor Saylor, who was admittedly present at the scrimmage, examined plaintiff before he was moved to the sidelines. Franklin Barr, a member of the Dunsmuir team, testified on plaintiff's behalf that Doctor Saylor was from 20 to 25 yards away when plaintiff was injured but did not go over to see him until after he had been removed from the place of injury. Thereupon Johnson, another member of the team, testified on plaintiff's behalf that he did not see the doctor on the field. Barr testified further that he assisted in carrying plaintiff from the field; that he was moved by eight boys, four on each side; and that no one directed the moving. Other witnesses testified that Doctor Saylor came out to the boy immediately after the accident. It was not claimed that the doctor was an agent or employee of the defendant.

The undisputed and only medical testimony was that the plaintiff is a permanent quadriplegic caused by damage to the spinal cord at the level of the fifth cervical vertebra; that there was a fracture of this vertebra without significant displacement; that the fracture was the result of severe trauma; that the removal of the plaintiff from the field without the use of a stretcher was an improper medical practice in view of the symptoms. In answer to the question: "Doctor, in determining just exactly what did damage to the spinal cord, is movement of the fingers, hands and feet the most significant thing?" he testified, "Actually far more important than any kind of examination that one can make of the local injury. This follows from what I have previously said about the fact that the level of injury precludes, if it is complete, the movement of the hands and feet in any effective fashion. If the injury has already been sustained and if the individual can, following the injury, move the hands and feet, he should continue to be able to move the hands and feet." It appears that after the plaintiff was moved off the field to the sidelines he was unable to move his hands, fingers and feet. With these circumstances in mind the doctor testified it was his opinion that the plaintiff must have sustained additional damage to the spinal cord after being tackled. The doctor's testimony stands undisputed in the record.

[2] Defendant contends first that it was denied a fair trial because of the misconduct of juror Earline Adair when she failed upon examination to fully disclose her relationship with plaintiff's counsel, Jack Halpin. During the impanelment of the jury the court asked the prospective jurors if at anytime since March 22, 1955, any one of them had been a client of any of the lawyers in the case including attorneys Halpin and Halpin. One of the prospective jurors answered that Mr. Halpin had represented her husband in a personal injury settlement. There was no response to the court's inquiry, "Any further answers to that question?" On voir dire juror Adair stated her impartiality. In response to the question of defendant's counsel, "Mrs. Adair, what is the extent of your acquaintance with Mr. Halpin?" she said, "We belong to one of the same clubs." In answer to his next question, "What club is that?" she said, "Democratic." The affidavits supporting and opposing the motion for a new trial disclosed that Jack Halpin, counsel for plaintiff, had on various occasions since 1954 represented Local 2608, Lumber and Sawmill Workers, AFL-CIO, and had appeared in cases wherein juror Adair's husband had been named as the representative of the members; that juror Adair was not a member of said union; that on November 29, 1956, attorney Jack Halpin consulted with both the juror and her husband at the scene of an accident involving an automobile owned by the union. At the time of the accident juror Adair was sitting in the front seat of the car which was parked on the side of the road. Mr. Adair had been driving the car but was not in it at the time of the accident. In his affidavit Mr. Halpin said that he was not employed by the Adairs to represent them in this matter. The trial court made no finding although the affidavits opposing the motion could have supported a finding that no attorney-client relationship had existed between Mr. Halpin and the juror Adair. However, assuming that such relationship existed within one year prior to the filing of the complaint in this action, and was grounds of challenge for cause under the provisions of section 602, subsection 3, of the Code of Civil Procedure, the appeal must fail on that ground for lack of complete affidavits. The affidavits in support of the motion for a new trial merely show that the defendant's counsel were unaware of the facts constituting the alleged misconduct or irregularity prior to the rendition of the verdict.

[3, 4] It is essential, not only that there be affidavits showing that the defendant's counsel were unaware of the facts constituting the claimed misconduct prior to the rendition of the verdict, but also that the defendant school district file an affidavit to the same effect, stating that it had no knowledge prior to the rendition of the verdict. Forman v. Alexander's Markets, 138 Cal.App.2d 671, 292 P.2d 257; Dunford v. General Water Heater Corp., 150 Cal.App.2d 260, 309 P.2d 958; Lafferty v. Market Street Ry. Co., 7 Cal.App.2d 698, 46 P.2d 996. If such was the fact the president or secretary, or an authorized officer of the governing board of defendant school district could and should have executed such an affidavit on behalf of the defendant. "When an affidavit is required of a corporation, and no particular officer is designated * * * as the person who shall make it, it may be made by any one of its officers or agents in its behalf." Old Settlers Investment Co. v. White, 158 Cal. 236, 246, 110 P. 922, 927. School districts have been declared to be corporations organized for educational purposes and are classified with

counties as necessary political subdivisions. Ward v. San Diego School District, 203 Cal. 712, 265 P. 821. A union or joint union high school district is governed by a board consisting of five members and has a president and a secretary. Sections 3121 and 3127,[1] Education Code.

[5] Defendant also claims that attorney Jack Halpin was guilty of misconduct in connection with the alleged misconduct of the juror Adair. "Since the [defendant] did not tender the issue to the trial court which he now argues for the first time on appeal, there was no error in that court in reference to that issue which can be reviewed here." Reinhard v. Lawrence Warehouse Co., 41 Cal.App.2d 741, 745, 107 P.2d 501, 504.

It is next contended by defendant that the court erred in polling the jury by its failure to comply with the provisions of section 618 of the Code of Civil Procedure. When the jury returned with its verdict, the jurors were polled and each individual juror was instructed to answer "yes" or "no" as to whether or not it was his or her verdict. The result was eight to four for the verdict. The court then stated, "Upon the poll, the verdict is not the verdict of the jury. To obviate the possibility of any error, the Clerk will poll the jury again." Upon the jury being again polled the result was nine to three for the verdict. The record shows the following upon the polling of one juror: "Juror Slisky: Yes, I guess so. The Court: Mrs. Slisky, we will have no guessing here. It either is or is not your verdict. Juror Slisky: Yes." Upon completion of the second polling the court stated: "There appearing ambiguity in the answer of one juror, the Clerk will again poll the jury." Upon completion of the third polling, the result was nine to three in favor of the verdict. Prior to its motion for a new trial the defendant made no objection to the procedure followed by the trial judge.

Section 613 of the Code of Civil Procedure provides that when a case is finally submitted to a jury, they may decide in court or retire for deliberation. Section 618 provides that, "When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, or by the court if there be no clerk, and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read to the jury by the clerk, or by the court if there be no clerk, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is his verdict. If upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, * * *".

And section 619 of the Code of Civil Procedure provides that, "When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the Court, or the jury may be again sent out."

[6, 7] There is no merit in defendant's contention. Sections 618 and 619 should be read together. The polling of the jury does not preclude the court from exercising its powers under section 619 to correct an incorrect or insufficient verdict. The trial court retains control over such proceeding with power to procure correction of an informal or insufficient verdict until the verdict is recorded and the jury finally discharged. Sparks v. Berntsen, 19 Cal.2d 308, 121 P.2d 497. Nor was it error not to send the jury out for further deliberation, notwithstanding the fact that one juror answered in the negative the question whether it was her verdict, where it was apparent from a second poll and third poll of the jury that the juror had answered contrary to what she had in fact intended upon the first poll. Fulton v. Huguet, 113 Cal.App.2d 692, 248 P.2d 954.

Defendant contends that the court erred in giving certain instructions at plaintiff's request and in failing to give certain instructions proposed by defendant.

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[1] Now section 3125.

[8] Here it is complained that the court erred in giving an instruction including the language of Education Code, sections 24501 through 24503, because subdivision (a) of section 24503 was omitted. Section 24501 reads:

> "The governing board of any school district, superintendent of schools, or principal in whom is vested the administration or supervision of any public or private school in the State shall equip the school with a first aid kit containing the articles mentioned in Section 24503, whenever any pupils of the school are conducted or taken on field trips under the supervision or direction of any teacher in, or employee or agent of, the school."

Section 24503 provides:

> "Every first aid kit shall include the following articles and such other equipment as the school officials charged with the duty of maintaining it may consider useful or necessary for the purpose of this chapter:
>
> "(a) 12 3″ x 3″ sterile gauge packages
> 4 1″ gauze roller bandages
> 4 2″ gauze roller bandages
> 4 Triangular bandages
> 1 Roll adhesive tape 1″ (10 yds.)
>
> "(b) An American Red Cross first aid textbook or written instructions for use of contents of the first aid kit."

[9] The trial court very aptly had this to say respecting the omission of subdivision (a) of section 24503 when ruling on the motion for a new trial: "* * * the type of bandages listed were not those called for by the injury in question. There was no suggestion that anyone had for use, intended for use, or should have used, written instructions for them. And in view of the language read to the jury, the thing to do with a man with a broken neck is to carry him off on a door or a shutter. It is a little bit difficult to see what the presence or absence of instructions on the use of ordinary bandages would accomplish." It is obvious that the presence or absence of the contents of the first aid kit as specified in subdivision (a) was not material to the facts of this case. As stated in Leo v. Dunham, 41 Cal.2d 712, 714, 264 P.2d 1, 2: "An instruction should be given only when it is applicable to the issues raised by the pleadings or it is pertinent to some issue or theory developed by the evidence."

[10] Defendant contends next that the court erred prejudicially in giving an instruction in the language of BAJI 102-D as follows: "Because of the great danger involved in moving an injured human being a person of ordinary prudence will exercise extreme caution when engaged in such an activity. Hence it is the duty of anyone managing or participating in such an activity to exercise extreme caution." Defendant claims that the giving of this instruction was prejudicial for the reason that it set up a false standard of conduct and placed upon the defendant a burden that is not consistent with the existing law. We do not agree with defendant. In this case it appears that the challenged instruction, read with the other instructions, correctly informed the jury that the standard of care required of the defendant was that of ordinary care under the circumstances. Tucker v. Lombardo, 47 Cal.2d 457, 303 P.2d 1041; Jensen v. Minard, 44 Cal.2d 325, 282 P.2d 7, supra. Immediately preceding this instruction the court gave the following instruction:

> "Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances.
>
> "To put the matter in another way, the amount of caution involved in the exercise of ordinary care, and hence required by law, increases or decreases as does the danger that reasonably

> should be apprehended." (BAJI 102-A.)

The standard was still one of ordinary care, that is, of a person of ordinary prudence, where the factual situation shows that great danger was involved in the activity. There was evidence in the case that the moving of a person with suspected grave injuries is inherently a hazardous activity.

[11] We find no merit in the defendant's contention that the court erred in failing to give the following two proposed instructions:

> (1) "If you find that Dr. Saylor attended the plaintiff after the accident and before the plaintiff was moved from the place where he was injured; then, in that event, I instruct you that the responsibility of the coach to render first aid ended when the doctor's responsibility began."

> (2) "I instruct you that the evidence in this case did not establish that Dr. Saylor was an agent, servant or employee of the Dunsmuir Joint Union High School District and if you find that the doctor was negligent, such negligence is not chargeable to the defendant."

The first of the above refused instructions is taken substantially from the Red Cross textbook which says: "The responsibilities of the first aider stop when the physician's begin. First aid tells what to do until the doctor comes." It is claimed that the instruction would have given the jury a measuring stick by which they could have determined when the responsibility of the coach would have ended and the responsibility of the doctor would have commenced. The second instruction was proposed on the theory that the doctor alone was negligent. In lieu thereof the court gave the following instruction which the defendant claims was prejudicial:

> "When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently and as proximate causes to the injury of another, each of such persons is liable. This is true regardless of the relative degree of the contribution. It is no defense for one of such persons that some other person, not joined as a defendant in the action, participated in causing the injury even if it should appear to you that the negligence of that other person was greater in either its wrongful nature or its effect." (BAJI 104-B.)

Under the evidence in this case the jury could reasonably have inferred that both the doctor and the coach were negligent in the removal of the plaintiff from the field to the sidelines; the coach in failing to wait for the doctor and allowing plaintiff to be moved, and the doctor in failing to act promptly after plaintiff's injury. Therefore, the court properly gave the above instruction and properly refused defendant's proposed instruction. See Palmer v. Brown, 127 Cal.App.2d 44, 62, 273 P.2d 306. Further there was no pleading and no evidence introduced on the issue of Doctor Saylor's agency. An instruction should be given only when it is applicable to the issues raised by the pleadings or is pertinent to some issue or theory developed by the evidence. Leo v. Dunham, supra.

Defendant also contends that since contributory negligence was not pleaded as a defense, the court erred in giving an instruction reading in part as follows: "Thus it is not negligence for such a person to fail to anticipate injury which can only come from a violation of law or duty by another." If anyone gained any benefit from the instruction it was the defendant. Defendant cannot complain of an error favorable to it. Mella v. Hooper, 200 Cal. 628, 254 P. 256.

[12] Lastly defendant contends that under the provisions of section 1008 of the Education Code interest on the judgment should be computed at the rate of four per cent per annum instead of seven per cent.

That section provides: "The governing board of any school district shall pay any judgment for debts, liabilities, or damages out of the school funds to the credit of the district, subject to the limitation on the use of the funds provided in the Constitution. * * *" And subdivision (b) further provides: "If, in the opinion of the board, the amount of the judgment is so great that undue hardship will arise if the entire amount is paid out of taxes for the next ensuing tax year, the board shall provide for the payment of the judgment in not exceeding three annual installments with interest thereon, at a rate not exceeding 4 per cent per annum, up to the date of each payment, * * *".

Insofar as the section limits the rate of interest to four per cent per annum, it is contrary to the provisions of article XX, section 22, of the California Constitution and is therefore unconstitutional. The Constitution provides that the rate of interest upon any judgment rendered in any court of the State, shall be seven per cent per annum. We find no constitutional exception in favor of a school district.

The purported appeal from the order denying defendant's motion for a new trial is dismissed. The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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161 Cal.App.2d 278

Raymond J. BUSH and Madonna Louise Bush, Plaintiffs, Cross-Defendants and Appellants,

v.

Elwin E. LANE and Dorothy I. Lane, Defendants, Cross-Complainants and Respondents.

Civ. 9315.

District Court of Appeal, Third District, California.

June 11, 1958.

Action wherein defendants filed cross-complaint for reasonable value of certain storage charges. The Superior Court of Mendocino County, Wakefield Taylor, J., rendered judgment in favor of cross-complainants, and cross-defendants appealed. The District Court of Appeal, Warne, J. pro tem., held that where vendors repossessed realty upon default by purchasers, pursuant to quitclaim deed, and notified purchasers that if they failed to remove personal property by specified date, such property would be stored at their expense, and purchasers did not remove the property and permitted it to be stored, there was an implied agreement on their part to pay for the storage.

Affirmed.

1. Warehousemen 🔑10

Where vendors repossessed realty upon purchasers' default, pursuant to quitclaim deed, and notified purchasers that if they failed to remove personal property by specified date, such property would be stored at their expense, and purchasers did not remove the property and permitted it to be stored, there was an implied agreement on their part to pay for the storage. West's Ann.Civ.Code, §§ 1619, 1620.

2. Contracts 🔑4

An "implied contract" is inferred from the conduct, situation, or mutual relations of parties, and enforced by the law on ground of justice. West's Ann.Civ.Code, §§ 1619, 1620.

3. Contracts 🔑4

The making of an agreement may be inferred by proof of conduct as well as by proof of use of words.

4. Work and Labor 🔑4(2)

Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied.

◆

Spurr & Brunner, Ukiah, for appellants.

Preston, Falk & Johnson, Ukiah, for respondents.

WARNE, Justice pro tem.

The cross-defendants, Bush, appeal from a judgment in the sum of $2,218.01 entered in favor of the Lanes on their cross-complaint for the reasonable value of certain storage charges. A motion for a new trial was denied.

The cross-complaint alleged that appellants became indebted to Leonard Nix in the sum of $2,218.01 for storage furnished by Nix at appellants' request and in consideration of their promise to pay therefor; that no part of said sum had been paid; and that Nix had assigned said storage charge to the respondents.

Appellants contend that the evidence is insufficient to support the findings that they became indebted to Nix for storage furnished at their request and in consideration of their promise to pay therefor.

The facts of this case were before this court in the case of Bush v. Lane, 139 Cal. App.2d 376, 293 P.2d 465—petition for hearing in the Supreme Court denied.

Because of the appellants' default of a contract of sale whereby they purchased from the respondents certain real property known as Lane's Riverdale Resort, the respondents repossessed the premises pursuant to a quitclaim deed. By a letter mailed on April 10, 1952, respondents notified appellants that their personal property would be held for them without expense until April 19th, but if they failed to remove such effects by the 19th, they would be delivered to Leonard Nix to be transported to his warehouse and stored at appellants' expense. Appellants failed to remove their property and, accordingly, on April 20th the goods were delivered to Leonard Nix and stored in his warehouse. At the trial of the instant case, it was stipulated that the storage charges were reasonable. The claim for the storage was duly assigned by Leonard Nix to the respondents.

[1] Since the record shows that the appellants were notified that if they did not remove their property it would be transported and placed in storage at their expense, and they chose to allow it to be stored in a warehouse, it follows that there was an implied agreement on their part to pay for the storage.

[2, 3] "A contract is either express or implied." Civil Code, Sec. 1619. "An express contract is one, the terms of which are stated in words." Civil Code, Sec. 1620. " 'An implied contract is one, the existence and terms of which are manifested by conduct,' (Civil Code, § 1621,) or, in the language of a learned writer, 'is inferred from the conduct, situation, or mutual relations of the parties, and enforced by the law on the ground of justice.' " Jennings v. Bank of California, 79 Cal. 323, 326, 21 P. 852, 853, 5 L.R.A. 233. "The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words." Dunham, Carrigan & Hayden Co. v. Thurmoid Rubber Co., 84 Cal.App. 669, 673, 258 P. 663, 664.

[4] As stated in Young v. Bruere, 78 Cal.App. 127, 132, 248 P. 301, 302: "Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied." See, also, Medina v. Van Camp Sea Food Co., 75 Cal. App.2d 551, 553–554, 171 P.2d 445.

Under the rules laid down in the above cited cases the evidence amply supports the findings and the judgment.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

161 Cal.App.2d 247

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Samuel BILLINGSLEY and Morris Volo, Defendants and Appellants.

Cr. No. 3418.

District Court of Appeal, First District, Division 1, California.

June 11, 1958.

Defendants were convicted of robbery in the first degree and of being armed with a deadly weapon and they appealed from the judgment of the Superior Court, City and County of San Francisco, Harry J. Neubarth, J. The District Court of Appeal, Bray, J., held, inter alia, that where victim testified that defendant "placed what looked to be a gun in" his side, and when asked to "describe the object that you saw against your ribs" victim stated "Well, it was blue steel, and I saw about two inches of the barrel, and I also observed what looked to be a hole", and when asked "Now you say you're sure you saw a gun" victim answered "It looked to be a gun", and when asked if he looked at the gun victim said that he "looked at it" such evidence was sufficient to support finding of jury that there was a gun used in the robbery.

Affirmed.

1. Robbery ⚷11

In prosecution for robbery while armed with a gun, to constitute first degree robbery there must be proof to satisfy jury beyond a reasonable doubt that a gun was used. West's Ann.Pen.Code, § 211.

2. Criminal Law ⚷1144(13)

The appellate court must assume in favor of jury's verdict the existence of every fact which jury could have reasonably deduced from the evidence.

3. Robbery ⚷24(1)

Where victim testified that defendant "placed what looked to be a gun in" his side, and when asked to "describe the object that you saw against your ribs" victim stated "Well, it was blue steel, and I saw about two inches of the barrel, and I also observed what looked to be a hole", and when asked "Now you say you're sure you saw a gun" victim answered "It looked to be a gun" and when asked if he looked at the gun victim said that he "looked at it", such evidence was sufficient to support finding of jury that there was a gun used in the robbery. West's Ann.Pen.Code, § 211.

4. Robbery ⚷24(1)

Proof of presence of a gun includes evidence of facts, circumstances, and conduct from which a jury may infer that robber was thus armed, and fact that victim saw only two inches of barrel did not disprove that it was a gun since a short barrelled blue steel revolver could be easily cradled in one's hand in such fashion as to expose no more of the barrel than that. West's Ann.Pen.Code, § 211.

5. Criminal Law ⚷742(1)

In robbery prosecution credibility of victim who testified that he saw a gun was for jury. West's Ann.Pen.Code, § 211.

6. Criminal Law ⚷889

Where jury had been given three verdicts as to each defendant, (1) not guilty, (2) guilty of robbery, with blank left to determine the degree and whether or not charge of being armed was true, and (3) guilty of grand theft, and jury returned two verdicts as to each defendant, finding each guilty of first degree robbery and of grand theft, trial judge properly sent jury back to determine which of the two verdicts it desired to bring in, as against contention that the judge should have accepted the lesser verdict and rejected the greater. West's Ann.Pen.Code, § 211.

7. Criminal Law ⚷889

Where jury had been given three verdicts, (1) not guilty, (2) guilty of robbery, with blank left to determine the degree and whether or not charge of being armed was true, and (3) guilty of grand theft, and jury returned two verdicts as to each defendant finding each guilty of first degree robbery and of grand theft, trial court's action in sending jury back to determine which of the two verdicts it desired to bring in was not error on ground that court in effect was instructing jury to bring in a verdict of guilty, particularly in view of trial judge's remarks. West's Ann.Pen. Code, § 211.

◆

Lawrence Speiser, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendants were charged with violation of section 211, Penal Code (robbery armed with a gun). Defendant Billingsley was also charged with a prior conviction of two counts of larceny. The jury found both guilty of robbery in the first degree and of being armed with a deadly weapon. It also found the prior conviction of defendant Billingsley to be true. Both defendants appeal from the judgment and the order denying new trial.

Questions Presented.

1. Sufficiency of evidence of possession of a gun.

2. Did the court order a conviction?

Evidence.

About noon February 15, 1957, Robert C. Chenault, a postal employee, having just cashed his pay check ($130.15) at a bank, was walking east on Page Street, San Francisco. He was carrying his 2-year old daughter in his arms. At a point near to 530 Page Street defendant Volo stopped him. Volo showed him a card with the name Bessie Smith, Eagle Rock Hotel, Pea Green Street, on it and asked its location. Thereupon defendant Billingsley "came up and placed what looked to be a gun in my, in my side, in my ribs; told me to hold still or don't move, and he quickly took his other hand and took my money out of my pocket, and he and the other fellow left up the street running." Chenault took time off from his job to look for the robbers. On February 21st he saw them on the street but by the time he could call the police department and the police arrived they had disappeared. On February 24th he again saw them and had them arrested by the police.

About 12:30 on February 15th Roy L. Doss drove up to his home at 530 Page Street and stopped his car on the sidewalk driveway. He then noticed Chenault, whom he did not know, walking up the street with a little girl in his arms. He also noticed both defendants, whom he likewise did not know, standing by a fence next to his apartment. As Chenault approached the two men stopped him. Doss then got out of his car, went into the house, took his coat off, put some coveralls on, picked up a screwdriver and returned to the street. There he saw Chenault coming back down the street, crying and screaming. The defendants were gone. Chenault said he had been robbed and asked Doss to call the police. Doss was not in the house over two minutes.

Both defendants testified that they had seen Chenault coming from the bank and had assumed that he had some money on him. They accosted Chenault and Volo, assuming a Jamaican dialect, showed Chenault the Bessie Smith address, asking where it was, gave him what was obviously a fantastic story and got him into a crap game and won his money from him. Both denied having a gun or taking the money from him other than in the crap game. Defendant Volo admitted that he was a professional "con man" and that Chenault was the "sucker." The meeting with Chenault took five or ten minutes. Defendants left when Chenault got mad over losing his money in the game. Defendant Billingsley's testimony was to the effect that although the defendants were working together to mulct Chenault, Chenault told him that Volo had $1800 tied around his waist and that Chenault and Billingsley should somehow get that money away from him. Billingsley then produced dice, and he and Chenault agreed that neither would lose to the other, and would split evenly their winnings from Volo. Volo had what

Billingsley called a "Philadelphia bankroll," a $20 bill wrapped around some newspaper with a $500 money band around it. Volo himself called this arrangement a "Mexican bankroll." Volo told Inspector Zimmerlin that he and Billingsley had been waiting outside the bank to make a "score," that is, make money through some scheme or device. Sometimes they stop quite a few persons before they succeed in making a score.

1. Sufficiency of the Evidence.

[1, 2] The main attack under this heading is that the presence of a gun was not proved. The jury found expressly that a gun was used. Moreover, to constitute first degree robbery under the circumstances of this case there must be proof to satisfy a jury beyond a reasonable doubt that a gun was used. Our duty is to determine whether upon the face of the evidence there were sufficient facts to support the finding of the jury, and we must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence. People v. Daugherty, 40 Cal.2d 876, 885, 256 P.2d 911.

[3–5] Chenault testified that defendant Billingsley "placed what looked to be a gun in" his side. When asked to "describe the object that you saw against your ribs" he stated, "Well, it was blue steel, and I saw about two inches of the barrel, and I also observed what looked to be a hole." Later when asked "Now you say you're sure you saw a gun" he answered "It looked to be a gun." He did not see the handle. When asked if he looked at the gun he said that he "looked at it." He was scared. This evidence was sufficient to support the finding of the jury that there was a gun used in the robbery. Proof of the presence of a gun "includes evidence of facts, circumstances, and conduct from which the jury may infer that the robber was thus armed." People v. Raucho, 8 Cal.App.2d 655, 666, 47 P.2d 1108, 1113. The fact that Chenault saw only two inches of the barrel does not disprove that it was a gun. A short barrelled blue steel revolver could be easily cradled in one's hand in such a fashion as to expose no more of the barrel than that. Chenault's credibility was a matter for the jury to determine. People v. Ross, 120 Cal.App.2d 882, 886, 262 P.2d 343.

2. Verdicts.

A most unusual situation developed concerning the jury's verdicts. It had been given three verdicts as to each defendant, (1) not guilty, (2) guilty of robbery, with blank left to determine the degree and whether or not the charge of being armed was true, and (3) guilty of grand theft. Returning to the courtroom after deliberating approximately 1½ hours, the foreman gave the clerk four verdicts. Apparently he handed them to the judge. Before they were read the judge stated that there were two verdicts as to each defendant, finding each guilty of first degree robbery and of grand theft. He then asked the jury if it intended that. The foreman stated that the jury thought from the instructions that they could find the defendants guilty of both crimes as grand theft was included in robbery. The judge then told them they could not find the defendants guilty of both, that it must be one crime or the other. Defense counsel then insisted that only the lesser verdict could be considered as the verdict of the jury. More discussion followed in which the foreman said that the two verdicts were due to the jury's misunderstanding. Stating that he had not accepted the verdicts, the judge instructed the jury to return to the jury room and to bring in but one verdict as to each defendant, stating "I'm not telling you to bring in first degree or grand theft * * * I am only telling you to bring in one." The jury retired and later brought in a verdict of guilty of first degree robbery against each defendant.

[6] Defendants concede that the contention made in the trial court to the effect that the court must accept the lesser verdict and reject the greater was erroneous, as the rule requiring such action only applies where there is no verdict brought in on the greater offense. See People v. Esposti, 82 Cal.App.2d 76, 185 P.2d 866; People v. Greer, 30 Cal.2d 589, 184 P.2d 512. Under these cases, had the judge ac-

cepted the verdicts and had them recorded, the conviction of the greater offense would have stood and that of the lesser offense would have had to be set aside. The judge was correct in sending the jury back to determine which of the two verdicts it desired to bring in. Actually, this action was in defendants' favor as it gave the jury a chance to consider returning the lesser verdict.

[7] Defendants contend that, in effect, the court was instructing the jury to bring in a verdict of guilty and not to bring in a verdict of not guilty. A reading of the entire colloquy between the judge, counsel, and the foreman of the jury shows that the judge was only informing the jury that it could not find the defendants guilty of both crimes but only of one. It would have been idle and unnecessary for the judge to inform the jury that it could also bring in a verdict of not guilty. Apparently the jury still had the not guilty form of verdict. Moreover, it had agreed that the defendants were guilty of both the greater and lesser crimes and it is inconceivable that because it was instructed that it could not find the defendants guilty of both crimes it would have found them guilty of neither. People v. Walker, 93 Cal.App.2d 818, 209 P.2d 834, where it was held that the judge practically forced a jury to agree, is not in point. There the jury had not agreed. Here it had, and the judge was sending them back to determine which of two guilty verdicts the jury desired to stand on, thereby, in effect, giving the defendants a second chance at a lesser verdict. Had the judge accepted the verdicts as originally brought in, the verdict of first degree robbery would have stood and the grand theft verdict would have had to be set aside. People v. Brancato, 83 Cal.App.2d 734, 189 P.2d 504, supports the action of the judge here rather than as defendants claim shows error. There the jury returned with a guilty verdict against each of the defendants. On being polled, one of the jurors gave an equivocal answer as to whether they were her verdicts. Thereupon the court sent the jury out for further deliberation. Returning with guilty verdicts, it developed that after the jury on its return to the jury room had unanimously voted the defendants guilty, the foreman did not sign new verdicts but used the ones previously signed and which had been brought into the courtroom the first time and returned to him. The defendants objected that the verdicts had not been signed after the last vote was taken. Thereupon, upon stipulation of the parties that the foreman's signatures could be cut off the verdicts instead of preparing new ones, the verdicts without the signatures were given to the jury, which retired to the jury room where the verdicts were signed by the foreman and the jury returned to court. On appeal the reviewing court held that this was proper procedure. Defendants rely upon the following language in the case (83 Cal.App.2d at page 744, 189 P.2d at page 509): "There is no merit to the contention that the court failed to submit forms of verdict other than those of guilty. The jury had also been given 'not guilty' forms and the subsequent proceedings involved only the furnishing of new forms for guilty verdicts, which was done in a way consented to by the defendants. There is no question that the matter was fully understood by everyone and the 'not guilty' forms originally furnished were never withdrawn from the consideration of the jury." However, that language supports the action in our case. Here the jury had also been given "not guilty" forms and the subsequent proceedings involved only the determination by the jury of which of two verdicts it had agreed upon was to stand when informed that they both could not stand. Here "There is no question that the matter was fully understood by everyone and the 'not guilty' forms originally furnished were never withdrawn from the consideration of the jury." Particularly is this so in view of a portion of the judge's remarks during the discussion concerning the verdicts: "You misunderstood me. In other words, either the men are guilty,—*if they are guilty to begin with*, either they are guilty

of robbery or they are guilty of grand theft; but they can't be guilty of both." (Emphasis added.)

There was no error in connection with the verdicts, or otherwise. The judgment and order denying new trial are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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161 Cal.App.2d 302

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Rosario Joseph BOUCHARD, Defendant and Respondent.

Cr. 5927.

District Court of Appeal, Second District, Division 1, California.

June 13, 1958.

Prosecution for unlawful possession of brass knuckles. The Superior Court, Los Angeles County, Louis H. Burke, J., granted defendant's motion to set aside the information, and the state appealed. The District Court of Appeal, White, P. J., held that evidence, including testimony that brass knuckles were found in defendant's apartment, and that he told a police officer that they had been given to him by a certain girl, was sufficient to constitute reasonable cause to hold defendant to answer in Superior Court for unlawful possession thereof.

Order reversed. See also 317 P.2d 971.

1. Criminal Law 🔑394

It is not necessary for the state to show a search and seizure without a warrant were reasonable as incident to a proper arrest, where the facts show defendant freely consented to the search which disclosed evidence which defendant thereafter claimed was illegally obtained.

2. Searches and Seizures 🔑1

A "search or seizure" implies some exploratory investigation or an invasion and quest, a looking for or seeking out.

See publication Words and Phrases, for other judicial constructions and definitions of "Search or Seizure".

3. Searches and Seizures 🔑7(27)

Where police officers went to defendant's apartment to question him in regard to a robbery, and asked defendant if they could search his room, and he stated "yes", and as an officer walked toward a bed in the room defendant stated "If you look under the mattress there is a pair of brass knuckles" there was reasonable cause for search of defendant's apartment and seizure of the brass knuckles, and such search and seizure were lawful even though officer did not have a search warrant or a warrant for defendant's arrest. West's Ann.Pen. Code, § 12020.

4. Arrest 🔑71

Where officers had reasonable cause to arrest a defendant and seize certain brass knuckles discovered in his apartment, as evidence, it was immaterial to a determination of the lawfulness of the search and seizure which was conducted without a warrant, whether such search was initiated before or after the arrest.

5. Indictment and Information 🔑140(1)

Although a magistrate in determining whether there is reasonable cause to hold a defendant may weigh the evidence, resolve conflicts, and judge the credibility of witnesses, the Superior Court may not do such things when testing the sufficiency of the showing there made on a motion to set aside the information. West's Ann. Pen.Code, § 995.

6. Criminal Law 🔑238

In proceeding on motion to set aside information charging defendant with unlawful possession of brass knuckles, evidence, including testimony that brass knuckles were found in defendant's apartment, and that defendant told a police officer that they had been given to him by a certain girl, was sufficient to hold defendant to answer in Superior Court for unlawful possession thereof. West's Ann.Pen.Code, § 995.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan, Fred N. Whichello, Lewis Watnick, Robert Lederman, Deputy Dist. Attys. Los Angeles, for appellant.

No appearance for respondent.

WHITE, Presiding Justice.

On February 6, 1957, the District Attorney of Los Angeles County filed an information charging defendant with a violation of the Dangerous Weapons' Control Law (Penal Code, Section 12020) in that defendant had in his possession metal knuckles, or as commonly referred to, brass knuckles.

When the cause was called for plea in the superior court, defendant made a motion pursuant to Section 995 of the Penal Code on the ground "That there was an illegal search and seizure, Your Honor; that there was no information on which to base probable cause * * *". The motion was granted and the People appeal therefrom.

As to the evidentiary features of this case when it was presented to the committing magistrate, the record reflects that Officer R. E. Byron testified he was a Los Angeles city police officer assigned to the Robbery Division, and one of the arresting officers. That the arrest occurred on January 16, 1957, in Room 17 of a hotel in the city of Los Angeles. The officer testified that prior to going to the room he had received information that two roommates of defendant had been identified as participants in a robbery and had been arrested; that defendant was not present at the time of his roommates' arrest; and that there had been four active participants in the robbery. This information had been received from Sergeant Murphy who arrested the other two persons.

At approximately 10:20 a. m. on January 16, 1957, the officer went to the room to "apprehend the third occupant of the room." At the time he had neither a warrant of arrest nor a search warrant.

The officer knocked on the door. Defendant opened it. Officer Byron and another officer who accompanied him identified themselves and asked defendant his name, which he gave them. The officers "informed him the reason we were there and asked the defendant if he had in his possession in the room or available to him a gun or any metal objects which might be used as a gun." Defendant stated that he did not own a gun. The officers asked him if they could search the room. Defendant said, "Yes." As Officer Byron walked toward the bed, the defendant stated, "If you look under the mattress there is a pair of brass knuckles." The officer lifted the mattress and found a pair of brass knuckles which were marked Exhibit 1 for Identification, and later received into evidence. In the officer's expert opinion they are brass knuckles.

The officer asked defendant to whom the brass knuckles belonged. The latter stated he had found them in the room when "they" moved into the room. Asked why he had kept them, defendant said, "* * * he didn't know, he thought he would just keep them." He said that he didn't know why he had put them under the mattress. The evidence indicates that the officers were just inside the doorway and had searched the defendant for weapons before they asked him for permission to search the room.

Frank Estrada, also a police officer of the City of Los Angeles, attached to the Robbery Division, testified that in the course of his investigation of the case he had a conversation with defendant on January 17, 1957, at the central jail, and that defendant's statements were freely and voluntarily made. The officer asked him where he had obtained the brass knuckles, and the latter stated, "* * * that a girl by the name of Janet Beasley had given the knuckles to him the first part of December * * *."

Defendant did not testify at the preliminary examination nor did he offer any evidence in his behalf.

The questions presented on this appeal are:

> "1. Do the facts and circumstances herein establish reasonable cause for the search of defendant's apartment and the seizure of the brass knuckles? and
>
> "2. Was there reasonable cause to hold the defendant to answer in the Superior Court?"

[1] From the foregoing uncontradicted evidentiary narrative it is manifest that the evidence in question (brass knuckles) was voluntarily produced in response to a reasonable inquiry (People v. Michael, 45 Cal.2d 751, 754, 290 P.2d 852). Applicable and pertinent also to the case now engaging our attention, is the following language of our Supreme Court in People v. Burke, 47 Cal.2d 45, 49, 301 P.2d 241, 243: "It was not necessary here, however, for the People to show that the search and seizure were reasonable as incident to a proper arrest, for they showed that defendant freely consented to the search of his apartment which disclosed the evidence which defendant has since claimed was illegally obtained. It was not unreasonable for the officers, without any show of force or coercion, to call upon the suspected defendant at his home, or to ask him questions, or to accept defendant's statement, 'No, go ahead,' in answer to the inquiry, 'You don't mind then if we search your apartment do you?' Under the circumstances here, as under those in People v. Michael (1955), 45 Cal.2d 751, 754, 290 P.2d 852, a holding that as a matter of law defendant acted because of an unlawful assertion of authority by the officers would be unjustified. See also People v. Martin (1955), 45 Cal.2d 755, 761, 290 P.2d 855."

[2] In the instant case we are persuaded that there was in fact no search or seizure as those terms are known to the law. As was said by this court in People v. West, 144 Cal.App.2d 214, 219, 300 P.2d 729, 733:

> "As used in this connection, the term implies some exploratory investigation or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a 'search'. A seizure contemplates a forcible dispossession of the owner and it is not a voluntary surrender. 79 C.J.S. Searches and Seizures §§ 1–3, pp. 775–776. In this case, the defendant showed the officers the clothing and there is no evidence whatsoever that the apparel was forcibly taken from him.
>
> "Even, however, if it be held that there was a search by the officer to find the name on the laundry tag, the evidence reveals that the defendant voluntarily showed the officer the clothing. Since the defendant voluntarily produced the evidence against himself, any constitutional rights he might have had were not violated and any search or taking of evidence pursuant to his consent is not unreasonable. Consent is a question of fact and in this particular case, the defendant did not testify." See also People v. Garnett, 148 Cal.App.2d 280, 284, 306 P.2d 571; People v. Allen, 142 Cal.App.2d 267, 281, 298 P.2d 714.

[3, 4] As to the arrest of defendant, such action was certainly reasonable. Penal Code, Section 836, subd. 3, authorizes an officer to make an arrest without a warrant "When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it". When defendant advised the officer that a pair of brass knuckles was under the mattress, no doubt was left as to the reasonableness, but as well, the necessity for an investigation, on the basis of reasonable cause for belief that a felony was then and there being committed in the officer's presence. And from defendant's admission that he kept the brass knuckles, it was certainly reasonable to assume that his possession thereof constituted a violation of Penal Code Section 12020 (People v. McKinney, 9 Cal.App.2d 523, 524, 50 P.2d 827; People v. Rios, 46 Cal.2d 297, 298, 294 P.2d 39). Since the officers had reasonable cause to arrest the defendant and to seize the brass knuckles as evidence it follows that it was immaterial whether the search was initiated before or after the arrest. People v. Martin, 45 Cal.2d 755, 762, 290 P.2d 855; People v. Walters, 148 Cal.App.2d 426, 431, 306 P.2d 606; People v. Stewart, 144 Cal.App.2d 555, 559, 301 P.2d 301.

[5, 6] As has often been repeated, it is the record before the magistrate that is decisive. The latter may weigh the evidence, may resolve conflicts, and may judge of the credibility of witnesses, but these things the superior court may not do when testing the sufficiency of the showing there made on a motion to set aside the information under Section 995 of the Penal Code (People v. Jackson, 146 Cal.App.2d 553, 556, 303 P.2d 767). With these rules in mind, and upon the authority of and for the reasons stated in People v. Platt, 124 Cal.App.2d 123, 130, 131, 134, 268 P.2d 529, we are satisfied that the court erred in setting aside the information.

The order is reversed.

FOURT and LILLIE, JJ., concur.

161 Cal.App.2d 233

Eli DRAGASH, an Incometent person, by Dorothy Dragash, his Guardian ad litem, and Dorothy Dragash, Plaintiffs and Appellants,

v.

The WESTERN PACIFIC RAILROAD COMPANY, a corporation, Falstaff Brewing Corporation, a corporation, Cal-Hi Beverage Co., a corporation, Defendants and Respondents.

Civ. 9254.

District Court of Appeal, Third District
California.

June 10, 1958.

Rehearing Denied July 7, 1958.

Hearing Denied Aug. 7, 1958.

Action by motorist, by his wife as guardian ad litem, and motorist's wife against railroad, and others, for personal injuries sustained by motorist in train-automobile collision at railroad crossing. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment against motorist and his wife and they appealed. The District Court of Appeal, Van Dyke, P. J., held that investigative file which was made up of reports by various individuals who had participated in investigation was not admissible, upon testimony of police officers who had refused their recollection from file and its admission in evidence, as well as fact that investigative file found its way into jury room, constituted prejudicial error.

Judgment reversed.

1. Appeal and Error 🔑1050(1), 1069(2)
Trial 🔑307(3)
Witnesses 🔑257

In action by motorist, by his guardian ad litem, and motorist's wife against railroad and others for personal injuries sustained in an accident between automobile and train at railroad crossing, investigative file, which was made up of reports by various individuals who had participated in the investigation of accident, was not admissible, upon testimony of police officers who had refreshed their recollection from file, and its admission in evidence, as well as fact that investigative file found its way into jury room, constituted prejudicial error. West's Ann.Code Civ.Proc. § 2047.

2. Witnesses ⚷256

Statute to effect that a witness is allowed to refresh his memory respecting a fact by anything written by himself, or under his direction, at time when fact occurred, or immediately thereafter and to effect that writing must be produced and may be seen by adverse party, applies only to conduct of a witness while on stand, and statute does not require witness to produce a writing which he has consulted prior to time he testified; production of notes for inspection may be compelled only where witness uses them while on stand. West's Ann.Code Civ.Proc. § 2047.

3. Evidence ⚷555

In action by motorist, by his wife as guardian ad litem, and motorist's wife against railroad and others, for personal injuries sustained in collision between automobile and train at crossing, trial court should have permitted expert witness, who was employed by the State Bureau of Criminal Identification and Investigation, to express an opinion, based on bruise marks, as to whether motorist was driving automobile or whether other person in automobile was driving at time of collision.

4. Evidence ⚷555

Where police investigative report had been admitted in evidence, over objection of plaintiffs, it was competent for plaintiffs to use material in police report in laying foundation for an expert's opinion, notwithstanding it was prejudicial error to receive investigative report in evidence in first instance. West's Ann.Code Civ. Proc. § 2047.

5. Railroads ⚷309

A railroad is not necessarily free from negligence even though it may have literally complied with safety statutes and rules.

6. Railroads ⚷351(7)

In action by motorist, by his wife as guardian ad litem, and motorist's wife against railroad and others, for personal injuries sustained by motorist in a train-automobile collision at railroad crossing, where jury was instructed, with respect to presumptions in favor of railroad, to effect that railroad had performed its duty by installing such protective devices and appliances as had been prescribed by regulations of utility commission, jury should have been told that regulations referred to constituted a minimum measure of care and something more might be required if in jury's judgment more was necessary in order to constitute reasonable conduct by railroad with respect to crossing.

7. Railroads ⚷347(4)

Generally, evidence of prior accidents which occurred under substantially same general circumstances as accident in question, and which are not too remote in time, is admissible to prove existence of a dangerous condition and notice thereof to railroad; it is not necessary that the prior accidents be shown to have occurred in precisely the same manner.

8. Appeal and Error ⚷970(2)

Ordinarily, question whether rules, with respect to admissibility of evidence in collision case against railroad concerning prior accidents at railroad crossing, have been met is for trial court to determine.

9. Railroads ⚷347(4, 8)

In action by motorist, by his wife as guardian ad litem, and motorist's wife against railroad and others, for personal injuries sustained by motorist in a collision between automobile and train at railroad crossing, exclusion of proffered proof of prior accidents at crossing and of proposed testimony from city traffic manager to effect that railroad had notice from him as to need for automatic signal on crossing was not error, under circumstances.

◆

Perkins & Carr and Kenneth B. Cayocca, Sacramento, for appellants.

Johnson, Davies & Greve, Sacramento, for respondent Western Pac. R. Co.

Fitzwilliam, Memering & McDonald, Sacramento, for other respondents.

VAN DYKE, Presiding Justice.

Eli and Dorothy Dragash appeal from a judgment following a jury verdict in favor of defendants Western Pacific Railroad Company, a corporation, and Cal-Hi Beverage Company, a corporation, hereinafter called respectively Western and Cal-Hi. Eli Dragash, who was alleged to be incompetent by reason of injuries suffered in the accident out of which this action arose, was represented by his wife, Dorothy, as guardian ad litem. Dorothy Dragash was also a party plaintiff.

On April 30, 1955, at a point in Sacramento where Western's tracks running north and south cross "D" Street, an automobile in which Eli Dragash and Michael Pobar were riding came into collision with a train of Western. Cal-Hi was joined as a defendant upon the theory that it had illegally parked two trucks near the tracks in such a way as to further obscure an already obscured railroad crossing. Dragash sought to hold Western for negligent operation of its train and for negligent maintenance of its crossing.

Michael Pobar was killed, and Dragash, by reason of his injuries, had no recollection of events before, during or after the accident. He was unable to testify as to the cause of the collision. He alleged that he was driving the car and that Pobar was his passenger. These allegations were denied by Western and Cal-Hi who contended that Pobar was driving. The car belonged to Dragash. Which man was driving became a vital issue at the trial. Analysis of the alcoholic content of Pobar's blood made after his death showed that he was intoxicated. Respondents sought to establish that he was the driver and thus to impute to Dragash the conduct of Pobar, which respondents claimed was the sole proximate cause of the accident or at least proximately contributed thereto. If Dragash was the driver of the car he was entitled to the benefit of the presumption that he was operating the car with due caution at the time of the collision. Early in the case this contest developed and one of the main contentions on appeal is based upon the acceptance and rejection of evidence tending to prove which man was the driver.

[1] It appears that other than the train crew there were no available eyewitnesses to the collision. Early in the presentation of appellants' case, Arthur L. Green, a city patrolman, was called to the stand. He had been the first officer to arrive at the scene and he made a report of his findings which were incorporated into the police investigation file. Green did not have the official file while testifying and used no part of it to refresh his memory while on the stand. One Schiro, a police officer next called by appellant, had been put in charge of the investigation at the scene of the accident. He and another officer made certain physical measurements, the other officer writing the measurements down in the form of field notes. These notes were a part of the accident investigation file, and before testifying Schiro had refreshed his recollection of the measurements and distances observed as they appeared in the field notes. From them he had made a diagram and he had this diagram with him and used it while testifying. Western cross-examined Schiro about the contents of the entire file of which defense counsel had a copy. Objections that hearsay and unqualified opinion evidence was being introduced were overruled, and Schiro was ordered to bring in the entire file. This he did. After receiving evidence that the file constituted the whole of the accident investigation made by the police department of the city, the entire file was introduced in evidence, marked as an exhibit in the case, and read to the jury. Thereafter, when the cause was submitted to the jury, this exhibit found its way into the jury room. It was prejudicially erroneous for the court to receive the entire file into evidence. A large number of people in pursuit of their official duties had done investigative work related to various phases of the police investigation of the accident and each person had made a report to the police department.

The accident investigation file which was received in evidence was made up of these various reports by the individuals who had participated in the investigation. The file was not in any sense the work of one person and neither Officer Green nor Officer Schiro had personal knowledge of any of the contents of the investigation file except such parts as they had reported. It was contended at the trial, and has been contended on appeal, that the introduction of the file was justified by Section 2047 of the Code of Civil Procedure which in material part reads as follows:

> "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury."

[2] This section afforded no justification for the introduction of the file into evidence. It is settled law in California that Section 2047 applies only to the conduct of a witness while on the stand, that it does not require him to produce a writing which he consulted prior to the time he testified, and that "production of notes for inspection may be compelled only where the witness uses them while on the stand and not where he refreshes his memory with them before being examined." People v. Gallardo, 41 Cal.2d 57, 67, 257 P.2d 29, 35. Neither Green nor Schiro so conducted himself as to warrant the ordering of the file into the courtroom. Officer Schiro did testify that as a sergeant in the traffic department of the Sacramento Police Department the entire file came over his desk to be approved by him, yet he said he had no personal knowledge of any of the other reports and did not prepare them. Furthermore, Section 2047 refers to a writing made by the witness himself or under his direction stating facts he personally knew to be correctly stated. Obviously, the section affords no foundation for the introduction of the hearsay statement of other investigators. As will be shown, the file introduced was replete with such objectionable statements. There being no foundation laid for the introduction of any part of the investigative file, we will now proceed to summarize its contents sufficiently to show the damaging effect it must have had upon the appellants' case in the trial court.

The reports which made up the file were replete with hearsay statements as to conversations had with various people, some of whom were witnesses and some of whom were not. One officer's report stated that the engineer had said to him the train was going north at 15 miles per hour; that as it approached "D" Street he saw the reflection of headlights from a vehicle coming east on "D"; that he was then 40 feet back from the intersection and the car was 150 feet west of the crossing, coming very fast at a speed of 40 to 50 miles per hour; that when the engine was 10 feet south of the intersection the car was 50 feet west; that the headlights were on; that the bell was ringing; that he sounded the horn, but did not have time to apply the brakes. The officer stated that the rest of the train crew corroborated the statements of the engineer. The file contained a report that an officer had been told the left rear tire of the automobile left a mark 19 feet 8 inches north of the south curb, and 4 feet 7 inches west of the west rail lines; that there had been no skid prior to the accident. The file contained a letter to the Chief of Police by the District Attorney of the county, stating that after a review of the file, he had concluded there was insufficient evidence upon which to base a felony complaint against Dragash. Another officer reported a conversation with one Betty Jo Barrick, who told him she last saw Dragash two days before the accident and could not remember when she last saw Pobar; that she later changed her story, and that he concluded "she was lying throughout my entire discussion, because she became very nervous and upset when I directly accused her of seeing Dragash on the evening of the accident. She kept repeating that she had not seen him. She was very visibly moved when I also accused her of the fact that perhaps Dragash and Pobar were on their way out to see her." Another officer reported an interview with the same witness, and he said at that time the witness stated she had seen Dragash and Pobar drive by the place where she worked, just before the accident; that she was almost positive that Pobar was driving because she definitely recognized Dragash "giving her the finger." The file contained another report of a further interview with the same witness. She was then reported as saying that she was almost sure that the occurrences she had previously related had happened on the day before the accident. Later in the interview she was said to have stated that what she had told the officer the first time was right and that she was not going to say any more to anyone for fear she might get embarrassingly involved; that she had said Dragash's wife had called her and asked her if she had seen Dragash that day and that she had denied to her that she had. The report contained the officer's conclusion "that someone had gotten to her and perhaps told her to deviate from her original story." Several of the investigating officers in their reports gave it as their opinion that the automobile was being driven by Michael Pobar. One report contained an assertion that the traffic control at the crossing was functioning at the time of the accident; another report stated a conversation with a witness who had told the officer that he had seen the Dragash car going north on 16th Street at 70 miles an hour with a police car chasing it; that the police car turned into "D" and within a few seconds he heard the crash of the collision; that the siren of the police car was still sounding. Enough has been said to demonstrate the damaging effect of the receipt of the investigation file in evidence. On what the parties both refer to in their briefs as the vital issue as to who was driving the car much hearsay testimony and many unqualified opinions were introduced to the effect that Pobar was the driver of the car. This went along with the evidence that Pobar had been intoxicated at the time. We think the foregoing summary demonstrates that appellants suffered prejudice to their entire case through the receipt in evidence of the file. On the vital issue of who was driving the car the jury must have been powerfully persuaded against appellants' theory of their case.

Appellants assign other errors, but in view of the fact that a new trial must be ordered it is unnecessary to discuss them all. Some will be noticed.

[3, 4] Appellants assign error in that the court excluded proposed testimony of an expert witness as to which of the two men was driving the Dragash car. Appellants assert that the trial court ruled this was a question of ultimate fact and not a proper subject for expert testimony and that the court so instructed the jury. The record bears out these statements. After excluding the evidence the court turned to the jury and said: "I think that I should here instruct the jury somewhat upon this point. The position of the Court is that this question of who was driving this automobile at the time of the accident is a question which is solely in the determination of the jury. In other words, you ladies and gentlemen are to determine that fact from all the evidence in the case. * * * that particular inquiry, to-wit, who was driving the car at that time, is not the proper sphere for what we call 'expert testimony'. Therefore the Court is not allowing anyone to give his or her opinion as to who was driving the car. Now the difference between an opinion and an actual fact, I think perhaps you all know. In general, opinion may only be given by experts. Mr. Greene [the witness] is an expert in his field, but I am holding this as not a field for the necessity of expert— In other words, it is a matter for you ladies and gentlemen of the jury to determine from all the evidence in the case." It appears that the expert was employed by the State

Bureau of Criminal Identification and Investigation. He testified that he had examined the wrecked vehicle, had examined the reports of police officers as reflected in the investigation file that had been received in evidence at that time as to the position of the bodies in the car, and had examined the autopsy surgeon's reports as to the marks upon the body of Pobar, and the surgeon's expressed opinion that absence of chest bruising led him to believe Pobar was not driving the car. The witness stated that in his examination of the vehicle he had observed other details which indicated the identity of the driver. He stated he had an opinion on the matter, but he was prevented by the court from expressing it. It is unnecessary to evaluate the qualifications of the witness to express an opinion upon the subject for they may not be the same at another trial. It is enough to point out that the question of who was driving the car could be the subject of expert testimony by a qualified witness and that it was error to hold that the issue was not one which could be properly the subject of expert opinion. Respondents argue that in qualifying his witness, counsel for appellants used some of the material that was in the police report. Inasmuch as the court had, over his objection, received the entire file in evidence in which these matters appeared, it was competent for counsel for appellants to use the evidence thus thrust upon him in laying the foundation for the expert's opinion. All of the documents referred to had been received in evidence for all purposes.

[5, 6] Appellants complain of error in certain instructions given by the trial court on the force and effect of the orders of the Public Utilities Commission with respect to safeguards to be maintained at crossings such as the one here involved. The trial court instructed the jury as follows: That the Public Utilities Commission had been given exclusive power to determine and prescribe protective measures to be taken at each crossing of a public highway by a railroad; that presumably the commission had performed its duties and presumably had exercised its exclusive power and had determined the protection required at "D" Street; that there was also a presumption that Western had performed its duty by installing such protective devices and appliances as had been prescribed by the commission; that Western had not been required by the commission to install any automatic signaling device or supply a flagman; that Western was not required by statutory provisions to install any automatic signaling device or supply a flagman; that it was the duty of Western to exercise reasonable care in warning travelers on a public street of its railroad crossings by the installation of whatever warning devices were reasonably necessary under the circumstances; that whether or not Western's compliance with any regulations issued by the commission amounted to reasonable care was a question for the jury; that if from consideration of all the facts and circumstances the jury found that a reasonably prudent person in the position of Western would have furnished an automatic warning system and Western had not in the exercise of ordinary care furnished such a warning device then it had been guilty of negligence. Appellants had requested an instruction advising the jury that the requirements of the commission with respect to warning devices constituted a minimum measure of care. This request the court denied. It is stated in Pennington v. Southern Pacific Co., 146 Cal.App.2d 605, 613, 304 P.2d 22, 27:

> "* * * It is well settled that such statutory regulations constitute only the minimum measure of care required by the railroad, and it is usually a matter for the jury to determine whether something more than the minimum was required under the evidence in the case." Citing Peri v. Los Angeles Junction Ry. Co., 22 Cal.2d 111, 137 P.2d 441, and other cases.

A railroad company is not necessarily free from negligence, even though it may have literally complied with safety statutes or rules. The circumstances may require it to do more. Peri v. Los Angeles Junction

Ry. Co., 22 Cal.2d 111, 126, 137 P.2d 441. In view of the recital of presumptions in favor of the railroad we think the jury ought to have been told that the regulations referred to constituted a minimum measure of care and that something more might be required if in their judgment more was necessary in order to constitute reasonable conduct by Western. Without such an instruction, the jury probably received the impression that Western was free from fault notwithstanding the general instruction that the jury could find otherwise.

[7–9] Appellants contend that the court erred in refusing to admit proposed testimony as to prior accidents at the same crossing and to admit testimony that on one occasion the City of Sacramento, through its traffic department, had requested the railroad to install added safeguards at the "D" Street crossing. Speaking generally, evidence of prior accidents which occurred under substantially the same general circumstances as the accident in question and which were not too remote in time is admissible to prove the existence of a dangerous condition and notice thereof to the defendant. Jaehne v. Pacific Tel. & Tel. Co., 105 Cal.App.2d 683, 689, 234 P.2d 165; Gilbert v. Pessin Grocery Co., 132 Cal.App.2d 212, 282 P.2d 148; Magnuson v. City of Stockton, 116 Cal.App. 532, 535, 3 P.2d 30. Again speaking generally, it is not necessary that the prior accidents be shown to have occurred in precisely the same manner, but it is sufficient if a foundation be laid that they occurred under substantially similar circumstances. Gilbert v. Pessin Grocery Co., supra. The parties are not in disagreement as to the general principles above stated. The objections made and sustained on behalf of Western were based upon the proposition that the requirements of these rules had not been met. Whether or not the test has been met in any case is primarily a question for the trial court to determine. There was testimony that between January 1, 1949 and April 30, 1955 there had been seven train-car collisions at the "D" Street crossing involving northbound trains, and that six of these involved eastbound vehicles. Only three of these, however, occurred at night when the streets were dark, as was the situation here. Mr. Jackson Faustman, who had for long been City Traffic Manager of Sacramento, who had studied this crossing in his official capacity and gathered data concerning prior accidents, was asked if he had recommended the installation of an electric blinking signal. This testimony was refused admission by the court, as was the offered proof of the prior accidents mentioned. The record presented is confused as to the issue presented by this assignment of error. The proposed testimony of Mr. Faustman as to Western having had from him notice of his conclusions as to the need of an automatic signal was admissible for that purpose had it been prefaced by proof of a dangerous condition in fact. But there had been no satisfactory proof of this and there were no clear-cut offers of proof. From the whole record touching this issue we think error has not been shown. We think nothing would be gained by a more detailed discussion. The situation is not likely to be the same on a retrial of the cause.

In view of the necessity of ordering a retrial, we think it would be profitless to discuss any of the other assignments of error made by the appellants.

For the reasons given, the judgment appealed from is reversed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

50 Cal.2d 509

Woodrow WILSON, Petitioner,
v.
STATE BAR OF CALIFORNIA, Respondent.
L. A. 24887.

Supreme Court of California.
In Bank.
June 27, 1958.

Disciplinary proceeding. The Supreme Court held that evidence warranted suspension from the practice of law for one year.

Order in accordance with opinion.

1. Constitutional Law ⚷306

Where attorney in disciplinary proceeding was afforded an opportunity to be heard and to present evidence before board of governors of the state bar, and attorney declined to avail himself of the opportunity, there was no showing by attorney of any violation of due process of law.

2. Attorney and Client ⚷54

In disciplinary proceeding, state bar could not be deemed without jurisdiction of the matter on theory that attorney was not given reasonable opportunity to examine certain records in possession of the state bar, where record showed that board continued the matter and notified attorney that he had an opportunity during such continuance to inspect records in question. Rules of Procedure of State Bar, rule 8; West's Ann.Bus. & Prof.Code following section 6087.

3. Attorney and Client ⚷54

In disciplinary proceeding, record did not establish a material variance between a notice to show cause and findings of fact, conclusions and recommendation of board of governors of state bar.

4. Attorney and Client ⚷58

Evidence warranted suspension from the practice of law for one year.

Woodrow Wilson, in pro. per., for petitioner.

Garrett H. Elmore, San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of The State Bar that petitioner be suspended from the practice of law for one year.

In July or August 1952, Mr. Benekos employed petitioner to bring an action for the alleged wrongful death of his son. He paid petitioner $25 for costs. In April 1953 petitioner filed an action in the Superior Court of San Diego County for Mr. Benekos, after prior presentation and rejection of claims.

Two and one half years later, another attorney was substituted for petitioner. As of November 3, 1955, there had been no return of service of summons and no answer was in the file. Thereafter, an alias summons was issued upon the affidavit of the new attorney, and defendants were duly served.

In the meantime, commencing December 5, 1954, petitioner made a series of false representations to his client concerning the status of the action, supposed negotiations for settlement, and a supposed settlement offer of $9,000 by the insurance carrier. Included in these false representations was one to the effect that a check for $9,000 was being sent by the insurance carrier. On July 20, 1955, after Mr. Benekos had signed release documents prepared by petitioner, petitioner gave him his personal, nonnegotiable note for $6,464, payable 30 days from date, purportedly representing the client's share of the settlement. At this time petitioner said that if the insurance company's check did not arrive in 30 days, he would pay Mr. Benekos from his own funds. He paid nothing on the note.

The Board of Governors found that the representations were false and were made by petitioner with intent to deceive his client. Petitioner does not question the sufficiency of the evidence to support the above stated facts, but contends:

[1] *First*: That he has been denied due process of law and a fair trial.

This contention is devoid of merit. Clearly, there is no showing by petitioner of any violation of due process. The board afforded him the opportunity to be heard and to present evidence, and petitioner declined to avail himself of the opportunity.

Petitioner urges that it is fundamental that the accused be given the opportunity to present a defense under rule 20 of the Rules of Procedure of The State Bar of California. This contention is correct. However, the record discloses that there were various hearings and continuances, some of the continuances having been granted at the request of petitioner. Finally, the matter was heard on January 3, 1957, but after some discussion, petitioner stated that he was withdrawing from the hearing and left the room.

[2] *Second*: That The State Bar is without jurisdiction of the matter for the reason that petitioner was not given a reasonable opportunity to examine certain records in the possession of The State Bar in accordance with rule 8 of the Rules of Procedure of The State Bar of California.

This contention is entirely devoid of merit. At the April 1957 board meeting, petitioner made certain contentions, claiming they would be supported by records of The State Bar which he had not examined. Thereupon, the board recessed, and the meeting was continued, the president of the board announcing the following action: "The Board has determined to continue this matter until June. During that time you have an opportunity to inspect the record [transcript] which was handed you today. * * * At that time the Board intends to proceed on the merits. *In the meantime, we will instruct Mr. Scharnikow to permit you to inspect the records that are in his possession,* and you will be notified by letter as to the exact time and place. At that time the Board will expect to consider the matter on the merits." (Italics added.)

It is obvious from the last sentence of the president's announcement quoted above that his statement that petitioner would be notified by letter "as to the exact time and place" referred to the time and place of the continued meeting.

Clearly, petitioner was afforded every opportunity to examine the records, and it appears from evidence before the board that he did not avail himself thereof.

[3] *Third*: That there was a material variance between the notice to show cause and the findings of fact, conclusions and recommendation.

This contention is likewise unsound. Petitioner has not directed our attention to any offense included in the findings of which he was not informed in the notice to show cause served upon him.

[4] The record discloses that the findings are in accord with the charges outlined against petitioner in the notice to show cause.

It is ordered that petitioner be suspended from the practice of law in this state for a period of one year commencing 30 days after the date of filing of this order.

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50 Cal.2d 507

James Alexander TRINGHAM, Petitioner and Respondent,

v.

STATE BOARD OF EDUCATION of the State of California et al., Defendants and Appellants.

L. A. 24958.

Supreme Court of California,
In Bank.

June 24, 1958.

Proceeding in mandamus to review order of State Board of Education in suspending school principal's credentials. The

Superior Court, Orange County, John Shea, J., set the order aside, and Board appealed. The Supreme Court, Gibson, C. J., held that record disclosed that court had exercised its independent judgment on the evidence in concluding that the evidence was insufficient to support the action of the Board, notwithstanding statement by the court that there was no substantial evidence to support the order.

Judgment affirmed.

Opinion, 321 P.2d 41, vacated.

1. Schools and School Districts ⚷132

On review of order of State Board of Education suspending teacher's credentials, it was duty of court to exercise its independent judgment on the evidence, and its decision must be sustained if there was any credible, competent evidence to support its finding. West's Ann.Code Civ. Proc. § 1094.5.

2. Schools and School Districts ⚷132

Record on appeal from decision of superior court in proceeding to review action of State Board of Education in suspending a school principal's credentials disclosed that court had exercised its independent judgment on the evidence in concluding that the evidence was insufficient to support the action of the Board, notwithstanding statement by the court that there was no substantial evidence to support the order. West's Ann.Code Civ.Proc. § 1094.5.

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Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for appellants.

Joseph Scott, A. H. Risse and G. L. McFarland, Los Angeles, for respondent.

GIBSON, Chief Justice.

An accusation was filed with the State Board of Education charging that respondent committed immoral acts while serving as the principal of a public school. The matter was heard before a hearing officer, who prepared a proposed decision suspending respondent's credentials for one year. The board considered the evidence taken at the hearing, rejected the recommendation of the hearing officer as to punishment, and ordered that respondent's credentials be revoked.

Respondent brought this proceeding in mandamus in the superior court to review the order of the board, and the parties submitted the matter on the administrative record. The court found and concluded that respondent did not commit the acts with which he was charged, and judgment was entered setting aside the order of the board.

[1, 2] In this type of proceeding it is the duty of the court to exercise its independent judgment on the evidence, and its decision must be sustained if there is any credible, competent evidence to support its findings. Code Civ.Proc. § 1094.5; Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20. The board concedes, as is clearly shown by the record, that the evidence is in conflict on each of the accusations, but it contends that the court did not weigh the evidence, as was its legal right and duty. Instead, the board asserts, the court, acting in an appellate capacity, reviewed the record of the proceedings before the board to see if there was substantial evidence to support the order of revocation, and erroneously concluded that the proof was insufficient to establish a prima facie case against respondent. This contention is based upon a statement in the findings that there is "no substantial evidence" to support the order of the board. The statement is unfortunate as there is abundant evidence, consisting of the testimony of several witnesses, which if believed would justify the revocation of respondent's credentials. However, the court specifically found on credible evidence that respondent did not commit the acts of which he was accused and that none of the charges were true. The record shows that the court exercised its independent judgment on the evidence and determined that the board's order was

not supported by the weight of the evidence.

The judgment is affirmed.

SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

TRAYNOR, Justice (concurring).

My views with respect to judicial review of administrative findings of fact under Code of Civil Procedure section 1094.5 are set forth in dissenting opinions in Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 315, 196 P.2d 20, and Southern California Jockey Club, Inc., v. California Horse Racing Board, 36 Cal.2d 167, 178, 223 P.2d 1. These views remain unchanged, but since a majority of the court adhere to the Moran case, I concur in the judgment under the compulsion of that case.

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161 Cal.App.2d 396

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Bertrous WASHINGTON, Defendant and
Appellant.
Cr. 1184.

District Court of Appeal, Fourth District,
California.
June 18, 1958.

Defendant was convicted under second and third counts of indictment of sales of heroin and marijuana. The Superior Court of Riverside County, Russell S. Waite, J., entered judgment of conviction and order denying a new trial, and the defendant appealed. The District Court of Appeal, Griffin, Acting P. J., held that evidence sustained finding of Superior Court that defendant was not induced to commit the crimes by police officer and was not a victim of entrapment.

Judgment and order denying new trial affirmed.

Criminal Law 🔑569

In prosecution for sale of heroin and marijuana, evidence sustained trial court's finding that defendant was not induced to commit the crimes by police officer and was not a victim of entrapment. West's Ann. Health & Safety Code, § 11500.

Joseph Seymour, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., and Jack E. Goertzen, Deputy Atty. Gen., for respondent.

GRIFFIN, Acting Presiding Justice.

In an indictment defendant-appellant was accused in count one of transporting a narcotic (heroin) on August 18, 1957; in count two with its sale; and in count three with the sale of marijuana on September 11, 1957, in violation of section 11500 of the Health and Safety Code. A trial by jury was waived. The court found defendant guilty on counts two and three and dismissed the first count. A motion for new trial was denied and defendant was committed to State's prison, sentences to run concurrently on each count. Thereafter, the court denied defendant's motion to vacate the judgment.

The principal contention of defendant on appeal is that the crimes of which he was convicted were the result of entrapment by police officers. Generally, the evidence shows one Earl Smith was a police officer for the city of Riverside, working as an undercover operator on a narcotics assignment. He observed defendant, while parked in a car in front of defendant's home on August 18, 1957, about 5 p. m. One Whitmore, an informant working with him, went into defendant's house. Later that night, defendant came to informant's home. Inside of the house defendant sold them a bindle of heroin and Smith paid $30 for it. Defendant then drove away. Later, on September 11th, defendant, in front of his home, sold Whitmore, in Smith's presence, a package containing four marijuana cigarettes. He gave defendant $2, which he had obtained from Smith. The contents of this package and the bindle proved to be marijuana and heroin respectively. Defendant told Smith it was difficult to obtain heroin; that he had been to the city to locate some; and he believed this was of good quality.

Defendant testified he met Whitmore in June and then later in July he tried to sell defendant an automobile (1949 Ford) and he agreed to buy it from Whitmore, but after driving it three weeks turned it back to him; that Whitmore came to his home on August 13th with Officer Smith and asked defendant to go riding in Whitmore's new car; that he did so and Smith went along; that Whitmore produced some marijuana cigarettes and the three of them smoked them; that Whitmore told defendant that Smith was a friend of his and that Whitmore asked defendant if he could obtain some heroin; that Whitmore said he knew where he could obtain it but not being colored like defendant he would have difficulty in buying it and if he did buy it for him he would, in turn, obtain some marijuana for defendant; that the next day Whitmore came by defendant's home and asked if they could go to Los Angeles; that they did so and Whitmore there pointed out a colored person and suggested he could obtain heroin from him but he was unable to do so; that they returned to Riverside the following day; that on the 18th of August, Whitmore contacted defendant again and defendant went to Los Angeles alone, talked to this same colored person, bought some heroin for $20 and brought it back with him, took it to Whitmore's home and that Whitmore gave him marijuana in exchange for it; that he left the marijuana at his home and about September 11th Whitmore and Smith came to his house and wanted to know if he had any marijuana cigarettes left because he and Smith were going to a "pot" (marijuana) party, so he gave them some but no money was paid to him for them; that it was Smith's and Whitmore's idea that he obtain heroin so he could exchange it for marijuana; that he had smoked marijuana and it was difficult for him to obtain; that Whitmore had previously told defendant he had been arrested in Riverside for selling narcotics and he had "beat it".

Smith denied ever being with defendant in an automobile or participating in such an arrangement with defendant. Whitmore did not testify at the trial. Apparently the trial court believed the testimony of the officer and disbelieved that of the defendant. The trial court's conclusion that defendant was not induced to commit the crime by the officer and was not a victim of entrapment was fully justified. People v. Schwartz, 109 Cal.App.2d 450, 240 P.2d 1024; People v. Lindsey, 91 Cal. App.2d 914, 205 P.2d 1114; People v. Braddock, 41 Cal.2d 794, 802, 264 P.2d 521.

The motion for new trial was properly denied. Defendant attempts here to review the sufficiency of the evidence taken before the Grand Jury to support the charges in the indictment. A similar attack was made in the trial court by motion to set aside the indictment. The motion was denied and no subsequent writ of prohibition was sought testing that ruling under section 999a of the Penal Code. Even if this ruling could be properly reviewable on appeal from the judgment, the evidence was sufficient and no conclusive proof of entrapment was shown. People v. Hernandez, 150 Cal.App.2d 398, 402, 309 P.2d 969. All points attempted to be raised by a subsequent motion to set aside the judgment have been considered on appeal from the judgment and order denying the motion for a new trial. The attempted appeal from this order is dismissed. People v. Palmer, 49 Cal.App.2d 579, 122 P.2d 114; People v. Brattingham, 91 Cal.App. 527, 267 P. 120; 3 Cal.Jur.2d p. 544, Sec. 94.

Judgment and order denying a new trial affirmed.

MUSSELL, J., and McCABE, J. pro tem., concur.

161 Cal.App.2d 544

Ralph G. SWATZELL, Plaintiff and Respondent,

v.

PACIFIC GREYHOUND LINES, a corporation, et al., Defendants and Appellants.

Civ. 17898.

District Court of Appeal, First District, Division 2, California.

June 23, 1958.

Motorist brought action against bus company and bus driver for injuries sustained by southbound motorist when he attempted to make left turn at intersection and collided with northbound bus. The Superior Court, City and County of San Francisco, William F. Traverso, J., entered judgment in favor of the motorist, and the bus company and bus driver appealed. The District Court of Appeal, Brazil, J. pro tem., held that question whether motorist was guilty of contributory negligence was a question of fact and not of law.

Judgment affirmed.

1. Evidence ⚿563(5, 6)

Testimony of witness concerning time, speed, or distance, particularly when case involves moving vehicles, which collide at intersection, are only estimates and can never be exact, and therefore determination of who is right or wrong is not the result of mathematical calculation.

2. Automobiles ⚿245(80)

Contributory negligence is almost always a question of fact in case involving intersectional collision of motor vehicles, and it is only in a most unusual case that it becomes a question of law.

3. Automobiles ⚿245(80)

In action by motorist against bus company and bus driver for injuries sustained by southbound motorist when he attempted to make left turn at intersection and collided with northbound bus, question whether motorist was guilty of contributory negligence was a question of fact and not of law. West's Ann.Vehicle Code, § 1 et seq.

Carroll, Davis, Burdick & McDonough, San Francisco, for appellants.

Pelton, Gunther, Durney & Gudmundson, San Francisco, for respondent.

BRAZIL, Justice pro tem.

From a judgment in a non-jury trial awarding the plaintiff $4,266 against the appellant bus company and its driver for injuries received in a collision between two motor vehicles, the defendants appeal.

The appellants have not found fault with anything occurring at the trial other than the conclusion reached by the trial judge upon submission of the case for his decision. The only statement of an issue presented to the appellate court for review is that "the uncontradicted evidence elicited at the trial establishes the contributory negligence of the respondent Ralph G. Swatzell as a matter of law."

Using only the statement of facts as presented by appellants' own opening brief, the following is a fair summary of what occurred on Bayshore Highway about half past three in the afternoon of April 3, 1954.

The day was clear, visibility was unimpaired, the road surface was dry and the traffic at that time was very light. Mr. Swatzell was driving southward on this four-lane highway going about forty or fifty miles an hour when he changed from the outside lane to the one closest to the dividing line between the north and south traffic lanes. This changeover was made about 1,000 feet north of the junction of Bayshore Highway and Haven Road, where respondent intended to make a left turn. About 300 feet north of the opening in the center double line for turning vehicles, he took his foot off the gas pedal and then a few feet further on put the Hudson vehicle he was driving into "low-low." Fifty feet north of the opening he applied his brakes while going about 10 or 15 miles an hour and then actually brought his vehicle to a stop at the northern edge of the break in the dividing line at the intersection. He then saw two automobiles and a Greyhound bus coming north, the bus being about 600 feet away and traveling in the north-bound lane closest to the center of the highway. He estimated the speed of the bus at that time to be about 50 miles an hour. The respondent testified he put on his left-turn signal, signaled for a stop and then for a left turn. He said he was stopped for two seconds, allowing the two north-bound automobiles to go by; and he then commenced his turn while the bus appeared to be about 450 feet away still going about 50 miles an hour. He looked to the right again only when he heard the sound of brakes and skidding tires and at this moment he estimated the speed of the bus to be 60 to 70 miles an hour. The bus was then angling to its right, was in the outside north-bound lane and heading for the shoulder at which moment of time respondent had the front wheels of the Hudson practically on the shoulder of the road. He pulled his car to the left to avoid the impending crash but was unable to avoid the impact. The front of the bus struck the right side of the automobile, and in the resulting collision, respondent was injured and his passenger was killed.

[1–3] Respondent relies on Chase **v.** Thomas, 7 Cal.App.2d 440, 46 P.2d 200, which in effect holds that a violation of the law by a plaintiff, if it proximately contributes to the accident, constitutes contributory negligence as a matter of law. In that case there was no factual dispute upon which reasonable men might differ. In the present case, whether plaintiff did or did not have sufficient clearance to make a left turn was a question first of fact; and those facts are not so clear or uncontradicted that reasonable men could only draw the one conclusion, maintained by appellant, that plaintiff turned in front of the oncoming bus when it was so close to him that it constituted an immediate hazard. It must be remembered, testimony of a witness concerning time, speed or distance, particularly when the case involves moving vehicles which collide at an intersection are only estimates and can never be exact. The determination of who is right or wrong is not therefore the result of mathematical calculation. Contributory negligence is almost always a question of fact and it is only in a most unusual case that it becomes a question of law. Alwood v. City of Los Angeles, 139 Cal.App.2d 49, 293 P.2d 69. In this case it is a question of fact and not of law whether the plaintiff was guilty of contributory negligence. Whether the conduct of the plaintiff at the time and place of the occurrence of the accident amounted to a violation of any of the provisions of the Vehicle Code depends on the facts presented at the trial. In like manner, if there were a violation of any section of the Vehicle Code, whether or not such violation proximately contributed to the happening of the accident depends upon the facts; and it is not clear that only the result sought by the appellant can legally be reached.

The record discloses no merit in this appeal.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

161 Cal.App.2d 572

Katherine C. BURTON, Plaintiff, Cross-Defendant and Respondent,

v.

Henry J. BURTON, Defendant, Cross-Complainant and Appellant.

Civ. 5814.

District Court of Appeal, Fourth District, California.

June 23, 1958.

Rehearing Denied July 15, 1958.

Divorce action by wife. The Superior Court of San Diego County, Joe L. Shell, J., awarded wife $12,500 as her share of community property consisting of one-half interest in a corporation, the stock of which was owned by husband and his brother. The husband appealed. The District Court of Appeal, Griffin, Acting P. J., held that evidence, including that relating to capital stock of corporation, value of assets and good will of business, the gross sales and bad debt losses supported finding that the community property had a total value of $50,000 and that wife was entitled to one-fourth of said value or the sum of $12,500.

Affirmed.

1. Divorce ⚷253

In divorce action, evidence, including that relating to capital stock of corporation and value of assets and good will of business and the gross sales and bad debt losses sustained finding that community property, consisting of one-half interest in corporation, the stock of which was owned by husband and his brother, had a total value of $50,000 and that wife was entitled to one-fourth interest of said value or the sum of $12,500.

2. Good Will ⚷1

Good will is property of an intangible nature and is a thing of value.

3. Evidence ⚷522, 571(7)

Opinion evidence as to value of good will is admissible but is not conclusive.

4. Good Will ⚷2

In determining good will, the elements to be considered are the situation of the premises, the amount of patronage and the general conditions existing at the time and the personality of the parties engaged in business, the length of time the business has been established, the habit of customers who have been used to dealing at a particular place to continue to go there.

5. Corporations ⚷60

The term "capital stock" is frequently used to express property and assets of corporation; strictly speaking, the capital stock is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise; it consists of consideration received or agreed to be received in exchange for all issued stock, whether the consideration takes form of money paid, labor done, or property actually received. West's Ann. Corp.Code, § 3018.

See publication Words and Phrases, for other judicial constructions and definitions of "Capital Stock".

◆

Swing, Scharnikow & Staniforth, by Robert O. Staniforth, San Diego, for appellant.

Clifford K. Fitzgerald, San Diego, for respondent.

GRIFFIN, Acting Presiding Justice.

[1] In an action for divorce instituted by plaintiff-respondent against defendant-appellant, the court found that the parties owned, as community property, a one-half interest in a certain named corporation, its stock, tools, equipment and good will. There was also a claimed community interest in certain rental units. The court found the total value of said business, good will, etc. to be $50,000. Assets and accounts receivable were fixed at $45,112, and good will at $4,888. It held that plaintiff was entitled to one-fourth of said valuation or the sum of $12,500, as her share of the community property. It found the rental units to be defendant's separate property. The main contention of defendant is that the findings of valuation of the community property interests in said business are contrary to the evidence. It was stipulated at the trial that the valuation was to be fixed as of the date of the separation, January 31, 1956, and that the community property be equally divided.

The evidence shows Burton Enterprises was incorporated for $75,000 in 1956. It was owned and operated by defendant and his brother, who held the corporate stock. Each had a drawing account of $10,000 per year and shared equally in its profits. The business is the outgrowth of a family partnership and has, over the years, been quite successful from a financial standpoint. The gross sales for 1955 was $190,179.49, with a net profit of $28,195, after paying the drawing accounts. The gross sales for 1956 between January and September was

$235,616.19, with an estimate of $300,000 for that year. It was claimed by defendant that the business had no good will value as a going concern. It would appear that this testimony refutes that claim. The value of 13 items of rolling stock consisting of cars and trucks, was carried on the corporate books. Depreciation was allowed on a three-year basis. In all probability it did not reflect their actual value. Some cars and trucks were still in use after the three-year depreciation period although carried on the books as of "no value". Some were not completely paid for by the company. Many of the trucks were improved with equipment for this line of business and had two-way radio equipment. To accommodate this service a transmitter station was erected costing about $5,000. The court disregarded the Blue Book value and placed a higher valuation thereon.

Defendant and his witnesses testified the real property valuation was not more than $20,000, plus $6,000 cost of model home built upon it. Pictures of the building were received in evidence. There is evidence that the plaintiff employed investigators who called at defendant's office with a public accountant to go over defendant's books and they were ordered off of the property. Later, by agreement, the accountant went there again and did see the books and looked over the property in general and took photographs of it. It consisted of a new office building, a 2-bedroom home, three warehouses, stock consisting of electrical fittings and equipment and stock. Defendant said he would not give the auditor an inventory of the property other than that reflected on the books. The investigator testified that he said he was going to the various creditors and determine the status of their account with the defendant's company, but was told by defendant's brother, in defendant's presence, that if he did he would "get a bad case of lead poisoning". Defendant testified he had made a current inventory of stock and equipment but had not carried out the values, as yet; but he said his estimate of its value was about $5,000; and that he believed the company owed about $69,000 in outstanding obligations.

Plaintiff produced a certified public accountant who testified he examined the books of the company and they were kept on a "going concern" basis; that his investigation definitely showed the market value would be substantially higher than the actual book value; that the model home, constructed on the property at an approximate cost of $6,500, was not carried on the books as a capital asset but was charged off as expenses; that according to book value there was a capital equity of $20,000 between the brothers. A verified statement as to what the books reflected was received in evidence. He testified that as of January 31, 1956, the total capital assets as reflected by the books were $30,662.20, i. e., a valuation account arrived at by subtracting the accounts payable from the unrealized accounts receivable; and that there was a plastic cabin cruiser valued at $2,600, which was listed as a business deduction. The difference between accounts payable and accounts receivable showed a figure of $23,430.99 in the black.

There was testimony, in detail, by an appraiser, that the Blue Book value of many of the articles of machinery and rolling stock was in excess of the values carried on the company's books. Plaintiff testified defendant told her at the time the business was incorporated in 1956 that defendant and his brother were going to incorporate for $75,000 but that the business was actually worth between $80,000 and $100,000, and they had the books set up so that should plaintiff ever leave him, he had it fixed so she would never be able to obtain anything out of it; that thereafter, when he was drinking, he bragged about being worth anywhere between $80,000 and $150,000.

After the reception of the corporation's books in evidence defendant's bookkeeper testified from summaries taken therefrom and said that the books, as of December 31, 1955, after subtracting the accounts payable from the accounts receivable, showed current assets of $38,861.32; that under this system (cash basis) of keeping books, they did not carry a bad debt account; and that usually on such accounts, two per cent is allowable for bad debts. She explained several items reflected in the books as to valuations and how they were obtained, and said the total assets fixed and current, were $66,876.31 at the end of the year 1955, and against that were accounts payable totaling $35,475.74, showing a net worth of $31,400.57. A similar showing was made for 1956, and income tax returns were prepared accordingly.

Defendant produced other evidence as to the value of the rolling stock and equipment. Counsel for defendant, in reply to an inquiry by the court, said that in making application to the Corporation Commissioner for the approval of the corporation, a statement justifying the value of $75,000 stock capitalization was submitted.

From a summarization of the transcript of the evidence, the trial judge remarked that he was impressed by a former statement of the parties, made to the Corporation Commissioner, that the assets of their business amounted to at least $75,000, in order to secure a capitalization in that amount, but in addition, he relied upon the other evidence produced that the value of the property and business was $71,112, less $26,000 obligations owing; that he did not consider the actual value of the rolling stock to be nothing, after 3 years depreciation; and he took into consideration the value of the yacht, trailer house, telephone communication system owned by the corporation, as well as the inventory furnished; that the balance of accounts receivable and accounts payable were likewise considered; that the good will did have a value and he fixed it at $4,888, all totaling $50,000; and that accordingly plaintiff was entitled to $12,500 on that basis.

The main complaint is that the court was unauthorized to lay so much weight on the figure of $75,000 as a basis for the value of the assets of the corporation, including good will, as indicated by the authorized capitalization; that the record of the value, as evidenced by the books, was unimpeached and must prevail; that $31,506.13 is that value; and that plaintiff was entitled to no more than a one-fourth interest therein. It is also argued that since there was no good will and its value, if any, was not established, it was error to allow the sum indicated for that purpose.

[2-4] While it might well appear that the trial court did adopt the figure of $75,000 as the actual value of the properties, including the good will, it is clearly indicated he also considered the other evidence admitted in arriving at that determination, and deducted certain items allowable. Good will has been held to be property of an intangible nature and is recognized as a thing of value. In re Levinson's Estate, 2 Coff.Prob. 325; 24 Cal.Jur.2d p. 141, sec. 3. It has been held that opinion evidence, as to its value, is admissible but not conclusive; that it is difficult to approximate the value of good will; that the situation of the premises, the amount of patronage and the general conditions existing at the time are stronger evidence than the opinion of a so-called interested expert; that the data for estimating the value of the good will of a business are always more or less uncertain and depend very much upon the personality of the parties engaged in the business; that one man by his personality, his adroitness in conducting his business, his geniality in attracting customers, and his wide acquaintance with his customers, may be capable of doing a profitable business where another, lacking some or all of these qualities may fail, or at least not succeed to the extent his predecessor had attained; that the fact that the business had been long established, and the habit of customers who have been used to dealing at a particular place to continue to go there, and the fact that there may be some other attraction, such as the location, etc., are elements not to be overlooked; and that after all, it is a question for the jury, taking all the circumstances, including the testimony of persons familiar therewith, into consideration. Sturtevant v. Dowson, 110 Or. 155, 219 P. 802, 222 P. 294. To the

same effect is 38 C.J.S. Good Will § 6, pp. 953, 954, reciting:

> "The determination of the question must, within proper limits, be left to the jury, whose conclusion must rest on evidence legitimately tending to establish value and supporting the verdict.
>
> "In determining the value the profits are necessarily taken into account, and the value is usually estimated at so many years' purchase on the amount of such profits. * * *
>
> "A principle applied in some cases is that the valuation of good will may be fairly arrived at by multiplying the average net profits for a period of years by the number of years, such number being suitable and proper, having reference to the nature and character of the particular business under consideration * * *
>
> "*Evidence.* The basis of the estimate is past profits. Evidence of the condition of the business subsequent to the sale thereof has been admitted, however, for the purpose of enabling the jury to make comparisons and draw conclusions as to the condition at the time of the sale. Expressions as to the value of the good will of a business must usually be regarded as the statement of an opinion and not as a statement of fact." See also Mueller v. Mueller, 144 Cal.App.2d 245, 301 P.2d 90, where this rule is cited.

[5] Here, the trial court had before it the fact that these two brothers had been, for many years, successfully operating this concern as a partnership. It was well known in the community; it had many employees and accumulated considerable up-to-date equipment; and the assets and property of the partnership were set forth in a statement to the Corporation Commissioner in establishing the capital stock of $75,000. Stock was conditionally issued to the partners in that sum. Corporations Code, Section 3018, provides a penalty for filing a false statement. The term "Capital Stock" is frequently used to express the property and assets of a corporation. Strictly speaking, the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise. It consists of the consideration received or agreed to be received in exchange for all issued stock, whether the consideration takes the form of money paid, labor done, or property actually received. 12 Cal.Jur.2d p. 666, sec. 89. See also Excelsior Water & Mining Co. v. Pierce, 90 Cal. 131, 140, 27 P. 44.

If the book value submitted to secure the stock was less than the $75,000 indicated, the court might well have concluded that the good will of the corporation made up a part of the difference in arriving at the value for which the corporation was capitalized. Although not conclusive, this was some evidence of the value of the assets and good will. When considered together with the other evidence produced, and particularly the claimed statement of defendant that the company was actually worth between $80,000 and $100,000 when it was incorporated, and the books showed an increasing business and return of gross profits in the amount indicated, we must conclude the trial court was justified in fixing the value of the good will and determining the value of plaintiff's one-fourth interest therein at the figures indicated. Levene v. City of Salem, 191 Or. 182, 229 P.2d 255, 263; 38 C.J.S. Good Will § 6, p. 953; 12 Cal.Jur.2d p. 666, sec. 89; 24 Cal.Jur.2d p. 140, sec. 2.

While good business might well have allowed a deduction of two per cent in bad debt losses, there is no evidence of such losses, and the court was justified in disallowing such percentage in its calculations. No error appears from the record in reference to the distribution of other personal property.

Judgment affirmed.

MUSSELL, J., and McCABE, J. pro tem., concur.

161 Cal.App.2d 366

Charles Frederick PEAK, Holly B. Peak, George A. Rhodes, Bette C. Rhodes, Frank Carbis, Stella B. Carbis, Margaret Farrell and Alma Farrell, Plaintiffs and Appellants,

v.

RICHMOND ELEMENTARY SCHOOL DISTRICT et al., Defendants,

U. S. Barbachano, Oleg Ivanitsky and Roy G. Watanabe, Individually, and doing business under the fictitious name of Barbachano, Ivanitsky and Watanabe, Defendants and Respondents.

No. 17965.

District Court of Appeal, First District, Division 2, California.

June 18, 1958.

Actions by landowner against architects and others for damages to land allegedly due to negligence in construction on adjacent land. The Superior Court, Contra Costa County, Harold Jacoby, J., sustained architects' demurrer, and plaintiffs appealed. The District Court of Appeal, Kaufman, P. J., held that complaint against architects, as excavators, was sufficient against demurrer.

Judgment reversed.

1. **Pleading** ⚷204(2)

A complaint will be held good as against general demurrer if, on consideration of all facts stated, it appears that the plaintiff is entitled to any relief against the defendant.

2. **Adjoining Landowners** ⚷6

Complaint against architects, as excavators, for damages sustained by plaintiff's land allegedly due to negligence in construction of building on adjacent land was sufficient against demurrer. West's Ann. Civ.Code, §§ 832, 1708.

3. **Pleading** ⚷214(1)

On demurrer, allegations of complaint must be taken as true.

Tinning & De Lap, James E. Cox, Martinez, for appellants.

Robert J. Cooney, El Cerrito, for respondents.

KAUFMAN, Presiding Justice.

Plaintiffs who are home-owners in El Cerrito, California, allege in their first amended complaint that the slide damage to their respective homes in the early winter of 1956 was the direct result of the negligence of a group of defendants in the excavation of a school site on land adjacent to the plaintiffs' homes. The named defendants are the Richmond Elementary School District, John H. McCosker, general contractor, Clyde & Associates, soil engineers, Orinda Excavating and Paving Company, and Barbachano, Ivanitsky and Watanabe, the architects employed by the school district. All the defendants except the architects answered the complaints. The architects who are the respondents herein, filed a general demurrer, which was sustained without leave to amend. This appeal is taken from the Judgment thereafter entered in favor of respondents.

The sole issue on appeal is whether the complaint states a cause of action against the respondent architects. We think it does.

The allegations of the complaint applicable to the architects are contained in paragraphs 14, 15, 16, 17 and 18.

[1, 2] In determining whether a complaint states facts sufficient to constitute a cause of action, the rule is that if on consideration of all facts stated, it appears that the plaintiff is entitled to any relief against the defendant, the complaint will be held good. Augustine v. Trucco, 124 Cal.App.2d 229, 268 P.2d 780. In the instant case, the question of what caused the damage to plaintiffs' land is one of fact; it may have been the negligence of one of the defendants or of all of them; there may have been some cause other than the conduct of the defendants. Civil Code, section 1708, reads as follows: "Abstinence from in-

jury. Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights. (Enacted 1872.)" The Restatement of Torts, section 819, recognizes a cause of action against the architects if their negligent conduct resulted in the injury to the plaintiffs' land. We do not think that under the liberal rules of pleading in this state the plaintiff can be denied the opportunity to try the question of proximate cause before a jury. If this court were to determine at this stage that the architects had no responsibility for the damage to the plaintiffs, the other defendants could all argue that it was not their fault but that of the faulty plans of the architects.

[3] Respondents argue that the trial court sustained their demurrer, as a licensed architect owes no duty to a third person with whom he has not contracted, after the completion of plans and specifications. Plaintiffs, contend that they are charging the architects not as architects but as excavators. The contract between the school district and the architects is not a part of the record on appeal. Architects do supervise construction as a common practice. MacDowell v. City of Long Beach, 12 Cal.App.2d 634, 55 P.2d 934. The allegations of the complaint must be taken as true. The complaint further states that the architects as excavators failed to give notice or provide the necessary support in compliance with Civil Code, section 832. In Green v. Berge, 105 Cal. 52, at page 58, 38 P. 539, at page 541, our Supreme Court said:

> "A landowner has an interest in adjoining land for the lateral support of his soil. This is a limitation upon the rights of landowners. Whoever deprives him of this support for his land, otherwise than as the statute has prescribed, performs an unlawful act. The general rule is that all who unite in such acts are wrongdoers, and are responsible in damages."

We conclude that the judgment must be reversed with directions to the trial court to overrule the demurrer to the complaint.

Judgment reversed.

DOOLING and DRAPER, JJ., concur.

161 Cal.App.2d 507

Matter of the ESTATE of Albert L. GENUNG, also known as A. L. Genung, Deceased.

Esther DONNELLAN, Administratrix of the Estate of Elizabeth Jones, Deceased, Contestant and Appellant,

v.

Mabel GENUNG, Legatee and Respondent.

Civ. 22909.

District Court of Appeal, Second District, Division 3, California.

June 20, 1958.

Rehearing Denied July 17, 1958.

Proceedings on life beneficiary's administratrix' petition for an order requiring that assets in hands of trustees be delivered to her. From a decree of the Superior Court of Los Angeles County, Harold W. Schweitzer, J., an appeal was taken. The District Court of Appeal, Vallée, J., held that evidence would sustain finding that trustees had been guilty of no abuse of discretion in determining what amounts of principal should be paid for benefit of life beneficiary.

Affirmed.

1. Appeal and Error 🔑1010(1)

Appellant contending that findings were not supported by evidence was required to demonstrate that there was no substantial evidence to support challenged findings. West's Ann.Civ.Code, § 2269.

2. Trusts ⚷262

In proceedings on life beneficiary's administratrix' petition for an order requiring that assets in hands of trustees be delivered to her, evidence would sustain finding that trustees had been guilty of no abuse of discretion in determining what amounts of principal should be paid for benefit of life beneficiary.

3. Trusts ⚷331

Where matters are litigated and determined in settlement of intermediate account, order settling that account is conclusive on parties as to matters so litigated, in all subsequent proceedings in probate of estate.

4. Executors and Administrators ⚷315(6)

Decree of distribution having become final, adjudication was conclusive as an ascertainment of terms of testamentary trust and interests created thereby, and it was not subject to collateral attack or to be impeached by resort to terms of will or by resort to evidence received at hearing of account current and report.

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Halverson & Halverson and George Halverson, Los Angeles, for appellant.

Pence, Johnson & Downing, Covina, and John H. Halpin, Jr., Redding, for respondent.

VALLÉE, Justice.

Appeal from a decree determining distributive interests in a testamentary trust.

The decree of distribution of the estate of Albert L. Genung, made December 18, 1941, distributed half thereof "to Paul Jones and Mabel Genung, as co-trustees, in trust for the following uses and purposes: (a) Said trustees shall administer said trust as in their judgment and discretion shall seem proper, and are vested with full authority to sell, convey, encumber, mortgage, loan or otherwise transfer or alienate any and all property in or belonging to such trust, and with the monies therein or to be derived from any deals with trust property, to make such investments or to buy such property or assets as shall in their judgment be proper. (b) Said trustees shall, during the lifetime of decedent's sister, Elizabeth Jones, devote the full income from said trust to the use and benefit of said Elizabeth Jones; and shall pay to her the income from said trust at such intervals and in such amounts as shall be for the best interests and advantage of said Elizabeth Jones. Or, if in the judgment of said trustees, it shall be advisable to pay over such income to some other person or persons to be expended for the benefit of said Elizabeth Jones, they are hereby fully empowered so to do and to pay over such income to such person or persons as in their judgment will best or most advantageously expend the sum for the benefit of said Elizabeth Jones; and if, in the judgment of said trustees, it shall be necessary or proper for the care, health, benefit or support of said Elizabeth Jones, that monies in addition to the income from said trust be expended by her for her benefit, then and in that event said trustees are hereby expressly directed and empowered to use and expend such portion of the principal of said trust property as in their judgment is needed for the care, health, and benefit or support of said Elizabeth Jones. (c) Upon the death of said Elizabeth Jones, said trust shall forthwith cease and terminate, and all of the property remaining in said trust at that time shall go and pass to decedent's wife, Mabel Genung, individually and not as trustee." The property distributed consisted of a half interest in a lot improved with a dwelling house, a half interest in an unimproved lot, and $.45 cash, all of the value of $6,125.45. The half interest in the improved lot was sold on February 14, 1947, for $3,675—$1,175 cash and a purchase money deed of trust for $2,500.

The cotrustee, Paul Jones, died on August 17, 1951. On August 15, 1955, Mabel Genung, the surviving trustee, filed her first account and report. The beneficiary, Elizabeth Jones, filed objections to the account and a petition for instructions and for removal of the trustee. On December

8, 1955, an order was made settling the account, awarding $500 fees to the attorney for the trustee, and continuing the petition for instructions and removal of the trustee. The order adjudged that the trustee had in her possession a balance of $5,414.03, of which $664.03 was cash, and appointed Byron Halverson cotrustee. The order settling the account became final.

Elizabeth Jones died on April 24, 1956. On November 29, 1956, the administratrix of the estate of Elizabeth Jones filed a petition praying for an order that the assets in the hands of the trustees belonged to her estate and that they be delivered to her as administratrix after payment of fees of Mabel Genung. The petition alleged that on April 10, 1956, the trustees sold the unimproved lot, resulting in their receiving $5,911.60 which they hold, less $501 paid to the attorney for the trustee; Mabel Genung, as sole trustee, wilfully refused to exercise her discretion in behalf of Elizabeth although she knew Elizabeth was in need; Elizabeth left no estate to pay the expense of her last illness, her funeral expenses, or the care and advances made to her by her daughter.

At the hearing of the petition of the administratrix the court had before it the petition of Elizabeth Jones for instructions and for removal. The court treated them as moot because of the death of Elizabeth. Mabel Genung sought the remaining trust assets by virtue of the decree of distribution. The court found: that between December 18, 1941 and April 24, 1956, the date of death of Elizabeth, Mabel had expended from the trust for Elizabeth's use and benefit these sums:

"From increase of the trust	$5,874.57
From principal of the trust	2,357.93
Total	$8,232.50";

the discretion exercised by Mabel Genung was not arbitrary but was reasonable; it is not true that Elizabeth left no estate with which to pay the expenses of her last illness or her funeral expenses or the care or advances made by her daughter; the income of the trust was at no time large enough to provide for the entire support of Elizabeth; all of the income, and principal of $2,357.93, was paid by the trustees for the benefit of Elizabeth; the cotrustees until the death of Paul Jones, and Mabel Genung thereafter, exercised "a reasonable judgment and discretion in the determination of the amounts of principal to be paid from said trust for the benefit of Elizabeth Jones and were not guilty of any abuse of discretion in making such determination."

The court adjudged by decree dated June 4, 1957, that Mabel Genung, individually, is entitled to the whole of the balance of the trust available for distribution and it is vested absolutely in her subject to the winding up of the administration of the trust. The administratrix of the estate of Elizabeth appeals.

[1] Appellant contends numerous findings are not supported by the evidence. Such contention requires appellant to demonstrate that there is no substantial evidence to support the challenged findings. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550. "The rule is established that when an appellant contends that there is not any substantial evidence to sustain a finding of fact he must point out in his brief the (a) evidence, (b) particular finding claimed to be unsupported, and (c) show wherein the evidence does not sustain the questioned finding; otherwise the finding of the trial court is presumed to be correct and not erroneous and it will be upheld by an appellate court." Rinker v. McKinley, 65 Cal.App.2d 109, 110, 149 P.2d 859, 860. Appellant has not complied with the rule. None of the evidence received at the hearing on which the appeal from the decree is taken is set out in appellant's briefs.

[2] We have examined the record and find that the findings to the effect that Mabel Genung acted in good faith and reasonably in the administration of the trust and was not guilty of any abuse of dis-

cretion are amply supported by the evidence. The decree of distribution provided that the trustee should administer the "trust as in their judgment and discretion shall seem proper." No abuse of that discretion is shown. During administration of the trust the trustees and trustee received in cash $10,780.90, consisting of income and principal; and disbursed, other than to the beneficiary, $1,884.37, which disbursements were approved by the final order of December 8, 1955, leaving a balance of $8,896.53. They paid $8,232.50 to the beneficiary, retaining in the trust $664.03 which was principal. From the $664.03 the court by its final order of December 8, 1955, awarded $500 as attorney's fees. On the death of Elizabeth there was no income on hand. No trustees' fees were ever awarded.

[3] Appellant criticizes expenditures made by the trustees and the trustee prior to the hearing of the first account. As stated earlier, an order was made settling that account on December 8, 1955, which became final. It is settled that where matters are litigated and determined in the settlement of an intermediate account the order settling that account is conclusive on the parties as to the matters so litigated in all subsequent proceedings in the probate of the estate. In re Estate of Healy, 109 Cal.App. 2d 885, 887, 241 P.2d 1043.

Complaint is also made of the fact that no payment was made by the trustees to Elizabeth from May 23, 1940, the date of death of Albert Genung, until February 18, 1942. Appellant overlooks the fact that the trust estate did not pass to the trustee until the decree of distribution which was made December 18, 1941.

At the hearing of the present proceeding it was stipulated that the only question before the court was whether Mabel Genung or the administratrix of the estate of Elizabeth was entitled to any or all of the principal. The decree of distribution states that "if, in the judgment of said trustees, it shall be necessary or proper for the care, health, benefit or support of said Elizabeth Jones, that monies in addition to the income from said trust be expended by her for her benefit, then and in that event said trustees are hereby expressly directed and empowered to use and expend such portion of the principal of said trust property as in their judgment is needed" for such purposes. The power conferred on the trustees with respect to invasion of principal was discretionary. It was when, in the judgment of the trustees, such invasion was "necessary or proper" that they were "directed and empowered" to do so. The power being discretionary, they were subject to control of the court if it was not reasonably exercised. Civ.Code, § 2269. Since the court on substantial evidence found that the power had been reasonably exercised, the question is not open to review. "It is the general rule that if the power of the trustee is discretionary, and the trustee is fairly employing his judgment to advance or not to advance, the court will not control his action merely because it disagrees with him, but it must find some abuse of discretion or bad faith before it will interfere. Bogert on Trusts & Trustees, vol. 4, part 1, pp. 168–169. The court should not be burdened with the duty of administration, nor required, nor permitted to substitute its judgment and discretion for that of the trustee so long as it acts within proper limits; nor in any event until there is an entire failure or refusal on the part of the trustee to perform its duty." In re Estate of Greenleaf, 101 Cal.App.2d 658, 662, 225 P.2d 945, 948.

[4] We think the court correctly determined that under the decree of distribution Elizabeth was to receive the benefits of the trust for her care, health, benefit, or support during her lifetime and that the residue remaining on her death should be distributed to Mabel Genung. The decree of distribution having become final, the adjudication is conclusive as an ascertainment of the terms of the trust and the interests created thereby. It is not subject to collateral attack or to be impeached by resort to the terms of the will or by resort to the evidence received at the hearing of the account current and report held on December

8, 1955. In re Estate of Buckhantz, 159 Cal.App.2d 635, 324 P.2d 317; 25 Cal.Jur. 286, § 145.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

161 Cal.App.2d 723

Application of Harold Daniel ROCK, for a Writ of Habeas Corpus.

Cr. 6309.

District Court of Appeal, Second District, Division 3, California.

June 27, 1958.

Habeas corpus proceeding challenging extradition of petitioner to answer robbery charge in Kansas. The District Court of Appeal, Shinn, P. J., held that affidavits offered by the petitioner failed to substantiate his allegation that he could prove "beyond any doubt" that he was in Los Angeles on date when Kansas crime was alleged to have been committed.

Writ discharged and petitioner remanded to custody of sheriff with directions.

1. Habeas Corpus ⇨92(2)

Where warrant of rendition has been issued by Governor of California in compliance with requirements of Penal Code section, sole question on habeas corpus is whether arrestee is fugitive from justice of demanding state. West's Ann.Pen. Code, § 1548.2.

2. Habeas Corpus ⇨85.8(2)

When county attorney of demanding state makes oath that he has examined evidence which caused him to swear to complaint charging commission of offense by party accused, who thereafter fled state, and that county attorney is satisfied that evidence available would be sufficient to warrant conviction of accused, and upon production of all documents required for extradition governor has issued requisition for apprehension and delivery of accused, warrant of rendition issued by Governor of California may not be denied effect on habeas corpus, except upon convincing showing by petitioner that he is not fugitive from justice of demanding state.

3. Evidence ⇨584(1)

Evidence is not "convincing" as long as court remains in doubt.

See publication Words and Phrases, for other judicial constructions and definitions of "Convincing".

4. Habeas Corpus ⇨85.8(2)

In habeas corpus proceeding challenging extradition of petitioner to answer robbery charge in Kansas, affidavits offered by the petitioner failed to substantiate his allegation that he could prove "beyond any doubt" that he was in Los Angeles on date when Kansas crime was alleged to have been committed.

◆

Harrison M. Dunham, Los Angeles, for petitioner.

William B. McKesson, Dist. Atty., of Los Angeles County, Jere J. Sullivan and Ralph F. Bagley, Deputy Dist. Attys., for respondent Sheriff.

SHINN, Presiding Justice.

We issued a Writ of Habeas Corpus upon petition of an attorney authorized to act for Harold Daniel Rock which contained averments "that applicant has been held on a Warrant of Rendition issued by the Governor of the State of California, based upon a Warrant of Extradition issued by the Governor of the State of Kansas; that said Warrant of Rendition, if allowed to become effective, would permit applicant to be removed from the jurisdiction of the above entitled Court to the State of Kansas to be tried upon the alleged charge of robbery, which applicant did not and could not have committed.

That applicant can prove beyond any doubt that he was not in the State of Kansas on January 28, 1957, on which date the crime was alleged to have been committed, but was in fact in the State of California during the entire months of January and February, 1957. That applicant is prepared to prove by the testimony of five witnesses that he was present in the State of California County of Los Angeles on January 28, 1957." Return was duly made and upon the hearing it was stipulated that the petition be deemed a traverse to the return. Petitioner was granted leave to file affidavits in support of the allegations of the petition and these have been duly filed and served upon the District Attorney.

Presented with and as a part of the return was a requisition duly issued by the Governor of the State of Kansas addressed to the Governor of the State of California requesting the apprehension of Rock and his delivery to an agent of the State of Kansas. Attached thereto were exemplified copies of documents which in all respects complied with the requirements of Section 1548.2 of the California Penal Code. The warrant of the Governor of California is in due form.

It appears from the documents attached to the requisition that a complaint charging petitioner and another with armed robbery in Wyandotte County, Kansas, on January 28, 1957, was sworn to by the County Attorney of Wyandotte County. The application of the County Attorney to the Governor of the State of Kansas certifies that in his opinion the allegations of the complaint are true and that he believes that he has sufficient evidence to secure the conviction of the fugitive and it is stated further: "I further certify, that I have examined into the case and I am satisfied that a crime has been committed and that the person charged is the guilty person."

[1] It is settled law that where a warrant of rendition has been issued by the Governor of this state in compliance with the requirements of Section 1548.2 of the Penal Code the sole question on habeas corpus is whether the arrestee is a fugitive from justice of the demanding state.

[2] When, as here, a County Attorney of the demanding state makes oath that he has examined the evidence which caused him to swear to a complaint charging the commission of an offense by the party accused, who thereafter fled the state, and that he is satisfied that the evidence available would be sufficient to warrant the conviction of the accused, and upon the production of all documents required for extradition the Governor has issued a requisition for the apprehension and delivery of the accused, the warrant of rendition issued by the Governor of this state may not be denied effect on habeas corpus except upon a convincing showing by the petitioner that he is not a fugitive from justice of the demanding state.

[3, 4] We use the word "convincing" advisedly. The courts have described the required degree of proof as "clear," "clear and satisfactory," "clear and invincible," "substantial and convincing," "conclusive," "practically conclusive," etc. (25 Am.Jur. p. 198; 51 A.L.R. 797; 61 A.L.R. 716.) These descriptive adjectives all lead to the rule that the court must be convinced of the truth and sufficiency of the evidence offered by the petitioner. It is not convinced as long as the court remains in doubt, but when doubt that petitioner is a fugitive from justice is removed it must be held that his proof is insufficient to overcome that of the People and that the latter must prevail. It has often been said in the cases that a proper showing made by the demanding state establishes a prima facie case but this means only that the burden is cast upon the petitioner to prove that he is not a fugitive from justice. The proof of the demanding state in due form must prevail unless it is convincingly overcome by the proof of the petitioner.

The affidavits filed by petitioner, omitting the venue and attestation, read as set out in the margin.[1] Petitioner did not file his own affidavit.

The District Attorney requested and the court granted the privilege of filing counter affidavits should the court consider them necessary. We have ruled that counter affidavits will not be required. The affidavits filed in support of the petition are, in our judgment, wholly insufficient to controvert the existence of facts established by the documents upon which the Governor of Kansas issued his requisition. As evidence that petitioner was in California January 28, 1957, they are evasive and pitifully inadequate. We accord to them no probative force to substantiate the allegation of the petition that the petitioner could prove "beyond any doubt" that he was in Los Angeles. Needless to say, when we issued our writ we anticipated a substantial showing in support of the positive allegations of the petition.

The petition is discharged, the petitioner is remanded and the Sheriff of Los Angeles County is directed to deliver petitioner to an accredited agent of the State of Kansas thirty days after the filing of this opinion.

PARKER WOOD, J., and PATROSSO, J. pro tem., concur.

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161 Cal.App.2d 390

Samuel F. FINLEY, Plaintiff, Cross-Defendant and Appellant,

v.

Lola V. FINLEY, Defendant, Cross-Complainant and Respondent.

Civ. 9352.

District Court of Appeal, Third District, California.

June 18, 1958.

Action by husband for divorce wherein the wife filed a cross-complaint. From a judgment as modified in favor of the wife in the Superior Court, Del Norte County, Wakefield Taylor, J., the husband appeals. The District Court of Appeal, Van Dyke, P. J., held that the evidence did not entitle the husband to a divorce; that the division of community property would not be disturbed and that the award of attorney's fees was not excessive.

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[1] "Affidavit of John J. D'Andrea. John J. D'Andrea, being first duly sworn, deposes and says: I met Harold Rock at the Tailspin nightclub in Hollywood. He was with a girl that I wanted to dance with. I asked her to dance and brought her back to Harold after a few dances, and she introduced him to me as her boyfriend. I said I hoped he didn't mind my dancing with his girlfriend. We got into a conversation, and she remarked what a wonderful dancer I was, and I told them that I was a professional dancer; I also told them if they would care to, that I was rehearsing a dance group for a Concert at my home, 1620½ Vista Del Mar, Hollywood, California, and they could come there to watch. Harold came down a couple of times to watch the rehearsals, and that is how we became friends. As our friendship progressed, he asked if he could move in with me and stay for a couple of weeks, and I agreed. He moved in around the 20th day of January, 1957. The date stands out in my mind, because I had paid the rent just a few days previously, and needed the money from him, which was his share of the rental. Around the 4th of February, 1957, he left for Kansas City, due to the serious illness of his mother."

"Affidavit of Gerald Robert Newton. Gerald Robert Newton, being first duly sworn, deposes and says: That I am 21 years of age and a laborer by profession. That I have known Harold Rock for about 3 or 4 years, and first met him back in Kansas City, Missouri. I met him out in California in about 1955, and we have been friends and buddies since that time. To the best of my recollection and knowledge, Harold Rock and I were together many evenings during the entire month of January, 1957, and on my birthday, which is January 27th, we spent that day and evening together in and around Hollywood, California."

"Affidavit of Lazaro Marquez. Lazaro Marquez being first duly sworn, deposes and says: That I am 22 years of age, and an assembler by profession. That I have known Harold Rock since our childhood days back in Kansas City, Missouri, and we have been friends since I came to California with him in May, 1956. Harold Rock loaned me $100.00 when I first arrived here, and I paid him back this loan in Hollywood, California on or about February 1, 1957, just prior to his returning to Kansas City."

Judgment affirmed.

1. Appeal and Error ⚷1010(1)

Findings of fact substantially supported by the evidence are binding on appeal.

2. Divorce ⚷130

Evidence did not entitle husband to divorce on ground of wife's extreme cruelty.

3. Divorce ⚷286

In action for divorce where wife was granted decree, evidence did not establish that division of community property by the court was such as to justify the appellate court in exercising the revisionary power conferred upon it by the statute. West's Ann.Civ.Code, § 148.

4. Divorce ⚷227(2)

In action for divorce, evidence established that a trial fee of $1,850 and an appellate fee of $500 was not excessive in view of the serious nature of the contest.

◆

Nichols, Richard, Allard & Williams, Oakland, and Robert N. Conners, Eureka, and Wallace S. Myers, San Anselmo, for appellant.

Hilard H. Crawford, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

After a trial upon issues presented by appellant's complaint, respondent's answer thereto, respondent's cross-complaint, and appellant's answer thereto, the trial court, on April 1, 1957, granted to respondent upon her cross-complaint an interlocutory decree of divorce, apportioned the community property, and granted respondent alimony for the term of three years. Appellant herein moved for a new trial. The trial court made certain modifications in the interlocutory decree and denied the motion. From the judgment as modified this appeal is taken.

Appellant and respondent were married December 31, 1937, at which time appellant was a practicing attorney, and respondent was engaged in cosmetology. Each of the parties had two children by a previous marriage, appellant's children being of high school age, while respondent's children were of grammar school age. Save for a short time, appellant's children did not live with the parties hereto, but respondent's children were reared in the common home. In 1947, respondent's mother came to live with the parties and remained in residence with them until they were separated. On August 8, 1941, appellant became the Judge of the Superior Court for Del Norte County, and still holds that office. The parties separated November 29, 1955. There are no children of the marriage. All of the property of the parties was found by the trial court to be community in character. The divorce was granted upon a finding of extreme cruelty and the court found to be untrue the allegations contained in appellant's complaint that respondent had also been guilty of extreme cruelty toward him.

In support of his appeal, appellant makes four assignments of error. They are: 1. The refusal of the trial court to grant a divorce to appellant as well as to respondent; 2. The award to respondent of substantially all of the real property and the greater part of the personal property, while charging appellant with payment of all of the unsecured community debts; 3. The award to respondent of unwarranted alimony; and, 4. Exorbitant attorneys' fees ordered paid by appellant. Appellant does not seek a reversal of the interlocutory decree, but seeks a modification thereof under the terms of Section 148 of the Civil Code, and an enlargement of the decree to include a decree of divorce to appellant as well as to respondent.

In support of his first assignment of error, appellant argues that the record is replete with uncontradicted evidence that respondent breached her marriage obligations long before any violation by appellant by ignoring all duties to her husband, by denying him her love and affection, and by devoting all her time, efforts, attention and earnings to her mother and to her children by her prior marriage.

[1,2] Concerning this argument little can be said other than that appellant presented substantial evidence in support of his charges against respondent. The evidence on the issue of her failure to keep her marriage vows was conflicting. The trial court upon such conflicting evidence found the appellant's assertions to be untrue, and this court is bound by such findings under the oft-repeated rule that findings of fact substantially supported are binding on appeal. The trial court's denial of a divorce decree to appellant must stand, and we turn to the challenged property division.

The findings did not in all instances reflect the trial court's concept of values, but the memorandum of decision, which appears in the record, states that for the purpose of making its order dividing the community property the court considered Plaintiff's Exhibit No. 1 in evidence as furnishing a detailed outline of the property available for distribution. This exhibit, apparently prepared and submitted by appellant, sufficiently itemized the property and reflected appellant's opinion as to the value of the various items. However, the trial testimony discloses that as to the value of the ranch home and as to the value of the machinery and equipment used in operating it there was sharp conflict.

Appellant asserts that the following tables listing the property awarded to each fairly reflects the values:

To Appellant:		
Artisan tools	$ 1,642.00	
Law Library	893.00	
Withdrawable Retirement Contributions	3,300.00	
Credit with Clausen Motors	1,100.00	
Equity in Plymouth Car	100.00	
Equity in Nash Car	200.00	
Guns	300.00	
Vibrachair	265.00	
Lot	300.00	
Buggy	25.00	
Movie Camera	450.00	
Total		$ 8,575.00
Community Debts to be paid by appellant	$ 1,250.00	
Income Tax to be paid by appellant	1,700.00	
		2,950.00
Net Community Interest to appellant		$ 5,625.00
To Respondent:		
Fixtures and Furnishings in living room, kitchen dining room and bedroom of family home	$ 5,265.00	
Ranch equipment and vehicles	10,435.00	
Net value of Ranch (NOTE: Appellant asserts greater net value)	25,000.00	
Cash value of Life Insurance	1,200.00	
Miscellaneous	1,424.00	
Net Community Interest to respondent		$43,324.00

Respondent does not seriously question these values, and from the record it appears that they are reasonably accurate. For instance, the testimony as to the gross ranch value varied from $30,000 to in excess of $70,000. The property is burdened by secured debts approximating $25,000, so that the value reflected in the foregoing statement adopts a gross value of $50,000. By the modification made on motion for new trial, the court gave to appellant an opportunity for ninety days to sell the ranch at anything over $50,000, retaining any excess. Appellant argues that the term allowed was too short to either accomplish a sale, which in fact appellant failed to accomplish, or to establish that the value of the ranch was not materially greater than $50,000. Appellant has been required to pay attorneys' fees of $1,850 in the trial court, and $500 on the appeal. He is also ordered to pay $250 a month alimony for three years from April 1, 1957, a total of $9,000.

Appellant describes the situation resulting from the community property division as amounting to stripping him of every asset he had in the world of any commercial value, leaving him burdened with approximately $3,000 in unsecured community obligations, with the payment to respondent for attorneys' fees of $2,350, with the cost of his own attorneys and with the payment of $9,000 in alimony. On the other hand, appellant says that respondent has received $43,324 worth of property, and according to her own testimony has the ability to earn from $200 to $300 toward her own support and maintenance hereafter. We think appellant's summation omits material considerations.

One matter which the trial court undoubtedly considered in its determination as to community property division had to do with the earning capacity of appellant and the value of his retirement rights. Appellant receives a salary of $15,000 a year and has been earning additional sums by being assigned to other courts where the salaries are higher. He invites our attention to the effect of the federal income tax upon his salary, asserting that the tax for a single person is about $5,000 per year, leaving him $10,000 net. From this he must pay state income tax, as well as alimony. He estimates that during the alimony period he will have left about $500 per month, and after the alimony period about $750 per month. Appellant's present term of office will expire December 31, 1960, when he will be 61 years of age and will have served seven months short of 20 years. If he runs for an additional term and is defeated, he can, under the Judges' Retirement Act, Government Code, § 75000 et seq. receive an annual retirement allowance of approximately $6,000, beginning, however, at age 65. However, the trial court probably considered that he could return to the practice of law. These things are material factors to be considered and there can be little doubt that if his health be good at the end of his present term and if he turn then, willingly or unwillingly, to the practice of the law his widely recognized learning and competence will secure him a reasonable income.

Aside from such aid as she receives through the interlocutory decree, respondent's future is much less encouraging. She is 53 years of age. She testified that if she tried to return to the practice of cosmetology she would first have to take about eight months' training before she could receive a license. She has worked a number of years as a bookkeeper, earning between $200 and $300 per month. Although her health is presently good, she is of an age that will prove disadvantageous in a competitive labor market.

Although, on the face of the record, the community property division, all things considered, does appear to be a harsh one, the picture is crowded with many imponderables. The secured debt burden on the ranch is serious. The record of production has not been good. Generally losses of considerable magnitude have been suffered. The salability of the property as a farm at the price estimated in the foregoing table appears to be questionable and selling at that figure may be extremely difficult. The witnesses who testified to the highest value leaned heavily upon the adaptability of a portion of the ranch for subdivision. But certainly subdivision would be beyond the capacity of respondent, and the value for such a specialized purpose is, from the record, a matter of speculation. If the ranch's value approximate the lowest value placed on it, $30,000, the net over the debt is so small as to be inconsiderable and the debt threatens seriously the chances that respondent can realize anything.

If, as appellant requests, this court were to revise the distribution of the community property, the change, as we view it, would have to come about through the ordering of a sale of the ranch and that is the suggestion of appellant. If we examine into this, we may speculatively assume that $50,000 would be obtained, from which about $25,000 would have to be paid to clear the ranch of secured debts. The ranch equipment, the furniture and the incidentals listed above at a total value of over $17,000 could hardly be counted on to produce, on sale, any such amount. What they would produce is highly speculative. If now we consider the disparity in the potential earning capacities of the two, and if we consider the comparatively short time within which appellant can qualify for substantial retirement pay, a status achieved during marriage, it becomes apparent that what appears to be a harsh division on first view is shown to have material elements of fairness not at first perceivable.

[3] We feel compelled to conclude that this court ought not in this case to exercise the revisionary power conferred upon it by Section 148 of the Civil Code, and, accordingly, the division of community property will not be disturbed.

[4] So far as the attorneys' fees are concerned, we think the charge that excessive fees were allowed cannot be substantiated. A trial fee of $1,850 and an appellate fee of $500 are not excessive in view of the serious nature of the contest.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

161 Cal.App.2d 589

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Buster Elroy HARTMAN and John David Ray, Defendants and Appellants.

Cr. 1350.

District Court of Appeal, Fourth District, California.

June 23, 1958.

Defendants were convicted in the Superior Court of San Diego County, Richard B. Ault, J., for robbery, and they appealed. The District Court of Appeal, Mussell, J., held that since the People had not relied on circumstantial evidence to convict defendants of robbery and since circumstantial evidence produced had been only incident to or corroborative of direct evidence connecting defendants with crime charged, it had been unnecessary to give offered instructions that it was duty of jury to reject construction pointing to defendants' guilt if evidence was susceptible to two reasonable constructions.

Affirmed.

1. Criminal Law ⚷519(8)

On record presented, in robbery prosecution, it was not error to overrule defendants' objection to admission of confessions made prior to arraignment, notwithstanding defendants' contentions that their arraignments had been unnecessarily delayed. West's Ann.Pen.Code, § 825.

2. Criminal Law ⚷1037(1)

In robbery prosecution, unobjected-to references by prosecuting attorney in argument to lead pipe not shown to have been used in robbery would not require reversal.

3. Criminal Law ⚷814(17)

Where people did not rely on circumstantial evidence to convict defendants of robbery, and circumstantial evidence produced was only incident to or corroborative of direct evidence connecting defendants with crime charged, it was unnecessary to give offered instruction that it was duty of jury to reject construction pointing to defendants' guilt if evidence was susceptible to two reasonable constructions.

4. Criminal Law ⚷795(1)

Where evidence was that defendants were guilty of robbery, it was not necessary to give offered instructions relating to included offenses.

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Thomas Whelan, San Diego, for appellants.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellants Buster Elroy Hartman and John David Ray were charged with the crime of Robbery in that by means of force and fear and against the will of Kenneth R. Olson and Lawrence H. Weaver, they took from the person of Kenneth R. Olson $47, in money, the personal property of Kenneth R. Olson. The information also contained the allegation that at the time of the commission of said offense appellants were armed with a deadly weapon, to wit, a .32 calibre revolver. They were tried before a jury and found guilty of robbery in the first degree. It was further found that they were armed with a deadly weapon at the time the robbery was committed. Motions for a new trial were denied. Imposition of sentences was suspended for five years and appellants were placed on probation under certain conditions, including the requirement that they spend the first year of the probationary period in the custody of the sheriff of San Diego county.

Appellants in their appeals from the judgments of conviction do not question the sufficiency of the evidence to support them but claim that the court erred in decisions and questions of law arising during the trial, in instructing the jury, and that the district attorney was guilty of prejudicial misconduct.

On the night of July 10, 1957, Kenneth Olson and Lawrence Weaver, members of the United States Navy, met the appellants, who were also in the Navy, in downtown San Diego. After some conversation, they all got into an automobile which appellant Hartman had borrowed from a friend and started to go to Tiajuana. Before they left San Diego, appellant Ray went to his locker in the Locker Club and obtained a revolver, which he had previously borrowed, a pint of rum, and his jacket. Hartman drove the car to a filling station and bought gasoline and a stop was then made at a bar where Ray bought six 12-ounce cans of beer with money supplied by Olson. Hartman drove the car down a deserted country road and became so reckless that Ray took over the wheel. Several stops were made and Ray finally drove the car to the side of the road and backed it into a wooded lane.

Hartman, who was then in the front seat of the car with Ray, turned around with the revolver in his hand and demanded Weaver's wallet. It appeared that Olson had the wallet and when Ray took it from him, he, Ray, demanded the "rest of the stuff." Hartman forced Olson to get out of the car, searched him and struck him on the back of the head. Ray took possession of the revolver and apparently it was accidentally discharged. Appellants threatened to kill Olson and Weaver if they recognized appellants and ordered Olson and Weaver to help push the car when appellants failed to get it started. Olson and Weaver were then ordered to run down the hill and appellants drove away. They were stopped by police officers at about 2:00 a. m. and the .32 revolver was found in the car. Hartman had a discharged .32 calibre shell in his hand and a .32 calibre live cartridge was found on his person. Appellants were arrested and taken to the San Diego Police Station where they remained until about 4:00 a. m., when they were taken to the Chula Vista Police Department. They were there fingerprinted and booked and then went to sleep.

At 10:00 a. m. Hartman was questioned by the officers and denied participation of the robbery. About half an hour later Ray was questioned and admitted that he and Hartman were with Olson and Weaver in the car. He stated that he and Hartman got out and decided to "roll" Olson and Weaver; that Hartman ordered Weaver out of the car and he (Ray) got the wallet from Olson; that Hartman hit both of the sailors; that when they got the car started, he ordered the sailors to run down the road and he fired the revolver over their heads to scare them and make them run faster. Hartman was then brought back to the police office and advised that appellants had been identified by the victims. He then admitted that the robbery had taken place. At the trial both appellants testified that they were with the victims on the night involved but denied a robbery was committed by them.

[1] Appellants first argue that their alleged confessions were inadmissible since their arraignment was unnecessarily delayed. This contention is without merit. Section 825 of the Penal Code provides that "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; * * *". In the instant case the statements of appellants were taken well within the time limit specified in said section. The record shows that appellants were booked at the Chula Vista jail at approximately 4:00 a. m. on July 11th and were permitted to go to sleep without interrogation. The record is silent as to when a magistrate might be available before whom they might have been taken for arraignment. Under the circumstances, it does not appear that the statements were taken while appellants were being illegally restrained or that there was unnecessary delay in their arraignment. In this connection appellants cite the case of Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479, in which it was held that the confession of the defendant therein was inadmissible since it was obtained during a period of unlawful detention during which the defendant should have been arraigned. However, the facts in that case differ from those in the instant case and the Supreme Court of this state in Rogers v. Superior Court, 46 Cal.2d 3, 10, 291 P.2d 929, 933, held that "The test ordinarily used by state courts to determine the admissibility of a confession is, whether, considering all the circumstances, it was freely and voluntarily made without any inducement held out to the accused." In the instant case the record supports the ruling of the trial court and the implied finding of the jury that the statements made by appellants to detective Henrichon were freely and voluntarily made. Henrichon testified that he did not promise the appellants or either of them leniency "in any sense" and did not state to them that he could do anything toward getting them a lesser penalty. In this connection the court instructed the jury that:

> "The law absolutely forbids you to consider a confession in determining the innocence or guilt of the defendant unless the confession was voluntarily made, and although the Court has admitted evidence tending to show that a defendant made a confession, you must disregard the asserted confession entirely unless you yourself, by your own weighing of all the evidence, your own judging of the credibility of the witnesses, and your own reasonable deductions conclude that the alleged confession not only was made, but was voluntary."

We find no prejudicial error in the court's ruling and in admitting the statements made by the appellants.

[2] Appellants contend that the district attorney was guilty of prejudicial misconduct when he referred to a lead pipe during his cross-examination of Hartman and again referred to it in his argument to the jury. The deputy district attorney was questioning Hartman as to the statements he made to officer Henrichon and Hartman was asked if he told the officer he had obtained a piece of lead pipe from the locker

where he secured the gun. Hartman affirmed the statement made to the officer and there was no evidence introduced in the case that a lead pipe was used in the robbery. Furthermore, the jury was instructed not to consider for any purpose any evidence not received at the trial. In his argument to the jury the deputy district attorney again referred to the statement made by Hartman to the officer. However, no objection was made by counsel for appellants to these remarks. Under the circumstances the conduct of the deputy district attorney was not prejudicially erroneous.

[3, 4] Appellants claim that the trial court erred in refusing to give certain instructions offered by them and that no instructions were given covering the law treated in their offered instructions. The first of the eleven instructions refused was an instruction to the effect that "If the evidence is susceptible of two constructions, each appearing to be reasonable, it is the duty of the jury to reject that which points to his guilt * * *." Where, as here, the People did not rely on circumstantial evidence to convict the appellants, and the circumstantial evidence produced was only incident to or corroborative of the direct evidence connecting appellants with the crime charged, it was unnecessary to give the offered instruction. People v. Borbon, 146 Cal.App.2d 315, 321, 322, 303 P.2d 560. The second offered instruction deals with the rules applicable to circumstantial evidence but in the instant case circumstantial evidence was only incidental to and corroborative of the direct evidence and therefore it was not necessary to give the offered instruction. People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805. Offered instructions three, four, five and six relate to included offenses and were also unnecessary as the evidence was that appellants were guilty of robbery. People v. O'Brien, 88 Cal. 483, 491, 26 P. 362. The remaining instructions on larceny and intent were also unnecessary. People v. Griffin, 36 Cal. App.2d 59, 61, 96 P.2d 989. Examination of all of the instructions given show that the jury was fully and fairly instructed as to the elements of the crime of robbery and their application to the charges against the appellants.

Judgments affirmed.

GRIFFIN, Acting P. J., and McCABE, J. pro tem., concur.

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161 Cal.App.2d 439

Benjamin M. GILMORE, Petitioner and Appellant,

v.

The PERSONNEL BOARD of the State of California, Wilmer W. Morse, Ford A. Chatters, Robert D. Gray, Glenn R. Baker and Emery E. Olson, Defendants and Respondents.

Civ. 22425.

District Court of Appeal, Second District, Division 3, California.

June 19, 1958.

Rehearing Denied July 14, 1958.

Hearing Denied Aug. 13, 1958.

Mandate proceeding to compel reinstatement in civil service position as drivers' license examiner of one who has been discharged therefrom for insubordination and willful disobedience in failure to procure, at own cost, and wear prescribed uniform. The Superior Court of Los Angeles County, John J. Ford, J., rendered judgment adverse to the petitioner and he appealed. The District Court of Appeal, Parker Wood, J., held that record revealed that evidence before State Personnel Board supported its finding that petitioner's conduct constituted insubordination, willful disobedience and other failure of good behavior.

Judgment affirmed.

1. Mandamus 🔑168(4)

In mandate proceeding to compel Personnel Board to reinstate one discharged from his position as drivers' license examiner because of insubordination and willful disobedience of orders in that he refused to purchase and wear prescribed uniform, evidence supported finding that regulation that examiners wear prescribed uniforms was reasonably related to powers and duties of Department of Motor Vehicles. West's Ann.Vehicle Code, §§ 105, 106(b), 128(b), 267, 268; West's Ann.Gov.Code, §§ 11152, 19572.

2. Constitutional Law ⚷102(1)

Terms and conditions of civil service employment are fixed by statute and not by contract, and public employees have no vested right in any particular measure of compensation or benefits which may not be modified or reduced by proper statutory authority.

3. Officers ⚷69.7
States ⚷59

Where one accepts position of employment with state, under civil service, he does so with knowledge of fact that his salary and conduct are both subject to laws governing such matters and to rules and regulations of Civil Service Commission.

4. Constitutional Law ⚷102(1)

One holding civil service position as drivers' license examiner had no vested right to any specific amount of salary and consequently could not complain that regulation requiring him to purchase designated type of clothing as uniforms, out of his own moneys, impaired his rights to receive stated compensation.

5. Mandamus ⚷168(4)

Record, on petitioner's appeal from denial of writ of mandate compelling his reinstatement in civil service position of drivers' license examiner from which he had been discharged for insubordination for failing to wear required uniform consisting of, inter alia, gray gabardine suit, failed to sustain petitioner's contention that requiring him to purchase such from his own funds served to reduce his salary, and especially in view of fact that there was no showing that prices of such clothing were greater than for other clothing which he might have worn. West's Ann.Gov.Code, § 19572(f, p, s).

6. Officers ⚷72(1)

Under the sections of the Government Code pertaining to disciplinary proceedings against civil service employees of the state, such an employee's mere service of an answer to a notice of disciplinary action does not serve to stay the action against him. West's Ann.Gov.Code, §§ 19570, 19574, 19575, 19576, 19578, 19588.

7. Officers ⚷72(1)

Under sections of Government Code pertaining to disciplinary proceedings against civil service employees, Personnel Board is not required to grant a hearing with respect to an employee's answers to notices of suspension. West's Ann.Gov. Code, §§ 19570, 19574, 19575, 19576, 19588.

8. Constitutional Law ⚷318

In mandate proceeding to compel petitioner's reinstatement in his civil service position as drivers' license examiner from which he had been discharged for insubordination, record showing that he had been granted hearing with respect to his answer to notice of dismissal, and with respect to notices of suspension, revealed that he had been afforded due process of law. West's Ann.Gov.Code, §§ 19570, 19574, 19575, 19576, 19588.

9. Mandamus ⚷172

Credibility of witnesses appearing before State Personnel Board in hearing on suspension and dismissal of civil service employee and weight to be accorded evidence were matters to be determined by board and would not be reviewed in mandate proceeding to compel reinstatement of employee. West's Ann.Gov.Code, §§ 18539, 18850, 18851, 19572, 19574 and subd. (d), 19575, 19576, 19578; West's Ann.Code Civ. Proc. § 1094.5(b).

10. Officers ⚷72(2)

In proceeding to review suspension and discharge of one who had been employed in civil service position as drivers' license examiner, for insubordination and disobedience in failure to procure and wear prescribed uniform, evidence sustained Board's findings that prescribed dress made examiners readily identifiable, distinguishing them from general public, and that, when such was not worn there had been many examples of mistaken identities, and that efficient discharge of duties of department was promoted by such uniforms. West's Ann. Gov.Code, §§ 11152, 19572(f, p, s); West's Ann.Vehicle Code, §§ 105, 106(b), 267, 268.

11. Administrative Law and Procedure ⚿744, 791

Factual determinations of state-wide administrative agencies deriving power from Constitution are not subject to reexamination at trial de novo but are upheld by reviewing courts if they are supported by substantial evidence.

12. Mandamus ⚿168(4)

In mandate proceeding to compel reinstatement in civil service position as drivers' license examiner of one who has been discharged therefrom for insubordination and willful disobedience in failure to procure at own cost and wear prescribed uniform, record revealed that evidence before State Personnel Board supported its finding that petitioner's conduct constituted insubordination, willful disobedience and other failure of good behavior. West's Ann.Gov. Code, §§ 11152, 19572(f, p, s).

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Vaino Hassan Spencer, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondents.

PARKER WOOD, Justice.

Petitioner was dismissed by the State Personnel Board from his civil service position as a drivers' license examiner in the Department of Motor Vehicles. He sought a writ of mandate, in the superior court, compelling the Personnel Board to reinstate him in the position. His petition was denied. He appeals from the judgment.

Appellant contends that the Personnel Board proceeded in excess of its jurisdiction and abused its discretion in dismissing him.

On November 17, 1930, the Department of Motor Vehicles employed petitioner as a drivers' license examiner. He attained permanent civil service status in that position. When petitioner was first employed, and for a number of years thereafter, the department did not require examiners to wear a uniform. On August 29, 1938, the director of the department issued an order which provided that all examiners were to "provide themselves" with a uniform of the military type, as specified in the order, by November 1, 1938. Petitioner purchased a uniform of the specifications stated in the order, and from November 1, 1938, until October 28, 1943, he wore a uniform which complied with the specifications. On October 28, 1943, the director issued a bulletin which was to the effect that thereafter the examiners would not be required to wear a uniform. The bulletin stated that the reason for discontinuance of the requirement was that it was impossible (as a result of the shortage of material caused by the war) for examiners to secure replacements or to maintain uniforms in a satisfactory condition. The bulletin also stated that examiners must wear a badge when on duty; and that when "uniforms are resumed, a distinctly different type may be required."

On June 17, 1947, the director issued a memorandum which was to the effect that examiners would be required to wear a uniform, and that notice would be given before such an order was made. In that memorandum, the examiners were requested to supply themselves with, and to wear, uniform clothing as specified in the memorandum. On October 19, 1954, the director issued an order which provided that, effective July 1, 1955, all examiners "will wear" the regulation dress while they were on duty. The regulation dress, as specified in the order, included a two-piece business suit of twelve-ounce slate gray gabardine, white shirt, blue tie, blue or black socks, and black shoes. The order provided that it was optional as to where the clothing was to be purchased; that a certain store in

Los Angeles had arranged to have the suits available by March 1, 1955; and that the approximate price for the two-piece suit was $60. The order provided further that it was permissive for any male employee of the department (other than examiners) to wear the regulation dress, and that it was permissive for any female employee to wear a skirt of slate gray gabardine and a white blouse. On July 1, 1955, five examiners, including petitioner, reported for work at the Los Angeles office of the department wearing clothing other than the regulation dress specified in the order. The manager of the office issued a memorandum which was to the effect that any examiner who was not wearing regulation dress should advise the manager the reason therefor. Four of those five examiners advised the manager that the stores from which they had ordered uniforms could not deliver the uniforms on that date. Petitioner advised the manager, by a memorandum, that his reasons for not wearing the regulation dress were multiple, and that one of the reasons was personal economy. Also, in that memorandum he asked whether the department would pay for the regulation dress.

On August 11, 1955, the director issued an order in which he stated that September 1, 1955, would be the effective date on and after which regulation dress would be required.

Petitioner was on vacation the first five days of September. On September 6, 1955, he reported for duty, and at that time he was wearing a blue gabardine suit. He told the manager that he had not ordered a uniform. The manager told petitioner that he was "on suspension." On September 9, 1955, a notice of punitive action was served on petitioner. The notice stated that petitioner was suspended "without pay," from service in his position, for a period of three days, commencing September 6, 1955, and terminating September 9, 1955, and that the causes for his suspension were insubordination, wilful disobedience, and other failure of good behavior or acts during duty hours which were incompatible or inimical to the public service, as set forth in subdivisions (f), (p), and (s) of section 19572 of the Government Code,[1] in that when he reported for duty on September 6, 1955, he failed and neglected to wear the regulation gray gabardine suit. (On September 16, 1955, a copy of the notice was filed with the Personnel Board.)

On September 12, 1955, petitioner reported for duty, and at that time he was wearing a blue gabardine suit. He told the manager that he had not obtained a uniform. The manager told petitioner that he was "under suspension," and that the period of suspension was five days.

On September 19, 1955, petitioner reported for duty, and at that time he was wearing a blue gabardine suit. The manager told petitioner that he was "being suspended" for ten days.

On September 19, 1955, a notice of punitive action (regarding the suspension of September 12) was served on petitioner. The notice was similar to the previous notice, except that the date stated therein, as the date on which petitioner had failed to wear the regulation gray gabardine suit, was September 12, 1955, and the period of suspension was five days, commencing September 12, 1955, and terminating September 16, 1955; and except that the notice referred to the previous suspension and the reasons for such suspension. (On September 23, 1955, a copy of the notice was filed with the Personnel Board.)

On September 21, 1955, petitioner filed answers to the notices which were served on him on September 9 and September 19. In his answers petitioner alleged, among other things, that he had "at all times, made known to his superior his willingness to wear such uniform, provided the cost of furnishing same was not passed on to" him; and that he had inquired as to whether the department would furnish the regulation dress, or whether he would be reimbursed for the cost of furnishing the regulation dress, and he had not received an answer to his inquiries. In his answer to the notice which was served on him on September 19, petitioner requested an early hearing of the matter.

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[1] Section 19572 of the Government Code provides, in part: "Each of the following constitutes cause for discipline of an employee, * * * (f) Insubordination. * * * (p) Wilful disobedience. * * (s) Any other failure of good behavior or acts either during or outside of duty hours which are incompatible with or inimical to the public service."

On October 3, 1955, petitioner telephoned the manager of the department and said that he (petitioner) was ill and he could not return to work on that date. On October 3, 1955, a notice of punitive action (regarding the suspension of September 19) was served on petitioner. The notice was similar to the previous notices, except that the date stated therein, as the date on which petitioner had failed to wear the regulation gray gabardine suit, was September 19, 1955, and the period of suspension was ten days, commencing September 19, 1955, and terminating September 30, 1955; and except that the notice referred to the two previous suspensions and the reasons for such suspensions. (On October 4, 1955, a copy of the notice was filed with the Personnel Board.)

On October 11, 1955, petitioner filed an answer to the notice of October 3. The allegations in that answer were in substance the same as the allegations in his previous answers.

On October 18, 1955, petitioner reported for duty, and at that time he was wearing a blue gabardine suit. The manager inquired whether petitioner intended to buy a uniform, and petitioner replied, "Not unless I am compelled to." The manager told petitioner to "go home."

On October 31, 1955, a notice of punitive action was served on petitioner. The notice provided that petitioner was discharged from duty and that the causes for his discharge were insubordination, wilful disobedience, and other failure of good behavior or acts during duty hours which were incompatible with or inimical to the public service, as set forth in subdivisions (f), (p), and (s) of section 19572 of the Government Code, which causes were more particularly set forth in the notice. The notice referred to the suspensions of September 6, 12, and 19, and the causes therefor, and the notice stated that when petitioner reported for duty on October 18, 1955, he failed and neglected to wear the regulation gray gabardine suit. The effective date of petitioner's discharge, as stated in the notice, was October 18, 1955. (On November 2, 1955, a copy of the notice was filed with the Personnel Board.)

On November 14, 1955, petitioner filed an answer to the notice of October 31. The allegations of that answer were in substance the same as the allegations in his answer regarding the first suspension. Also, in the answer to the notice of October 31, he stated, in effect, that an investigation regarding the three notices of suspension had been set for hearing on November 22, 1955; and he requested that the Personnel Board consolidate the hearing regarding the notice of dismissal with the hearing regarding the three notices of suspension. Apparently the request was granted.

On November 22, 1955, a hearing on the four notices was held before a hearing officer of the Personnel Board. Petitioner and his counsel attended the hearing, and evidence was received, and the matter was submitted for decision.

On December 16, 1955, the hearing officer filed a proposed decision which was to the effect that the punitive actions against petitioner be revoked and that petitioner be returned to his position.

On January 7, 1956, the Personnel Board rejected the proposed decision of the hearing officer and ordered that the matter be argued before the board. On March 23, 1956, the department's attorney and petitioner's attorney argued the matter before the board.

On May 18, 1956, the board made detailed findings of fact which were in substance the same as the facts hereinabove set forth regarding the employment, the orders, the conduct of petitioner, the suspensions, the discharge, and the hearings. The board also found, among other things, that the requirement that the examiners wear the regulation dress is reasonably related to the powers and duties of the department; and that the actions and conduct of petitioner, as set forth in the decision, constitute "insubordination, wilful disobedience, and other failure of good behavior and acts during duty hours which are incompatible with and inimical to the public service within the meaning of subdivisions (f), (p) and (s) of Section 19572 of the Government Code"; and that "the causes, and each of them, for which the punitive actions were imposed * * * are, separately and severally, sufficient to support the punitive actions taken." The decision of the board was that the punitive actions against petitioner were sustained; that petitioner was suspended "without pay" from his position for a period of three days, effective September 6, 1955, and for a period of five days, effective September 12, 1955, and for a period of ten days, effective September 19, 1955; and that petitioner was dismissed from his position, effective October 18, 1955.

On August 15, 1956, petitioner demanded reinstatement in his position and payment of back salary from September 6, 1955, to date of reinstatement.

On August 17, 1956, petitioner sought a writ of mandate, in the superior court, compelling the board to reinstate him in the position of examiner. The petition alleged that the punitive actions suspending and discharging petitioner were discriminatory and invalid in that: (1) the department did not have authority to compel him to purchase uniforms at his own expense as a condition of continued employment; (2) there is no reasonable relation between the prescribed dress and the efficient discharge of the duties of the department; (3) the evidence was insufficient to sustain a finding that petitioner was wilfully disobedient, insubordinate, and had committed acts incompatible with and inimical to the public service; (4) the findings are "so contrary to the evidence as to constitute an abuse of discretion"; and (5) petitioner was subjected to four different penalties for the commission of a single act. An alternative writ was issued.

The board filed an answer. No testimony was presented at the hearing in the superior court, and the matter was submitted on the pleadings, the transcript of the testimony and proceedings before the examiner, and the exhibits introduced at that hearing. The court adopted the findings of the board and also found, among other things, that the board afforded petitioner due process under the law; that the findings of the board are supported by the evidence; that the decision of the board was supported by the findings; and that the board was not arbitrary or unreasonable in the matter. The petition for a writ of mandate was denied, and the alternative writ was discharged.

Section 1094.5 of the Code of Civil Procedure pertains to a review of an administrative order or decision in a mandamus proceeding. Subdivision (b) of that section provides: "The inquiry in such a case [mandamus proceeding] shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Appellant contends that the Personnel Board proceeded in excess of its jurisdiction in dismissing him. He argues that the Director of Motor Vehicles had no statutory or implied power to require appellant to wear the regulation clothing, and therefore the order of the director was invalid and the board proceeded in excess of its jurisdiction in dismissing him for his failure to comply with the order of the director.

Section 105 of the Vehicle Code provides, in part: "The department [of motor vehicles] shall be under the control of * * * the Director of Motor Vehicles * * *."

Section 106 of that code provides, in part: "The director [of motor vehicles] may appoint * * * (b) Such * * * employees as may be necessary for the proper discharge of the duties of the department." Section 267 of that code provides, in part: "Upon application for an original [operator's or chauffeur's] license the department shall require an examination of the applicant and shall make provision therefor before an officer or employee or authorized representative of the department * * *." Section 268 of that code provides, in part: "The examination shall include a test of the applicant's knowledge and understanding of the provisions of this code governing the operation of vehicles upon the highways, his understanding of traffic signs and signals and the applicant shall be required to give an actual demonstration of his ability to exercise ordinary and reasonable control in operating a motor vehicle by driving the same under the supervision of an examining officer." Section 11152 of the Government Code provides, in part: "* * * So far as consistent with law the head of each department may adopt such rules and regulations as are necessary to govern the activities of the department * * *." Section 128, subdivision (b), of the Vehicle Code provides: "The director [of motor vehicles] may adopt and enforce such rules and regulations as may be necessary to carry out the provisions of this code relating to said department."

In Dickey v. Raisin Proration Zone No. 1, 24 Cal.2d 796, at page 810, 151 P.2d 505, at page 513, 157 A.L.R. 324, it was said: "It is well settled in this state that governmental officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers."

[1] In the present case there was evidence that on several occasions, prior to the order requiring uniforms, an applicant for a driver's license entered the car of another applicant and the two applicants went several blocks before either of them became aware that the other one was not an examiner; that it is less objectionable to husbands and fathers if their wives and daughters take driving tests with a uniformed examiner than it is if their wives and daughters take driving tests with a non-uniformed examiner; and that a uniform makes it easier to identify the examiners. The board and the court found, as above stated, that the requirement that the examiners wear the regulation dress is reasonably related to the powers and duties of the department. There was substantial evidence to support that finding.

[2-4] Appellant argues further to the effect that the order of the Director of Motor Vehicles that appellant wear the regulation clothing reduced appellant's salary by the amount of the cost of the clothing; that the order was contrary to his vested contractual right to receive his "full salary," and therefore the order was invalid. "The terms and conditions of civil service employment are fixed by statute and not by contract." Boren v. State Personnel Board, 37 Cal.2d 634, 641, 234 P.2d 981, 985. "It is well settled that public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority." Butterworth v. Boyd, 12 Cal.2d 140, 150, 82 P.2d 434, 439, 126 A.L.R. 838. "When an employee of the state, under civil service, accepts a position, he does so with knowledge of the fact that his salary, and, indeed, his conduct, are both subject to the law governing such matters, as set forth in the statute and the rules and regulations of the commission." Raymond v. Christian, 24 Cal.App.2d 92, 100, 74 P.2d 536, 541. Appellant did not have a vested right to any specific amount of salary.

[5] Appellant argues further that, under the provisions of section 18850 [2] of the

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[2] Section 18850 of the Government Code provides, in part: "The board [Personnel Board] shall establish and adjust salary ranges for each class of position in the state civil service."

Government Code, his salary could be reduced only by the board after a hearing under the provisions of section 18851[3] of that code; that the order of the Director of Motor Vehicles was invalid for the reason that it, in effect, reduced appellant's salary, without the director having been authorized by the board to reduce the salary, and without the appellant having been afforded a hearing. The board is authorized by section 18850 of the Government Code to establish the salaries of civil service employees and, under the provisions of section 18851 of that code, the board should give an employee a reasonable opportunity to be heard regarding a change of salary. "Salary," however, as used in those sections, is defined in section 18539 of that code, as follows: "'Salary' * * * means the amount of money or credit received as compensation for service rendered exclusive of mileage, traveling allowances, and other sums received for actual and necessary expenses incurred in the performance of the State's business, but including the reasonable value of board, rent, housing, lodging, or similar advantages received from the State." The order of the director did not provide that the cost of the designated clothing should be deducted from appellant's salary. There was evidence, at the hearing before the board, that a gray gabardine suit of the kind designated in the order could be purchased at prices ranging from $40 to $68. There was no evidence that the cost of such clothing was more than the cost of clothing which appellant ordinarily wore, and provided at his own expense, while performing his duties. It was not contended that the clothing designated in the order was of a design which was impracticable or unsuitable for appellant in the performance of his duties, or that the clothing was of peculiar or odd design, or any design which would subject appellant to ridicule or scorn. On the contrary, it appears that appellant did not object to the style or design of the designated clothing, and it appears that he was willing to wear the clothing if it were furnished by the Department of Motor Vehicles. Persons who occupied administrative positions in the department conferred with a committee of examiners regarding the kind of uniform to be used. At a convention of examiners, a resolution which was "substantially in favor" of the business-suit type of uniform (prescribed by the director) was adopted. The suit ordinarily worn by appellant and the suit designated in the order were of the same kind of material, i. e., gabardine. It seems that the principal difference in the appearance of the suits was the color—appellant's suit was blue and the designated suit was gray. It cannot be determined from the evidence that appellant's expense for clothing would be increased, over his usual clothing expense, if he complied with the order. Of course, under the order there would not be any deduction in the amount of compensation that actually would be paid to appellant; and it does not appear that indirectly, by reason of the cost of the designated clothing, appellant's compensation would be reduced. It does not appear that the order was unreasonable, or that compliance with the order would reduce appellant's salary.

Appellant contends that the Personnel Board denied him procedural due process of law. He argues that the director and the members of the board knew that appellant's objections were directed to the matter of purchasing the articles of clothing at his expense; that it was apparent that appellant believed that he had the right to have the question, regarding the clothing, adjudicated by the board; that the action of the board in dismissing him, without affording him a prior opinion as to the validity of the order regarding clothing, constituted a denial of due process of law and was an abuse of discretion.

Section 19574 of the Government Code provides, in part: "The appointing power, or any person authorized by him, may take punitive action against an employee * * * by notifying the employee of the action, pending the service upon him of a written notice. Punitive action is valid only if a written notice is served on the employee and filed with the board not later than 15 calendar days after the date of such action. The notice [of punitive action] * * * shall include * * * (e) a statement advising the employee of his right to answer the notice and the time within which that must be done if the answer is to constitute an appeal." Section 19575 of that code provides, in part: "Not later than 15 calendar days after service of the notice of punitive action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of punitive action not expressly admitted and a request for hearing or investigation as provided in this article." Section 19576 of that code provides, in part: "Whenever an answer is filed by an employee who has been suspended without pay for 10 days or less the board or its authorized representative shall make an investigation with or without a hearing as it deems necessary." Section 19578 of that code provides, in part: "Whenever an answer is filed to a punitive action other than a suspension without pay for 10 days or less, the board or its authorized representative shall within a reasonable time hold a hearing."

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[3] Section 18851 of the Government Code provides: "Reasonable opportunity to be heard shall be provided by the board [Personnel Board] to any employee affected by a change in the salary range for the class of his position."

[6–8] The evidence shows that the notices of punitive action were served on appellant, and that copies of the notices were filed with the board, within the time provided by section 19574; and that appellant filed his answers within the time provided by section 19575. Under the provisions of subdivision (d) of section 19574, appellant's answers were, in effect, appeals from the punitive action (of the appointing power) as recited in the notices. Sections 19570 to 19588 of the Government Code, which pertain to disciplinary proceedings against civil service employees of the state, do not provide, however, that an answer to a notice of disciplinary action stays further action against the employee, upon subsequent violations of the order involved, until the validity of the order is determined on the appeal. The board was not required to grant a hearing with respect to appellant's answers to the notices of suspension. Section 19576 of the Government Code provides, as above shown, that when "an answer is filed by an employee who has been suspended without pay for 10 days or less the board * * * shall make an investigation with or without a hearing as it deems necessary * * *." None of the suspensions, involved herein, was for a time in excess of ten days. It appears, however, that prior to the time appellant answered the notice of dismissal the board had set the three suspension matters for hearing. It appears further that, at appellant's request, the hearing with respect to his answer to the notice of dismissal was consolidated with the hearing with respect to his answers to the notices of suspension. Appellant was afforded due process of law.

[9–11] Appellant contends that the decision of the board is based on findings which are not supported by substantial evidence. The findings, so referred to, are Finding IV and part of Finding VII. Finding IV is as follows: "That it has been the experience of said department, in the processing and examining of applicants for drivers' licenses, that the effective and efficient discharge of the duties described in Paragraph III of this decision by said drivers' license examiners is materially aided when said drivers' license examiners are readily distinguishable by applicants for said licenses; that there have been many instances where said drivers' license examiners have been mistaken for applicants and members of the general public by persons seeking information or waiting to be examined for said licenses; that the work of said drivers' license examiners has been hampered by their not being readily and easily identifiable; that the efficient discharge of the duties imposed upon the department by law have been hampered by the examiners not being readily identifiable as such by applicants for licenses and by other members of the public." Said part of Finding VII is as follows: "[T]hat the uniform so specified tends to make the drivers' license examiners readily and easily identifiable and to distinguish them from the general public." Appellant argues that the evidence showed that there were few cases of mistaken identity, that the validity of those cases was doubtful, and that the designated clothing was not sufficiently distinctive to identify examiners. The credibility of the witnesses and the weight of the evidence were matters to be determined by the board. The questions as to the experience of the department in matters regarding the identification of examiners, and the question as to the distinctive character of the designated clothing, were questions of fact for the determination of the board. The findings were supported by substantial evidence. In Shepherd v. State Personnel Board, 48 Cal.2d 41, at page 46, 307 P.2d 4, at page 7, it was said: "[T]he factual determinations of a state-wide administrative agency which derives adjudicating power from the Constitution are not subject to re-examination in a trial de novo but are to be upheld by a reviewing court if they are supported by substantial evidence."

[12] Appellant contends that the evidence does not support the finding that the actions and conduct of appellant, as specified in the decision, constitute insubordination, wilful disobedience, and other failure of good behavior and acts during duty hours which are incompatible with and inimical to the public service. The questions as to insubordination, disobedience, and other behavior were questions of fact for the determination of the administrative board. The finding was supported by substantial evidence.

Appellant also contends that the board inflicted four penalties for a single offense, and that such action establishes that the board was unfair. The evidence shows that on four different occasions, when appellant reported for duty, he refused to comply with the regulation. His conduct constituted four violations and indicated persistent defiance of authority.

The judgment is affirmed.

VALLÈE, J., concurs.

I concur. Petitioner's conduct was captious and constituted insubordination. He suffered no loss of compensation and no detriment. While he was wearing his uniform he was not wearing out his blue suit.

SHINN, Presiding Justice.

161 Cal.App.2d 501

John G. OPPENHEIMER, Plaintiff and Appellant,

v.

Julius DEUTCHMAN, Defendant and Respondent.

Civ. 19576.

District Court of Appeal, Second District, Division 1, California.

June 20, 1958.

Action for assault and battery. The Superior Court, Los Angeles County, Allen W. Ashburn and Roy L. Herndon, JJ., entered judgment for defendant and plaintiff appealed. The District Court of Appeal affirmed the judgment, 259 P.2d 457, and the plaintiff moved to vacate, strike and expunge the opinion and judgment and to recall remittitur. The District Court of Appeal held, inter alia, that where judgment for defendant in action for assault and battery had been based upon, and reflected substance of, jury's verdict, and nothing was left for future consideration by the court, costs were awarded to defendant as the successful party, and plaintiff had made various motions seeking new trial and to vacate the judgment and thereafter perfected an appeal which was affirmed, plaintiff's motion to vacate the opinion of the appellate court and to recall remittitur would be denied.

Motion denied.

1. Judgment ⚿218

The test of sufficiency of a judgment rests in its substance rather than in its form which is not very material provided that in substance it shows distinctly and not inferentially that matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated.

2. Judgment ⚿527

To uphold a judgment and to clarify any uncertainty, a court may look to other parts of the record such as the findings.

3. Appeal and Error ⚿1218

Where judgment for defendant in action for assault and battery had been based upon, and reflected substance of, jury's verdict, and nothing was left for future consideration by the court, costs were awarded to defendant as the successful party, and plaintiff had made various motions seeking new trial and to vacate the judgment and thereafter perfected an appeal which was affirmed, the plaintiff's motion to vacate the opinion of the appellate court and to recall remittitur would be denied. West's Ann.Code Civ. Proc. § 1032.

4. Appeal and Error ⚿1218

Where opinion of the appellate court affirming a judgment in favor of defendant was filed on July 30, 1953, the plaintiff's motion, filed April 24, 1958, to vacate the opinion and judgment and to recall remittitur, would be denied on ground that delay constituted laches even if motion possessed substantial basis.

5. Appeal and Error ⚿1218

Other than for the correction of clerical errors, recall of remittitur may be ordered on ground of fraud, mistake or inadvertence, and recall may not be granted to correct judicial error.

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John G. Oppenheimer, in pro. per. for appellant.

Edward M. Raskin, Los Angeles, for respondent.

PER CURIAM.

On July 30, 1953, this court in Oppenheimer v. Deutchman, 119 Cal.App.2d 450, 259 P.2d 457, 458, affirmed a judgment of the Superior Court of Los Angeles County based upon the verdict of a jury finding that plaintiff, John G. Oppenheimer, was not entitled to damages for an alleged assault. As stated by the court in that opinion, "plaintiff was the only witness who testified concerning the alleged wrongful acts of defendant Julius Deutchman," alleged to have been committed when plaintiff attempted to serve papers on the defendant. Prior to trial both plaintiff and defendant appeared at the city attorney's office, at which time plaintiff stated that Julius Deutchman was not the man who assaulted him. At the trial plaintiff admitted making such a statement. There was also evidence that the defendant was ill and not at his office at the time in question. After hearing plaintiff's uncorroborated testimony and evidence tending to discredit such testimony, the jury concluded that plaintiff was not entitled to damages.

In affirming the judgment, this court said: "We have examined the entire transcript of the proceedings because plaintiff has appeared in propria persona and his argument, both written and oral, in large part is confused and disconnected. The trial judge exercised courtesy toward the parties and was careful to limit the matters heard by the jury to those which were legally permissible and were not prejudicial. The case was a difficult one to try but no error occurred which can be said to have adversely affected plaintiff." 119 Cal.App.2d 450, at pages 454, 455, 259 P.2d 457, at page 460.

Appellant's present motion to vacate the opinion and judgment herein, filed April 24, 1958, and to recall the remittitur, is made on the grounds of "mistake, improvidence, inadvertence and oversight by the court and by the parties to this action, not the result of legal or judicial error, or error of judgment," and lack of jurisdiction "to review the cause or to hear the appeal, in the first place." More specifically, the movant's complaint is that "there was no appealable or any judgment in the record or entered in the action, which would give rise to an appeal or invoke the appellate or any jurisdiction of this court; respondent did not call that to the attention of this court at any time, as he might well have done and should have done, unless he was unaware of it, himself." Appellant terms the judgment and opinion of this court, reported in 119 Cal.App.2d 450, 259 P.2d 457, dated July 30, 1953, as "abortive, vain, purely academic, futile," etc.

The appellant's position, both in respect to substantive and adjective law, is clearly untenable. To give judicial approval to the contentions made herein would amount to an edict that litigation may go on forever, and that a judgment, alike approved by trial and appellate courts, is possessed of no finality. Such is not the law.

[1, 2] Appellant's first and fundamental misapprehension is that the record discloses no valid judgment. As the court said in Avakian v. Dusenberry, 15 Cal.App.2d 55, at page 56, 58 P.2d 1306: "It is well settled that the test of the sufficiency of a judgment rests in its substance rather than in its form." This opinion then quotes from Black on Judgments, section 115, which asserts the modern rule to be that "* * * the form of the judgment is not very material, provided that in substance it shows distinctly and not inferentially that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated." Moreover, to uphold a judgment and to clarify any uncertainty, a court may look to other parts of the record, such as the findings. Tonneson v. Tonneson, 126 Cal.App.2d 132, 134, 271 P.2d 534.

[3, 4] Testing the present judgment by these principles there can remain no doubt either as to its meaning or respecting its validity. In this case the judgment was based upon, and reflected the substance of, a jury's verdict finding for the defendant and against the plaintiff. Nothing was left for future consideration by the court; costs were awarded the defendant as the successful party, as provided for in section 1032 of the Code of Civil Procedure, and the entire matter was seemingly set at rest. Nothing more was required.

Certainly the appellant was left in no doubt as to the meaning of the judgment. He made various motions seeking a new trial and to vacate the judgment and, as hereinbefore noted, appellant thereafter perfected an appeal from the very judgment which is now assailed as being no judgment. After the reviewing court had "examined the entire transcript" (119 Cal.App.2d 450, 454, 259 P.2d 457, 460) the judgment was affirmed. The appellant has had not one but several days in court and the matter must be deemed to have reached a final conclusion. Moreover, the judgment of this court was filed on July 30, 1953, while the notice of the present motion to vacate, etc., was not filed until April 24, 1958,—a long and, so far as appellant has shown, unexplained delay in seeking relief. Even if the motion possessed substantial basis, which it does not, such a delay, unexcused, would constitute laches justifying denial of the relief prayed. Thompson v. Thompson, 38 Cal.App.2d 377, 380, 101 P.2d 160.

[5] The rule relating to the recall of a remittitur is well stated in Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal.2d 623, at page 626, 241 P.2d 985, at page 986: "Other than for the correction of clerical errors, the recall may be ordered on the ground of fraud, mistake or inadvertence. The recall may not be granted to correct judicial error." In the instant case neither fraud, mistake nor inadvertence has been made manifest by the appellant. Nor do any of the cases referred to by appellant furnish authority or precedent for any interference with the judgment in question.

The motion is denied.

161 Cal.App.2d 584

James J. MONTGOMERY, Plaintiff and Appellant,

v.

CITY OF SAN DIEGO HEALTH DEPARTMENT, Defendant and Respondent.

Civ. 5836.

District Court of Appeal, Fourth District, California.

June 23, 1958.

Rehearing Denied July 15, 1958.

Hearing Denied Aug. 21, 1958.

Proceeding by citrus fruit vendor for declaratory judgment as to validity of city ordinance requiring every vending vehicle to be constructed in such a manner that all foods are protected from dust, dirt, flies, and other injurious materials. The Supreme Court of San Diego County, Joe L. Shell, J., entered judgment in favor of defendant and plaintiff appealed. The District Court of Appeal, McCabe, J. pro tem., held that ordinance was not arbitrary and capricious and was enforceable although it would cost money for plaintiff to change his open and uncovered trailer to comply with ordinance.

Judgment affirmed.

1. Appeal and Error ⚷1010(1)
Municipal Corporations ⚷122(4)

In action by citrus fruit vendor seeking declaratory relief against city ordinance requiring vending vehicle to be constructed so that foods are protected from dust, dirt, flies, and other injurious materials, evidence sustained finding that fruit carried by vendor was entirely exposed and at all times unprotected from dust, dirt, flies and other injurious materials, and such finding could not be disturbed on appeal.

2. Municipal Corporations ⚷594(1)

An ordinance which has a substantial relation to public health, safety, morals or general welfare and is not arbitrary and unreasonable is constitutional.

3. Food ⚷1

City ordinance requiring vending vehicle to be constructed so that foods are protected from dust, dirt, flies, and other injurious materials but exempting retail grocery delivery trucks, and wholesale produce trucks, is not arbitrary and capricious, since distinction between two classes of carriers is reasonable.

4. Food ⚷1

Although it would cost money for citrus fruit vendor to change his open and uncovered trailer to comply with city ordinance requiring every vending vehicle to be constructed so that foods are protected from dust, dirt, flies, and other injurious materials, ordinance was enforceable.

5. Constitutional Law ⚷240(1)
Food ⚷1

City ordinance requiring every vending vehicle to be constructed in such a manner that all foods are protected from dust, dirt, flies, and other injurious materials had general and uniform application and afforded equal protection to all persons within class.

6. Municipal Corporations ⚷591

City ordinance imposing duty on health officer to inspect vending vehicles and to issue certificate of inspection for inspected vehicle if inspection discloses vehicle is constructed in such a manner that all foods are protected from dust, dirt, flies and other injurious materials does not make improper delegation of authority to health officer.

James J. Montgomery, in pro. per.

J. F. DuPaul, City Atty., John G. Whitney, Deputy City Atty., San Diego, for respondent.

McCABE, Justice pro tem.

Plaintiff, appearing in propria persona, brought this action in declaratory relief against the City of San Diego Health Department seeking relief from the provisions of Section 42.0130, San Diego Municipal Code. From the judgment and decree entered in favor of defendant, plaintiff appeals.

Plaintiff, a vendor of citrus fruits, sells his products from an open trailer drawn by a vehicle. His customers are householders in the City of San Diego, to whom he delivers the fruit at their homes. Prior to the trial he had been conducting this business for a period of approximately seven or eight years. Plaintiff picks up the fruit at the wholesalers in counties other than San Diego County and brings it into the City of San Diego by the above described process. It is conceded by plaintiff that his trailer is open and uncovered and that flies, dust and dirt could get onto the citrus fruits. Plaintiff sought a certificate of inspection described in the ordinance. After being denied the certificate plaintiff brought this action.

Although the named defendant was the City of San Diego Health Department, the City of San Diego, through its city attorney, appeared in the action and the case was tried by all parties upon the principle that the City of San Diego was in fact the defendant and, further, that the constitutionality of the ordinance in question was to be determined. Regardless of the form of pleadings we will accept the case upon the theory and principles upon which it was tried.

Section 42.0130 was amended in 1956, adding certain subsections to it. The new subsections of Section 42.0130 about which plaintiff complains read as follows:

> "(c) 3. Every vending vehicle shall be constructed in such a manner that all foods are protected from dust, dirt, flies, and other injurious materials.
> * * *
>
> "(c) 9. Each vending vehicle shall be inspected semi-annually on scheduled dates by the Health Officer, or more frequently if in the opinion of the Health Officer such additional inspections are required in order to protect the public health and safety. The vending vehicle shall be loaded and ready for operation at the time of inspection. The Health Officer shall issue a certificate of inspection for the inspected vending vehicle if his inspection discloses that the vending vehicle and the operation thereof conform to the requirements of this Code. The certificate of inspection shall expire six months from and after the date of its issue and shall specify the particular food products or beverages which will be sold from the vending vehicle."

Plaintiff contends (1) under the provisions of the ordinance wholesalers of citrus fruits are not required to cover their loads and, therefore, there is an arbitrary and capricious distinction being made, (2) the ordinance is unconstitutional because it does not apply equally to all classes of persons engaged in the same type of occupation, (3) there is an unreasonable and improper delegation of authority to an administrative officer.

[1] The court found and there is substantial evidence to sustain the finding that the fruit carried by plaintiff is entirely exposed and at all times is unprotected from dirt, flies, dust and other injurious materials. This finding will not be disturbed on appeal. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557.

[2] It is axiomatic that if an ordinance which has a substantial relation to the public health, safety, morals, or general welfare and is not arbitrary and unreasonable, it is constitutional. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303; Cusack Company v. City of Chicago, 242 U.S. 526, 37 S.Ct. 190, 61 L.Ed. 472.

[3] The plaintiff does not complain of this rule of law but contends there is no reasonable distinction between retail grocery delivery trucks and wholesale produce trucks, which are exempt from the requirements of permits or inspection certificates, and vending vehicles such as his which do require permits and inspection certificates. Respondent city replies that the distinction rests upon the following factors: retail grocery delivery trucks and wholesale produce trucks take their loads from one point to another and deliver it within an hour or two, whereas citrus fruits in a vending vehicle are long exposed day and night to the possible contamination of dust, dirt, flies, and other injurious mate-

rials. Further, that it is possible for the fruit to be exposed for days and until sold.

From a reading of the ordinance it is clear that it is designed to protect the health of the public by preventing contamination of eatables through flies, dust, dirt and other injurious materials. It is a matter of common experience that if a food, subject to contamination, is exposed to possible contaminating influences or elements for short periods of time there is less likelihood of contamination than those which are continuously exposed to contaminating influences or elements for long periods of time. This feature alone satisfied the law, and draws a very great distinction between wholesale produce trucks or retail grocery delivery trucks and the vending vehicles. This distinction is reasonable and is not an arbitrary one.

[4] If plaintiff desires to continue his business of vending retail citrus fruits, it will be necessary for him to make some physical changes in his trailer to provide the required protection. Plaintiff argues this will cost money. This argument was disposed of many years ago in a case involving an ordinance to protect fruit from contamination. In Ex parte Bacigalupo, 115 Minn. 339, 132 N.W. 303, 35 L.R.A., N.S., 1112, the court said:

> "The fact that the enforcement of the ordinance may require some radical change in the method of conducting a business does not necessarily furnish a defense to its enforcement. A privilege long countenanced does not always amount to a personal right. It is a very convenient and perhaps effective method of advertising fruit to display it in front of a store or on the street, in the view of the passer-by; but if, by its accumulation of dirt and germs, the health of the consumer is menaced, then certainly the police power may be invoked to take reasonable steps to abate this source of breeding disease, and, if necessary, may entirely deprive the vendor of fruit of the privilege of exposing it in the open air. The ordinance is a movement in the right direction. It speaks for health and cleanliness, and every right-thinking person ought to be in sympathy with a movement of this kind."

[5] The ordinance has general and uniform application and affords equal protection to all persons within the class. Therefore plaintiff cannot complain on this point. In re Miller, 162 Cal. 687, 124 P. 427.

[6] Plaintiff argues that Section 42.0130(c) 9 is an improper delegation of authority to the Health Officer. Under the ordinance the Health Officer has to inspect the loaded vending vehicle and shall issue a certificate of inspection, "if his inspection discloses that the vending vehicle and the operation thereof conform to the requirements of this Code * * *." In other words, if the vending vehicle is "constructed in such a manner that all foods are protected from dust, dirt, flies and other injurious materials" he must issue the certificate of inspection. The ordinance allows the plaintiff and others in the same class to select the type of protection and the manner in which the foods are to be protected, so long as it meets the objectives of the ordinance. Plaintiff and others in the same classes might have a right to complain if the ordinance designated the size or type of material used, or color of materials and of the vehicle, or the height of the vehicle from the ground or other confining and regulatory factors, but such is not true in this ordinance.

The Health Officer's duty is to determine whether the vehicle presented for inspection protects the food from "dust, dirt, flies and other injurious materials." If it does, he must issue the certificate of inspection. There is nothing in the record that the Health Officer did anything other than suggest to plaintiff how the vehicle could afford the required protection. These suggestions were not orders or demands, but were offered as an aid or assistance to plaintiff.

In many comparable situations, the line of cases recognize the need and the social requirement that certain discretionary matters may be properly delegated. 11 Cal. Jur.2d, Constitutional Law, Sec. 134, and cases therein cited; Leftridge v. City of Sacramento, 59 Cal.App.2d 516, 523, 139 P.2d 112. We think there is a proper delegation of authority in this ordinance.

The judgment is affirmed.

MUSSELL, Acting P. J., and GRIFFIN, J., concur.

161 Cal.App.2d 504

CAL-REX MACHINERY SALES, a Division of Chain Belt Company, a Wisconsin corporation, Plaintiff and Respondent,

v.

VALLEY MATERIALS COMPANY et al., Defendants,

Valley Materials Company, Appellant.

Civ. 22982.

District Court of Appeal, Second District, Division 2, California.

June 20, 1958.

Action on written contract and on account stated wherein defendant moved for change of venue. From an order of the Superior Court, Los Angeles County, William E. Fox, J., denying its motion the defendant appealed. The District Court of Appeal, Fox, P. J., held, inter alia, that where plaintiff's affidavit stated that account was payable and thus performable in Los Angeles, the failure to make payment constituted breach of alleged contract, the account stated, in county where payment was to be made, and hence venue was properly laid in Los Angeles County where contract was performable and where breach occurred.

Affirmed.

1. Venue 🔑36

If a defendant is entitled to a change of venue on one contractual cause of action, the change must be granted regardless of presence of other such causes of action in which he is not entitled to a change.

2. Associations 🔑20(1)

Under constitutional provision, an unincorporated association may be sued where contract is made, where it is to be performed, where liability or obligation arises, where breach occurs, or where any of the members of association reside. West's Ann. Code Civ.Proc. § 388; West's Ann.Const. art. 12, § 16.

3. Appeal and Error 🔑1024(3)

Where although count of complaint did not allege where account was stated nor where it was to be paid, plaintiff's affidavit in opposition to motion for change of venue stated that account was payable and thus performable in Los Angeles, and defendant's affidavit contradicted that, trial court's resolution of question in plaintiff's favor was binding on the appellate court.

4. Associations 🔑20(1)

Where plaintiff's affidavit stated that account was payable and thus performable in Los Angeles, the failure to make payment constituted breach of alleged contract, the account stated, in county where payment was to be made, and hence venue was properly laid in Los Angeles County where contract was performable and where breach occurred.

◆

Wallace & Wallace, San Diego, for appellant.

Iverson & Hogoboom, Los Angeles, for respondent.

FOX, Presiding Justice.

This is an appeal by Valley Materials Company from an order denying its motion for a change of venue.

Valley Materials Company (hereinafter referred to as defendant) is an unincorporated association of nine individuals doing business under a fictitious firm name. (See

Code Civ.Proc., § 388.) Service was made upon John B. Allen, who is the only member of the association residing in California. There was no other service of process.

The complaint is in two counts: the first count is based on two written contracts made and to be performed at Los Angeles; the second count alleges an account stated. Defendant's motion for a change of venue was based upon the affidavit of Allen, who asserted that he resides in San Mateo County and therefore demanded that the case be transferred to that county. Allen denied that any account was ever stated between plaintiff and defendant in Los Angeles County or elsewhere. The second count of the complaint does not allege where the account was stated or where it was to be paid. Plaintiff's affidavit in opposition to the motion, however, asserted that "said account stated was payable at the office of plaintiff, 7601 Telegraph Road, Los Angeles 22, California."

The sole question on this appeal is whether the trial court erred in denying defendant's motion for change of venue.

[1] If a defendant is entitled to a change of venue on one contractual cause of action, the change must be granted regardless of the presence of other such causes of action in which he is not entitled to a change. Ward Mfg. Co. v. Miley, 131 Cal. App.2d 603, 605, 281 P.2d 343, and cases cited therein. Therefore even though venue under count one is clearly proper in Los Angeles County, we must determine whether it is also proper as to count two.

[2] The venue of unincorporated associations is governed by Article XII, section 16, of the California Constitution. See Kendrick v. Diamond Creek Consolidated Gold Mining Co., 94 Cal. 137, 29 P. 324. Under the provisions of that section such an association may be sued where the contract is made, where it is to be performed, where the liability or obligation arises, where the breach occurs, or where any of the members of the association reside. Jeneau Spruce Corp. v. International Longshoremen's, etc., Union, 37 Cal.2d 760, 235 P.2d 607.

[3, 4] Although it was not alleged in count two of the complaint where the account was stated nor where it was to be paid, plaintiff's affidavit stated that the account was payable (and thus performable) in Los Angeles. While defendant's affidavit contradicts this, the trial court has resolved this question of fact in plaintiff's favor, and its determination is binding on this court. The failure to make payment constituted a breach of the alleged contract (the account stated) in the county where payment was to be made. See Ivey v. Kern County Land Co., 115 Cal. 196, 202–203, 46 P. 926. It is therefore apparent that the contract in count two was performable in Los Angeles County and was also breached there. It follows that venue was properly laid in Los Angeles County.

The order is affirmed.

HERNDON, J., concurs.

ASHBURN, J., deeming himself disqualified, did not participate herein.

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161 Cal.App.2d 624

Robert E. SIDEBOTHAM, James J. Sidebotham, Dennis B. Huttaball and Joan Huttaball, Petitioners,

v.

SUPERIOR COURT of the State of California IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, George W. Schonfeld, Judge thereof, Respondents.

Civ. 18087.

District Court of Appeal, First District, Division 1, California.

June 25, 1958.

Hearing Denied Aug. 21, 1958.

As Amended Sept. 23, 1958.

Proceeding was brought against the Superior Court of the State of California in and for the City and County of San Francisco and the judge thereof to review an order made in a proceeding for settlement of a proposed statement for use on appeal. The District Court of Appeal, Fred B. Wood, J., held that record failed to establish that Superior Court abused its discretion in striking out statement of oral proceedings, on ground that statement of oral proceedings was too incomplete, inaccurate and distorted to serve as a basis for amendment and correction.

Order modified.

1. Appeal and Error ⚷607(1)

Record failed to establish that Superior Court abused its discretion in striking out appellants' statement of oral proceedings in proceeding for settlement of proposed statement for use on appeal, on ground that statement of oral proceedings was too incomplete, inaccurate, and distorted to serve as a basis for amendment and correction, short of preparing an entirely new statement of the oral proceedings. West's Ann.Rules on Appeal, rule 7.

2. Appeal and Error ⚷607(1)

Trial judge may not arbitrarily refuse to settle proposed statement for use on appeal, unless there is some justifiable excuse.

3. Appeal and Error ⚷607(1)

Superior Court, in ordering that appellants' statement of oral proceedings for use on appeal be stricken out, should not have required appellants to purchase two copies of the transcript in addition to the original and give one of the copies to the opposite parties. West's Ann.Rules on Appeal, rule 7.

◆

Theodore M. Monell, San Francisco, for petitioners.

Morris Lowenthal, Juliet Lowenthal, San Francisco, for the real parties in interest.

FRED B. WOOD, Justice.

Petitioners question the validity of an order made by the respondent court in a proceeding for settlement of a proposed statement for use upon petitioners' appeal from a judgment rendered in an action tried in the respondent court.

Petitioner-appellants' proposed statement was in two parts: One part was in substance a clerk's transcript; the other a condensed narrative of the oral proceedings had upon the trial.

The respondent real parties in interest proposed no amendments to the first part of appellants' statement. They made numerous objections to appellants' statement of the oral proceedings.

The respondent court, after a hearing, ordered the statement of the oral proceedings stricken. It further ordered that appellants (1) file within 15 days a written request for a full and complete reporter's transcript of the oral proceedings and, within 10 days after notice of the estimate of the cost thereof, deposit with the clerk of the court the amount of the estimate in cash or file a waiver of such deposit signed by the reporter; (2) obtain at their own cost and furnish to the court the original and to respondent one copy of said complete reporter's transcript to aid in the preparation of a settled statement of the oral proceedings; (3) prepare and file, within 30 days after the reporter's transcript has been prepared and delivered to the appellants, the respondents and the court, an accurate and fair statement of the oral proceedings based upon the complete reporter's transcript; or (4) in lieu thereof, if appellants so elect, abandon any narrative statement or settled statement of the oral proceedings and proceed upon the judgment roll alone.

The court further ordered that if appellants fail to carry out any of the requirements of clauses (1) to (4), within the time or times limited therefor, respondents may at their election submit for settlement by the court a statement on appeal which shall consist of the judgment roll, notices of appeal and notices of election to proceed under rule 7 and such other matters as respondents may deem pertinent to the appeal, for inclusion in an engrossed statement on appeal.

[1] Appellants claim that the portion of the order which struck out their statement of the oral proceedings was made arbitrarily and in abuse of the sound discretion vested in the trial court and, therefore, in excess of its jurisdiction. Our examination of the record does not lead us to any such conclusion.

The court made a considerable number of "findings" and concluded that appellants' statement was too incomplete, inaccurate and distorted to serve as a basis for amendment and correction, short of preparing an entirely new statement; that appellants' and respondents' notes and the court's notes and memory of the oral proceedings (the trial consumed some 40 days extending over a period of seven months, and 27 witnesses testified) were too incomplete to serve as a means for preparation and amendment of an accurate and adequate settled statement without the aid of a reporter's transcript.

The following summary of some of these findings will serve to indicate the basis of the court's conclusion that appellants' proposed statement should go out and a new beginning be made: (1) Appellants' statement of the oral proceedings does not "accurately and fairly" reflect the proceedings; it is not a "full, fair, accurate, bona fide, objective, or truthful" statement; it is a "fragmentary, incomplete, untrue and thoroughly biased and distorted" synopsis of portions of the testimony, together with appellants' counsel's "own interpretation of the meaning and effect" of said testimony and certain exhibits; it "omits" substantial evidence "material" to the findings and to the issues on appeal. (2) Counsel used their incomplete and inaccurate trial notes "in a biased and distorted manner so as to present an incomplete, one-sided, and unfair condensation or synopsis slanted in behalf of appellants." (3) The full extent and exact nature of the "omissions and distortions" cannot be ascertained without a complete reporter's transcript. (4) It is wholly inadequate as a statement of the oral evidence material to the appeal and is "so incomplete, slanted, misleading, unfair, inaccurate and wholly lacking in the essentials as to render correction by amendment impossible." (5) It presents in "distorted fashion" evidence that is material and decisive. (6) Appellants "sought" to include "primarily" such evidence as might appear to substantiate some theory of the defense "with undue and exaggerated emphasis" and "wilfully watered down, minimized, diluted in content, or distorted" evidence supporting plaintiffs' case in such "incomplete, ambiguous or meaningless fashion" as to render it "innocuous and to lose its force and effect and value."

These and other relevant findings, the order states, were based on the evidence and the facts developed at the hearing, the respective arguments of counsel, the court's familiarity with the proceedings and its examination of appellants' proposed statement. An examination of the record furnished us, including the reporter's transcript of the hearing held upon the motion to strike, indicates sufficient evidentiary support for the court's findings and its order to strike. We cannot predicate upon this record a conclusion that the trial court acted arbitrarily, abused its discretion and thereby exceeded its jurisdiction. Moreover, we have no familiarity with the oral proceedings at the trial, as did the trial judge, against which to measure the adequacy or inadequacy, the correctness or incorrectness and the usefulness or unusefulness of appellants' proposed statement.

Appellants criticize the findings mentioned, claiming that some of them are too general in nature and that some are really but conclusions of law. This criticism we deem ill founded. Moreover, where, as here, findings are not required, such findings as are in fact made need not be measured with the same measuring stick as when findings are required. In addition, we observe that the order in question expressly finds that the "instances, examples and illustrations" of deficiencies of appellants' statement as set forth in a certain affidavit in evidence are true. This amounts to a series of detailed findings by the court of a considerable number of specific facts.

[2] It is true that "[u]nless there is some justifiable excuse, a trial judge may not arbitrarily refuse to settle the statement." Western States Const. Co. v. Municipal Ct., 38 Cal.2d 146, 148–149, 238 P.2d 562, 564, wherein it appeared that the opposite party proposed no amendments, interposed no objections and by withdrawing the answer to the verified petition for writ of mandate admitted that the proposed statement "'contains all of the material evidence, and is fair.'" (38 Cal.2d at page 149, 238 P.2d at page 564). See also Keller v. Superior Court, 100 Cal.App.2d 231, at page 234, 223 P.2d 309, at page 311, wherein the appellant accepted respondent's amendments and the trial court in refusing to settle failed to point out or specify any deficiencies; and Eisenberg v. Superior Court, 142 Cal.App.2d 12, 297 P.2d 803, where there were only five matters as to which the judge needed a transcript other than the partial transcript offered, these matters were pinpointed and the trial judge could settle the dispute by reference to his memory or his own notes or by having the reporter's notes on those five matters read back to him.

It is obvious that none of the three cases last cited was at all comparable to the instant case. Quite similar to our case was Nichols v. Smith, 25 Cal.App.2d 94, 76 P.2d 525, hearing by Supreme Court denied. After summarizing the trial court's findings (very similar to those in our case) the reviewing court said it was "not a case where a court or judge has arbitrarily refused to settle a proposed bill of exceptions, but rather one where, after consideration thereof, the same has been deemed so unfair and so lacking in its essentials as to render correction by amendment impossible." 25 Cal.2d at page 96, 76 P.2d at page 526.

However, we think that certain other features of the questioned order are subject to modification.

[3] We do not deem it proper to require appellants to purchase two copies of the transcript (in addition to the original) and give one of them to the opposite parties. Rule 7 of the Rules on Appeal, at the most, sanctions a direction by the superior court that the appellant "make his copy of the transcript available to the respondent." Also, the order as written is possibly susceptible to an interpretation that it precludes the use of portions of the transcript already transcribed by the reporter, even if in usable shape. Such a duplication of expense would not be proper. Appellants claim that oral proceedings pertinent to a motion for an allowance of fees to counsel for the opposite parties has no relevancy to this appeal and need not and should not be written up at the expense of the appellants. There well may be found that other considerable portions of the oral proceedings are not relevant to the issues involved upon this appeal. The ends of justice will be served by according appellants an opportunity within a reasonable time after this order becomes effective within which to state the questions they intend to raise and to delimit the issues as they may be advised. That portion of the order which grants appellants an option to proceed upon the judgment roll alone instead of obtaining a complete reporter's transcript and preparing a new statement based thereon is potentially subject to an interpretation that would preclude the appellants from using such a reporter's transcript as a part of the appeal record in lieu of a condensed narrative. We do not think that the trial court intended any such result. Certain other portions of the order are so related to and dependent upon those portions, above indicated, which should be vacated, that they too should be deleted.

The order under review is modified by vacating and annulling that portion which begins with "(2) That defendants and appellants" and closes with the words "signed by this court" (commencing in line 14, page 12, and ending in line 13, page 14, of the copy attached to the petition herein and designated Exhibit 3), and the clerk of this court is hereby directed to issue a peremptory writ of mandate commanding the respondent court to resume and continue the proceeding for the preparation of a settled statement in accordance with the views herein expressed.

PETERS, P. J., and BRAY, J., concur.

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161 Cal.App.2d 425

Mary G. GARCIA and Rudolfo Arzate dba Betsy's Coffee Shop, Petitioners and Appellants,

v.

Russell S. MUNRO, Director of Alcoholic Beverage Control, Respondent.

Civ. 18047.

District Court of Appeal, First District, Division 1, California.

June 19, 1958.

Rehearing Denied July 18, 1958.

Proceeding before Department of Alcoholic Beverage Control respecting alleged violations of various section of Alcoholic Beverage Control Act. The Superior Court, Monterey County, Stanley Lawson, J., affirmed decision of Appeals Board finding licensees guilty on three counts and licensees appealed only as to validity of penalty imposed under count 3. The District Court of Appeal, Peters, P. J., held that evidence was insufficient to support finding that licensees employed waitress to loiter on premises and to solicit drinks.

Judgment denying writ of mandate in so far as it related to count 3 reversed.

1. Intoxicating Liquors 🔑116

Statute prohibiting licensees from employing persons to loiter on premises for purpose of soliciting patrons to purchase alcoholic beverages is primarily aimed at preventing licensees from hiring persons to loiter on licensed premises for purpose of soliciting drinks. West's Ann.Bus. & Prof. Code, § 25657 and subd. (b).

2. Intoxicating Liquors 🔑108(5)

In proceedings against licensees for violation of Alcoholic Beverage Control Act, evidence, even though it did disclose that waitress consumed beer on premises purchased by patron for her, was insufficient to show that licensees employed waitress to loiter about premises and solicit drinks. West's Ann.Bus. & Prof.Code, § 25657 and subd. (b).

3. Appeal and Error 🔑878(1)

A respondent cannot challenge validity of a judgment from which he has not appealed.

4. Intoxicating Liquors 🔑108(10)

Where proceedings against licensees respecting violations of Alcoholic Beverage Control Act included four counts and trial court annulled one of those counts but respondent did not appeal from that determination, and licensees appealed from another count, annulled count was not before District Court of Appeal and claim that trial court erroneously annulled same could not be considered.

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Theodore H. Cominos, Lawrence Shostak, Salinas, for appellants.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Mary G. Garcia and Rudolfo Arzate, operators of Betsy's Coffee Shop in Salinas, own an on-sale beer and wine license. They were charged in four counts with violating various sections of the Alcoholic Beverage Control Act. The hearing officer found the licensees guilty of all four charged offenses, and recommended that on counts 1 and 2 the license be suspended for 15 days, and on violations charged in counts 3 and 4 the license should be revoked. The Department of Alcoholic Beverage Control adopted this proposed decision and the Alcoholic Beverage Control Appeals Board, in due course, affirmed. The Superior Court annulled count 4 and affirmed as to counts 1, 2 and 3. The licensees appeal. The briefs challenge only the validity of the penalty imposed under count 3.

As to count 1, the hearing officer found that on May 16, 17 and 18, 1956, the licensees permitted a female employee, Juana Villa, to accept alcoholic beverages from customers. As to count 2, it was found that on May 16 and 17, 1956, the licensees permitted Juana Villa to dispense wine from behind a permanently affixed fixture in violation of the Act. On each of these two violations the license was suspended for 15 days. The validity of these rulings is not challenged, and the evidence to support them is substantial. As to count 3, it was found that on May 16 and May 18, 1956, the licensees "did employ one Juana C. Villa to loiter in and upon said premises for the purpose of soliciting patrons and visitors in said premises to purchase alcoholic beverages, to-wit: beer, for her consumption and use." For this violation the license was revoked. It is this ruling that is challenged on this appeal.

The evidence relied upon to support the challenged ruling was given by Hugh A. Boyle, an agent of the Department of Alcoholic Beverage Control. He visited the premises on May 16, 17 and 18, 1956.

He testified that on May 16, 1956, Juana Villa, called by the patrons "Jennie," served him several wine drinks in violation of the law. This clearly supports the findings on count 2 which is not here involved. Boyle also testified that at this time there were two female bartenders behind the bar, one of whom was Jennie, and that there were about 10 patrons at the bar. He saw Jennie drinking beer with a party of two men and two women, and overheard Jennie ask the men to buy her a beer. One of the licensees, Mr. Arzate, was then on the premises. Later that same evening Boyle returned to the licensed premises, again purchased a wine drink, and saw that Jennie was drinking beer with some patrons. He did not, however, overhear any conversation between these patrons and Jennie, nor did he observe any other patron purchase a drink for her.

On the evening of May 17, 1956, Boyle again visited the premises. This time Jennie was the sole attendant behind the bar, and again served him a wine drink. He saw two men, without request from Jennie, purchase her a bottle of beer. Neither licensee was on the premises.

On the evening of May 18, 1956, Boyle again visited the premises, and this time Jennie and the female cook were behind the bar. There were about 30 patrons visible, and both licensees were present. Boyle purchased a beer, which was served him by the cook, and then he ordered another beer from Jennie. She asked him to buy her one, which he did, and, a little later, asked him to buy her another, which he did. He saw Jennie drink a little from each bottle. While this was going on Mrs. Garcia, one of the licensees was seated about 15 feet distant, and Mr. Arzate, the other licensee, was about 30 feet away. Boyle observed nothing that led him to believe that there was any profit-sharing deal between the licensees and Jennie. This evidence clearly shows that Jennie, an employee, solicited beverages from customers, and supports the charge in count 1 for which a 15-day suspension was imposed. This finding is not challenged on this appeal.

There was contrary evidence. Jennie testified that she had worked for the licensees for several weeks before May 16. Arzate told her not to serve wine, only beer, and, if wine was ordered, Arzate would serve it. She was told not to ask patrons to buy her a drink, and was not paid anything for drinks solicited by her. She never asked anyone to buy her a beer. Her salary was $35 a week.

One of the licensees, Mary Garcia, testified that she was in Mexico on May 16, 17, and 18, and her fellow licensee corroborated this. Arzate testified that he had no deal with Jennie to pay her for soliciting drinks, and, in fact, told her not to solicit because it was against the law. He told Jennie not to serve wine.

The basic question presented is whether finding number 3 is supported by the evidence. That finding declares that the licensees employed Jennie to loiter on the premises for the purpose of soliciting patrons to purchase her drinks. Such activity is prohibited by section 25657(b) of the Business and Professions Code. That section provides that it is unlawful "In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.

"Every person who violates the provisions of this section is guilty of a misdemeanor."

[1] This section was primarily aimed at preventing licensees from hiring persons to loiter on the licensed premises for the purpose of soliciting drinks. In Wright v. Munro, 144 Cal.App.2d 843, 301 P.2d 997, this court affirmed an order revoking a license under this section. In so holding it was stated (144 Cal.App.2d at page 846, 301 P.2d at page 999):

"The evidence is weak, but it is legally sufficient.

"The circumstances recounted by Templeman [the agent] support the inference that the bartender knew that Janet Hudson was loitering on the premises and soliciting drinks from patrons. The bartender's knowledge is, of course, chargeable to the licensees. Cornell v. Reilly, 127 Cal.App.2d 178, 273 P.2d 572. Janet merely told the bartender 'Give me a drink.' He apparently recognized her, knew what she wanted, and served it to her. The subsequent actions of the bartender in returning to the agent and asking him if he wanted to buy the girl another drink is also susceptible of the reasonable inference that the bartender knew that the girl was loitering on the premises for the prohibited purpose. This is corroborated by the actions of the bartender and the girl when the agent returned to the premises. The term 'loiter' has a well-recognized meaning, and that is 'to linger idly by the way, to idle,' 'to loaf' or 'to idle.' Phillips v. Municipal Court, 24 Cal.App.2d 453, 455, 75 P.2d 548. The evidence is susceptible of the reasonable interpretation that Janet Hudson was 'loitering' on the premises and that this was known to the bartender.

"That Janet Hudson 'solicited' or 'begged' a patron to buy her a drink is obvious. The question 'Do you want a drinking companion?' under the circumstances, was equivalent to, 'Will you buy me a drink?' Knowledge on the part of the bartender is reasonably inferable."

In that case the evidence that the girl was employed to loiter to solicit drinks while characterized as "weak," was held to be sufficient. In the present case the fact that Jennie was employed by the licensees is admitted. She was employed as a bartender or waitress. The real question is whether she was employed "to loiter" for the purpose of soliciting drinks from patrons.

It will be noted that section 25657(b) of the Business and Professions Code makes it unlawful "to employ or knowingly permit" anyone to loiter for the purpose of soliciting drinks from customers. The finding upon which the revocation is predicated is that the licensees "did employ" Jennie "to loiter in and upon said premises for the purpose of soliciting" patrons to buy her a drink.

[2] The fact that Jennie drank with patrons and perhaps solicited drinks from them to the knowledge of the licensees is shown by the evidence. That is the basis for the charge involved in count 1 for which a 15-day suspension was imposed.

But count 3 includes another element, employment for the purpose of loitering. The basic question is, does the evidence show that Jennie was employed to loiter to solicit drinks? Certainly the evidence on that issue is much weaker than the evidence in Wright v. Munro, 144 Cal.App.2d 843, 301 P.2d 997. In that case the woman who was loitering did no other work. Here Jennie was employed as a bartender or waitress and performed the duties of that position. Certainly evidence that she talked with patrons, spent some time with them and solicited some patrons to buy her drinks does not support a finding that she was employed to "loiter" on the premises to solicit drinks. If there was evidence that the licensees paid her a commission for drinks solicited, that might be some indication that she was employed "to loiter" to solicit drinks. But the fact that a bartender or waitress solicits a drink from a patron, and talks with him, does not support an inference that such bartender or waitress was employed "to loiter" to solicit drinks. There is no evidence at all that Jennie sat down with the patrons or neglected her duties as a bartender while drinking with patrons. There is no evidence that she lingered idly by or was loafing on the job. In Wright v. Munro, supra, the verb "loiter" was defined to mean "to linger idly by the way, to idle"; "to loaf"; or "to idle." The term has been defined in many cases. In every definition we have found (see many cases collected in 25 Words and Phrases, Loiter, p. 589 et seq., and Pocket Part) there is included the concepts of to stand idly by, to spend time idly, to loaf, or to walk about aimlessly without purpose. There is no evidence that Jennie did any of these things. For that reason there is no evidence to support the finding that she was employed to loiter on the premises to solicit drinks from patrons.

The evidence that the licensees knew that Jennie solicited drinks is very weak. Certainly the licensees knew, or should have known, that Jennie was drinking beer with customers, but knowledge of solicitation by her is another matter. Boyle admitted that neither licensee was on the premises during several of his visits to the premises when he heard Jennie solicit drinks from patrons. On May 18, 1956, when Jennie solicited him to buy a drink for her, his testimony was that one licensee was 15 feet away and the other 30 feet away. Whether this supports a finding that they knew she was soliciting drinks may be a debatable question. But on the sufficiency of the evidence to support count 3 there can be no doubt. There was no evidence to support the finding that Jennie was employed to loiter to solicit drinks.

[3, 4] Respondent argues that the evidence supports the finding as to count 4, and for that reason the judgment refusing a writ of mandate should be affirmed. Count 4 was annulled by the trial court. The respondent has not appealed from that determination. That count and that charge are not now before us, and therefore the claim that the trial court erroneously annulled that count cannot now be considered. There is nothing in McCracken v. Teets, 41 Cal.2d 648, 262 P.2d 561, cited by respondent, that purports to challenge the elementary rule that a respondent cannot challenge the validity of a judgment from which he has not appealed.

The judgment denying the writ of mandate, insofar as it relates to count 3, is reversed.

BRAY and FRED B. WOOD, JJ., concur.

161 Cal.App.2d 579

Gardner William BRYANT, Plaintiff, Cross-Defendant and Respondent,

v.

Agnes Elizabeth B. BRYANT, Defendant, Cross-Complainant and Appellant.

Civ. 5829.

District Court of Appeal, Fourth District, California.

June 23, 1958.

Proceeding on divorced wife's application for execution with respect to amount due under divorce decree. The Superior Court, San Diego County, Gerald C. Thomas, J., granted husband's motion to quash and recall writ of execution, and wife appealed. The District Court of Appeal, Griffin, J., held that where sum for which execution was issued was not the proper amount due and had been falsely represented to be due, trial court was authorized to recall the execution.

Order affirmed.

1. Execution 🔑161

Where sum for which execution was issued was not the proper amount due and had been falsely represented to be due, trial court was authorized to recall the execution. West's Ann.Code Civ.Proc. § 681.

2. Execution 🔑72

Where issuance of an execution on a judgment requiring monthly payments is sought upon payments accruing within a ten year period, the judgment plaintiff has a prima facie right to execution, and judgment debtor has burden to establish facts justifying denial of execution. West's Ann.Code Civ.Proc. § 681.

3. Divorce 🔑263, 311

Any award made to a spouse during a divorce action, or by decree, may be enforced by execution, as a matter of right, with respect to all payments that have accrued within 10 years from the date of application for execution, even though the award itself may have been made more than ten years before. West's Ann.Code Civ.Proc. § 681.

4. Divorce 🔑263, 311

Where an award has been made in a divorce action, an application for execution may be made ex parte. West's Ann.Code Civ.Proc. § 681.

5. Divorce 🔑263

That part of an ex parte order directing issuance of execution for alimony payments accruing more than ten years before application for execution is void. West's Ann.Code Civ.Proc. § 681.

6. Appeal and Error 🔑983(3)
Execution 🔑73

With respect to installments due on a judgment for more than ten years before application for execution, execution may be issued only at the court's discretion, which will not be disturbed unless there has been abuse. West's Ann.Code Civ.Proc. § 685.

7. Divorce 🔑309

On application, a court may terminate future payment of support required by a divorce decree, but may not modify the decree in respect to accumulated payments past due.

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James S. Duberg, Los Angeles, for appellant.

Atherton & Atherton, and Earl J. Cantos, San Diego, for respondent.

GRIFFIN, Justice.

On July 15, 1941, an interlocutory decree of divorce was entered in favor of defendant, cross-complainant and appellant, ordering plaintiff, cross-defendant and respondent to pay her $60 per month for the support of four minor children of the parties. No apportionment or allocation of the support money to the respective children was indicated in the order, and no payments were made after the year 1941. On November 14, 1956, defendant filed her affidavit alleging these facts, and claims that from October 15, 1948, to November 13, 1956, she received no payments from plaintiff and there is due from him, within the dates of October 15, 1948 to December 15, 1955, the sum of $5,160. On November 23, 1956, by minute order, the judge ordered that execution issue in said amount, based upon said affidavit. Subsequent executions were issued thereon to different counties and levy was made upon plaintiff's property. The record discloses that on December 5, 1956, an order to show cause was issued by said court ordering plaintiff to appear on December 12th to show cause why execution should not issue in said amount. The court's minutes show "Motion Granted". Thereafter, on March 1, 1957, a motion to set aside and quash the execution was made by plaintiff, alleging by affidavit that the affidavit filed by defendant on November 14, 1956, in support of her order for execution was false and untrue in that defendant did not have physical custody of said children during the period in question; that some were in institutions during this time and not supported by defendant; and that some had reached their majority. The whereabouts of the children during the time in question is set forth in detail. It further recites that both plaintiff and defendant have remarried, and alleges the sum claimed due was not due or owing by plaintiff to defendant. In defendant's reply affidavit, after substitution of attorneys, she "repents" the allegations of her affidavit in many respects and concedes that several of the children were not in her custody during the time indicated in her affidavit, and that some had arrived at their majority. But she opposed the motion to quash the execution. A hearing was had and the court set aside the execution and denied plaintiff's motion to modify the existing support order.

The memorandum opinion of the judge recites that no execution was issued within ten years after the date of the order of July 15, 1941, as required by section 681 of the Code of Civil Procedure, and that therefore the execution issued was not issued as a matter of right; that no affidavit setting forth the reasons for failure to proceed in compliance with section 681 was made or filed as required by section 685 of the Code of Civil Procedure and defendant having failed for the first five years after entry of the interlocutory judgment to use due diligence to enforce payment of the amounts due her thereunder, the motion to set aside and quash the execution should be granted; and that since there was no prospective payments to be made under the order for support, the application for modification should be denied. A formal order to this effect was signed on May 1, 1957. On June 5, 1957, the court, on its own motion, signed an order amending the order of May 1, 1957, nunc pro tunc, and denied defendant's motion to vacate the previous order quashing the execution. Defendant appeals from all of these purported orders. They will be considered under the appeal from the final order and judgment.

[1] Regardless of the reasoning used by the trial judge in granting the motion to recall and quash the execution, the order may well be affirmed and supported on the showing made by plaintiff that the sum for which the execution was issued was not the proper amount due and was falsely represented by defendant to be due. Under such circumstances, the trial court is authorized to recall the execution. See Wilkins v. Wilkins, 95 Cal.App.2d 605, 213 P.2d 748, where this question was determined. See also Hale v. Hale, 6 Cal. App.2d 661, 45 P.2d 246.

Section 681 of the Code of Civil Procedure provides that the party in whose favor judgment is given may, at any time within ten years after the entry thereof, have a writ or order issued for the execution or enforcement of the judgment. Formerly the section provided "within five years after the entry". (See amendment, Stats.1955, Chap. 754, p. 1248, Sec. 1.) Section 685 provides that in all cases the judgment may be enforced or carried into execution after the lapse of 10 years (formerly 5 years) from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.

[2–6] In construing these sections under the 5-year statute the Supreme Court, in Lohman v. Lohman, 1946, 29 Cal.2d 144, 173 P.2d 657 held that a creditor is entitled, as a matter of right, to execution on a judgment payable in installments for all amounts which have accrued within five years (now 10) of the date of the application. As to a judgment beyond that period, the issuance of an execution is discretionary, depending upon the circumstances. Where issuance of an execution on a judgment requiring monthly payments is sought upon payments accruing within the 5-year (now 10-year) period and where such facts are established, a prima facie right to execution exists and the burden is cast upon the judgment debtor to establish facts justifying an order denying the writ. The rule is that any award made to a spouse during the pendency of a divorce action, or in the decree, may be enforced by execution, and that a party is entitled, as a matter of right, to execution of a judgment directing payment of monthly sums for support as to all sums that have accrued within 10 years from the date of the application for such execution. Such an application may be made ex parte and it is immaterial that the award itself may have been made more than 10 years prior thereto. But that part of an ex parte order directing the issuance of execution for alimony payments that accrued more than ten years previously is void, and the execution and sale pursuant to the order are also void where made without notice and not accompanied by supporting affidavits. As to installments that accrued over 10 years before the issuance of an execution, the writ can only issue under section 685 of the Code of Civil Procedure. Issuance of execution under this provision is within the discretion of the court, and its order will not be disturbed unless there has been an abuse of that discretion. 16 Cal.Jur.2d pp. 528–529, sec. 240; 19 Cal.Jur.2d p. 335, sec. 22; Anderson v. Anderson, 129 Cal.App.2d 403, 276 P.2d 862.

[7] It has been held that in a divorce action including monthly support, even though the original decree was entered over five years before (ten years now), execution will issue under section 681 of the Code of Civil Procedure for installments falling due within the five-year period (now 10). Cochrane v. Cochrane, 57 Cal.App.2d 937, 938, 135 P.2d 714; Wolfe v. Wolfe, 30 Cal.2d 1, 4, 180 P.2d 345; Di Corpo v. Di Corpo, 33 Cal.2d 195, 201, 200 P.2d 529; Messenger v. Messenger, 46 Cal.2d 619, 629, 297 P.2d 988.

The case of Ford v. Ford, 144 Cal.App.2d 677, 301 P.2d 450, relied upon by the trial judge, contains other issues, but in reversing the judgment the court was instructed to order execution to issue under section 681 of the Code of Civil Procedure for the five-year period just prior to May, 1944. Other cases relied upon by the trial judge are not opposed to this construction. The authorities further demonstrate that the court, upon proper application, may terminate future payments of support, but may not modify the decree in respect to accumulated payments past due. Parker v. Parker, 203 Cal. 787, 266 P. 283; Wilkins v. Wilkins, supra.

Order to recall and quash execution affirmed.

MUSSELL, Acting P. J., and McCABE, J. pro tem., concur.

161 Cal.App.2d 608

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ernest KITTRELL, Defendant and Appellant.

Cr. 6133.

District Court of Appeal, Second District, Division 2, California.

June 24, 1958.

Defendant was convicted of grand theft. The Superior Court, Los Angeles County, Herbert V. Walker, J., rendered judgment and order denying new trial and the defendant appealed. The District Court of Appeal, Herndon, J., held that in view of statute providing that where offense charged is described with sufficient certainty in other respects, erroneous allegation as to, inter alia, property involved are immaterial, fact that information charging store employee with grand theft charged only theft of money and not of merchandise coupons which were used throughout the store as cash was immaterial where defendant could not show that the asserted variance misled him to his peril.

Affirmed.

1. Larceny ⟹65

Evidence sustained grand theft conviction. West's Ann.Pen.Code, § 487, subd. 1.

2. Larceny ⟹40(6)

In view of statute providing that, where offense charged is described with sufficient certainty in other respects, erroneous allegations as to, inter alia, property involved are immaterial, fact that information charging store employee with grand theft charged only theft of money and not of merchandise coupons which were used throughout the store as cash was immaterial where defendant could not show that the asserted variance misled him to his peril. West's Ann. Penn.Code, §§ 487, subd. 1, 956.

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Bertram H. Ross, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., John A. Vander Lans, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

Appellant was convicted of grand theft under the provision of subdivision 1 of section 487 of the Penal Code "* * * that where the money, labor, real or personal property is taken by a servant, agent or employee from his principal or employer and aggregates two hundred dollars ($200) or more in any 12 consecutive month period, then the same shall constitute grand theft." His motions to reduce the crime from grand theft to petty theft and for a new trial having been denied, appellant filed his notice of appeal from the order denying the latter motion.

In his opening brief, appellant states: "The entire basis of this appeal is that there is an insufficiency of the evidence to establish Grand Theft; that the evidence establishes nothing more than petty theft. The entire argument in this case will be a factual one rather than a legal one."

Appellant was employed by the May Company in downtown Los Angeles in the clothing department. The People introduced (1) the testimony of eight witnesses as to their purchases at the store, totaling $286.90; (2) the testimony of the store's operating superintendent describing the store's sales and accounting practices and establishing that the money covering the purchases in question had not been received by the store, and (3) the testimony of an examiner of questioned documents who identified the handwriting of appellant on several of the slips involved in the sales transactions testified to by the purchasers. The May Company utilizes a merchandizing scheme by which merchandise coupons are sold in the credit department and used throughout the store as cash. Two of the purchases testified to, totaling $63.98, were paid for with these merchandise coupons.

Appellant does not deny that the evidence clearly proves his guilt of petty theft, but he urges that with respect to the transactions in which *coupons* were used to pay for the merchandise there is a fatal variance between pleading and proof. The information charges that appellant took over $200 *"in money"*. The only authority cited in support of this argument is People v. Reed, 70 Cal. 529, 11 P. 676, decided in 1886, wherein it was held that an indictment for obtaining under false pretenses a promissory note alleged to have been executed by the person defrauded was not sustained by evidence showing that the note was jointly executed by him and another.

[1, 2] There are two short and sufficient answers to this contention. In the first place, the evidence is sufficient to support a finding that appellant took more than $200 *in money* even if the coupon transactions are excluded. In the second place, section 956 of the Penal Code, as amended in 1927,[1] deprives this variance of any materiality. In People v. Fleming, 220 Cal. 601, 610, 32 P.2d 593, 596, the contention was made that on an information charging theft of described shares of stock, the defendant could not be convicted of theft of money paid on account of the purchase thereof. In rejecting this contention, the Supreme Court referred to the 1927 amendment of section 956 of the Penal Code, and said:

"The plain intention here is that, when the offense itself is described with sufficient certainty in other respects to identify the act, a conviction thereof may be sustained notwithstanding the fact that the description of the property stolen as shown by the evidence is different from the property stolen described in the information."

"To be material, a variance between the information and proof must be 'of such a substantive character as to mislead the accused in preparing his defense, or * * * likely to place him in second jeopardy for the same offense.'" People v. Braddock, 41 Cal.2d 794, 799, 264 P.2d 521, 524; People v. Williams, 27 Cal.2d 220, 226, 163 P.2d 692. Appellant does not contend that the asserted variance misled him in preparing his defense or is likely to place him in double jeopardy.

The order appealed from is affirmed.

FOX, P. J., and ASHBURN, J., concur.

161 Cal.App.2d 466

The PEOPLE of the State of California, acting by and through the DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent,

v.

Roland E. LOOP, Helen M. Loop, Bank of America National Trust and Savings Association, a corporation, as Trustee, Occidental Life Insurance Company of California, a corporation, The Pacific Telephone & Telegraph Company, a corporation, successor to Southern California Telephone Company, Philip L. Wilson, Maud N. Wilson, also known as Maude N. Wilson, James H. Mulligan, Ann Fleming, Signal Oil & Gas Company, a corporation, Foster and Kleiser Company, a corporation, Nona Mahdesian, Corporation of America, a corporation, as Trustee, Bank of America National Trust and Savings Association, a corporation, Doe One to Doe One Hundred, Defendants,

Philip L. Wilson and Maud N. Wilson, Appellants.

Civ. 22681.

District Court of Appeal, Second District, Division 3, California.

June 19, 1958.

Rehearing Denied July 14, 1958.

Hearing Denied Aug. 13, 1958.

Proceeding was brought to condemn property. The Superior Court of Los Angeles County, Clarence B. Runkle and Roy

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[1] "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, *or of the place where the offense was committed, or of the property involved* in its commission, is not material." (Italics added to indicate amendments, Stats.1927, c. 611, p. 1042.)

L. Herndon, JJ., entered an interlocutory judgment and final order of condemnation, and the defendants appealed. The District Court of Appeal, Vallée, J., held that since defendants could not take deposit made by plaintiff, which was in possession of the property sought to be condemned, without giving up right of defendants to appeal and thus surrendering possibility of an increased award, interest continued to run notwithstanding the deposit by plaintiff.

Reversed with directions.

1. Eminent Domain ⚷130

"Just compensation" for taking of private property for public use includes not only market value of property but also actual cash value of use of property from date of taking possession thereof up to date of judgment, if possession is taken by condemner prior to judgment. West's Ann. Const. art. 1, § 14; West's Ann.Code Civ. Proc. § 1254.

See publication Words and Phrases, for other judicial constructions and definitions of "Just Compensation".

2. Eminent Domain ⚷148

Interest at legal rate on value of property sought to be condemned is proper measure by which to ascertain amount to be added to market value of property for possession of the property by the condemner prior to judgment. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1254.

3. Eminent Domain ⚷263

Damages contemplated by statutory provision that at any time after trial and judgment entered or pending appeal, whenever plaintiff in condemnation proceedings shall have paid into court for defendant full amount of judgment and such further sum as may be required by court as fund to pay any further "damages" and costs and all "damages" that may be sustained by defendant if property is not finally taken, court may, on notice of not less than 10 days, authorize plaintiff, if already in possession, to continue therein, are the enhanced damages which defendant may recover on reversal and order for a new trial. West's Ann.Code Civ.Proc. § 1254.

4. Eminent Domain ⚷187

Under statutory provision that at any time after trial and judgment entered or pending appeal, whenever plaintiff in condemnation proceedings shall have paid into court for defendant full amount of the judgment and such further sum as may be required by the court as fund to pay any further damages and costs and all damages that may be sustained by the defendant if the property is not finally taken, court may, on "notice" of not less than 10 days, authorize plaintiff, if already in possession, to continue therein, the notice is to be given by the plaintiff to the defendant. West's Ann.Code Civ.Proc. § 1254.

5. Motions ⚷19

Generally, notice of motion must be given whenever order sought may affect rights of an adverse party. West's Ann. Code Civ.Proc. § 1014.

6. Eminent Domain ⚷247(4)

Where deposit made by plaintiff, which had gone into possession of property sought to be condemned, so that plaintiff could remain in possession of the property during appeal by defendants, was insufficient, it did not prevent running of interest. West's Ann.Code Civ.Proc. § 1014.

7. Tender ⚷12(4)

Where obligation on which a tender is made carries interest, amount tendered must be sufficient to cover the interest.

8. Appeal and Error ⚷161

A party, who accepts benefits of a judgment, generally waives his right to appeal therefrom, and such rule applies in any form of practice or procedure whereby appeal may result in again putting in issue right of party in whose favor judgment was rendered, to money received.

9. Eminent Domain ⚷254

Generally, condemnee cannot accept payment of damages awarded him in proceeding in eminent domain and yet appeal, claiming a larger sum, if reversal of judgment will entail a general review of damages de novo.

10. Eminent Domain ⚿263

Effect of unqualified reversal of judgment in condemnation proceeding is to remand cause for new trial, and parties in trial court have same rights, which they originally had, and cause is at large for readjudication of all issues involved in the case, and it is in the same position as if it had never been tried, with exception that opinion of reviewing court must be followed as far as applicable.

11. Eminent Domain ⚿247(4)

Since defendants in condemnation proceeding could not take deposit made by plaintiff, which was in possession of the property sought to be condemned, without giving up right of defendants to appeal and thus surrendering possibility of an increased award, interest continued to run notwithstanding the deposit by plaintiff. West's Ann.Const art. 1, § 14; West's Ann.Code Civ.Proc. § 1254.

12. Eminent Domain ⚿241

Where, at time final order of condemnation was entered, interlocutory judgment had not been complied with and was not final, the final order was premature and erroneous. West's Ann.Code Civ.Proc. §§ 1251, 1253, 1264.7.

◆

Stanley M. Arndt, Los Angeles, for appellants.

George C. Hadley, R. B. Pegram, and Thomas M. Dankert, Los Angeles, for respondent

VALLÉE, Justice.

Appeal by defendants from the interlocutory judgment and the final order of condemnation in a proceeding in eminent domain. The question is the amount of interest to which defendants are entitled.

The action was filed June 20, 1950. On February 1, 1951 plaintiff went into possession of the property sought to be condemned pursuant to an order therefor (Const. art. I, § 14) and has remained in possession ever since. The action was first tried in 1952, resulting in a jury verdict for $15,187.20. An interlocutory judgment was entered on July 7, 1952. On July 15, 1952 defendants served and filed notice of intention to move for a new trial. On July 16, 1952 plaintiff sent the county clerk this letter:

> "Dear Sir:
>
> "Pursuant to Judgment in Condemnation entered July 7, 1952, in Book 2406, Page 248 of Judgments, as to Parcels 5 and 5-A of the above-entitled proceeding, enclosed is Division of Highways Revolving Fund Account check No. 86807, made payable to you in the total amount of $18,311.71.
>
> "Copy of this letter is being forwarded to Mr. Stanley M. Arndt, Attorney at Law, 535 Rowan Building, Los Angeles 13, California, in order that he will be advised that this deposit has been made for defendants' benefit.
>
> "Very truly yours,
> "P. O. Harding, Assistant State Highway Engineer
> "District VII, by H. W. Leonard, Metropolitan District Right of Way Agent."

The check, payable to the county clerk, was enclosed with the letter. A copy of the letter was mailed to the attorney for defendants on July 16, 1952 and received by him.

The check for $18,311.71 purported to represent:

(a) $15,187.20 (the value of parcel 5—Amended as found by the jury);

(b) $1,522.01 (interest at 7 per cent on $15,187.20 from February 1, 1951 to July 16, 1952);

(c) $1,575.00 (the stipulated value of parcel 5-A);

(d) costs of $27.50.

No motion was made by plaintiff and no order was made by the court under section 1254 of the Code of Civil Procedure with respect to the deposit of the $18,311.71.

The next day, July 17, 1952, a final order of condemnation was signed and entered. On September 12, 1952 defendants' motion for a new trial was denied. On September 29, 1952 defendants appealed from the interlocutory judgment and from the final order. On February 4, 1954, pursuant to stipulation of the parties, the $1,575 deposited for parcel 5–A was withdrawn by defendants. On October 6, 1954 the interlocutory judgment and the final order as to parcel 5–Amended were reversed. The reversal was unqualified and unconditional. People v. Loop, 127 Cal.App.2d 786, 274 P.2d 885.

On April 26, 1955 a written stipulation was entered into between the parties pursuant to which defendants withdrew from the county clerk $16,736.71, which was the remainder of the $18,311.71 deposited by plaintiff with the clerk on July 16, 1952. By the stipulation the parties agreed, and pursuant thereto the court ordered, that neither party would in anywise be prejudiced from asserting its respective contentions in regard either to the right to additional interest or that no further interest was due in connection with the deposit; and defendants stipulated that in no event would any further interest be charged upon the $15,187.20 included in the deposit from and after the date of withdrawal, April 26, 1955. The parties further stipulated that if the subsequent award should be "less than the amount so withdrawn then said defendants shall, upon said award becoming final, pay to said plaintiff within 30 days thereafter the difference between said amount so withdrawn and the amount of said subsequent award."

The cause was reset for trial, resulting in a verdict with respect to parcel 5–Amended of $25,078.40. The verdict did not include interest.[1] The difference between the amount of the prior award as to parcel 5–Amended exclusive of interest and the verdict in the second trial was $9,891.20. Thereafter the court made findings of fact and conclusions of law. It concluded that at all times after July 17, 1952, the date the first final order of condemnation was entered, defendants were entitled under section 1254 of the Code of Civil Procedure to withdraw the $18,311.71 deposited with the county clerk by plaintiff on July 16, 1952; defendants are not entitled to any further interest on that sum; plaintiff is entitled to judgment on paying into court for defendants the $9,891.20 together with interest thereon at 7 per cent from February 1, 1951 to September 26, 1955, and from June 4, 1956 to date of deposit of that sum into court.[2] Accordingly, on October 30, 1956 an interlocutory judgment was entered. On November 8, 1956 defendants filed notice of intention to move for a new trial. On November 16, 1956 a final order of condemnation was entered. On December 18, 1956 the motion for a new trial was denied. Defendants appeal from the judgment and from the final order of condemnation.

Defendants contend they are entitled to interest on $15,187.20, the amount of the deposit by plaintiff with the county clerk as to parcel 5–Amended from July 16, 1952, the date of the deposit, to April 26, 1955, the date it was withdrawn, which interest the court disallowed. Plaintiff says the deposit was made under section 1254 of the Code of Civil Procedure and that it stopped the running of interest.

[1, 2] Just compensation for the taking of private property for public use includes not only the market value of the property but also the actual cash value of the use of the property from the date of the taking possession thereof up to the date of the judgment if possession is taken by the condemner prior to judgment. Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 680,

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[1] The court instructed the jury: "In arriving at your verdict you are not to include or add any sum as interest on the value of Parcel 5 based upon the plaintiff's possession of this parcel during the pendency of this proceeding. The matter of interest will be considered by the Court after you shall have returned your verdict, and is not for your determination."

[2] Defendants waived interest for the period from September 26, 1955 to June 4, 1956 because of a continuance at their request.

107 P.2d 618; Los Angeles County Flood Control Dist. v. Hansen, 48 Cal.App.2d 314, 316–318, 119 P.2d 734. It is the rule in this state that interest at the legal rate on the value of the property sought to be condemned is the proper measure by which to ascertain the amount so to be added. Metropolitan Water Dist. v. Adams, supra, 16 Cal.2d 676, 682, 107 P.2d 618.

Section 1254 provides that at any time after trial and judgment entered or pending appeal, whenever the plaintiff shall have paid into court for the defendant "the full amount of the judgment" *and* such further sum "as may be required by the court" to pay 1) any further damages and costs and 2) all damages that may be sustained by the defendant if the property is not finally taken, the court may "upon notice of not less than 10 days" authorize the plaintiff if already in possession to continue therein. Section 1254 further provides, as an integral part thereof, that the defendant shall be entitled to receive the sum required by the court "at any time thereafter" on obtaining an order therefor; and that the court on application by the defendant shall order that the money "so paid into court for him" be delivered to him on his filing a satisfaction of the judgment, or on his filing a receipt therefor and an abandonment of all defenses to the proceeding except as to the amount of damages that he may be entitled to in the event a new trial is granted, and that "In ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate."[3]

[3] The court specifically found and the record shows that no motion was made by plaintiff and no order was made by the court under section 1254 with respect to the deposit of the $18,311.71. Plaintiff did not at any time give defendants the notice prescribed by section 1254. The court did not at any time hold a hearing for the purpose of fixing, nor did it fix, the further sum in addition to the "full amount of the judgment" which plaintiff should be required to pay into court. No amount was ever fixed which defendants could apply for and obtain an order that it be delivered to them. In short, the deposit of the $18,311.71 with the county clerk was not made under or pursuant to section 1254, and that section has no application. The deposit was merely a voluntary tender of what purported to be but, as we shall see, was not in fact the "full amount of the judgment." The money did not vest in defendants by its mere deposit, as argued by plaintiff. It will be noted that section 1254 is extremely

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3. Section 1254 in relevant part reads: "At any time after trial and judgment entered or pending an appeal from the judgment to the Supreme Court, whenever the plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use, the superior court in which the proceeding was tried may, upon notice of not less than 10 days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. * * * The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. In ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate."

careful in safeguarding the rights of the landowner. The full amount of the judgment is only one of the three factors which the court is required to determine as the amount which the plaintiff shall pay into court for the defendant. It requires the payment into court not only of the full amount of the judgment but also such sum as may be required by the court as a fund to pay "any further damages and costs that may be recovered" in the proceeding and "all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use." And such payment must be made before the plaintiff may be authorized to continue in possession. The damages contemplated are the enhanced damages which the defendant may recover on reversal and order for a new trial. Heilbron v. Superior Court, 151 Cal. 271, 277, 90 P. 706.

[4, 5] Plaintiff says section 1254 is silent as to who shall give notice; that there is nothing in the section saying to whom notice shall be given; and that the only purpose of notice is to apprise the condemnee of interference with possession. Section 1254 requires notice and hearing. Housing Authority v. Superior Court, 18 Cal.2d 336, 339, 115 P.2d 468. It would seem obvious to the most obtuse that the notice is to be given by the plaintiff, that it is to be given to the condemnee, and that its purpose is to enable the court to fix the sufficient and adequate further damages and costs and the damages should the property not be finally taken, and to permit the plaintiff to continue in possession. "After appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given." Code Civ.Proc. § 1014; see Goetz v. Superior Court, 49 Cal.2d 784, 322 P.2d 217. The general rule is that notice of motion must be given whenever the order sought may affect the rights of an adverse party. Caledonian Ins. Co. v. Superior Court, 140 Cal.App.2d 458, 461, 295 P.2d 49.

Plaintiff lifts out of context that part of section 1254 which says the defendant shall be entitled to receive the money paid into court for him on any judgment on obtaining an order therefor from the court, and that it is the duty of the court to order it delivered to him on his filing a satisfaction of the judgment or a receipt therefor and an abandonment of all defenses except as to the amount of damages in the event a new trial is granted. This part of the section may not be read out of context. Section 1254 must be read as a whole. The money referred to is the amount determined by the court after notice and hearing which includes the "full amount of the judgment" plus such further sum as the court requires to pay any additional damages and costs that may be recovered and plus all damages that may be sustained by the defendant if the property is not finally taken. It is only after such determination that the defendant is entitled to receive the money paid into court for him under section 1254.

[6, 7] The court erred in denying interest after July 15, 1952 on the first jury award of $15,187.20 for another reason: the deposit was insufficient. Plaintiff did not satisfy the judgment by paying $18,311.71 to the county clerk for the benefit of defendants. It appears that the deposit was not for the "full amount of the judgment." The deposit included $1,522.01 interest for the period February 1, 1951 to July 16, 1952 on $15,187.20, the value of parcel 5–Amended as found by the jury in the first trial. $1,522.01 is not the correct amount of interest on $15,187.20 from February 1, 1951 to July 16, 1952. The correct amount is $1,550.35.[4] Providing only partial compensation is not providing just compensation. The owner is not compelled to accept partial compensation. Where an obligation on which a tender is made carries interest, the

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[4] Calculated by the usual method, interest at 7 per cent on $15,187.20 from February 1, 1951 to July 16, 1952 (one year, five months, and fifteen days) is:

1 year interest on $15,187.20	$1,063.10
5 months ($\frac{5}{12}$ of $1,063.10)	442.95
15 days ($\frac{15}{30}$ of $\frac{1}{12}$ of $1,063.10)	44.30
	$1,550.35

amount tendered must be sufficient to cover the interest. United States v. Certain Lands In Borough of Brooklyn, 2 Cir., 129 F.2d 577, 579; In re Harlem River Drive, Sup., 122 N.Y.S.2d 866, 868–869; 86 C.J.S. Tender, § 8, p. 563. The deposit, which did not satisfy the judgment, did not, in any event, stop the running of interest. City of St. Louis v. Senter Commission Co., 343 Mo. 1075, 124 S.W.2d 1180, 1184, citing Rauer's Law & Collection Co. v. Sheridan Proctor Co., 40 Cal.App. 524, 181 P. 71.

[8] A party who accepts the benefits of a judgment generally waives his right to appeal therefrom. 3 Cal.Jur.2d 596, § 134. The rule is that "The right to accept the fruits of a judgment or order and the right to appeal therefrom, are not concurrent, but are wholly inconsistent, and an election of either is a waiver or renunciation of the other." San Bernardino County v. Riverside County, 135 Cal. 618, 620, 67 P. 1047, 1048; Schubert v. Reich, 36 Cal.2d 298, 299, 223 P.2d 242. The rule applies in any form of practice or procedure whereby the appeal might result in again putting in issue the right of the party in whose favor the judgment was rendered to the money received. Annotation, 169 A.L.R. 985, 989.

[9] It is the general rule that a condemnee cannot accept payment of the damages awarded him in a proceeding in eminent domain and yet appeal claiming a larger sum if a reversal of the judgment would entail a general review of the damages *de novo*. United States v. Benedict, 261 U.S. 294, 43 S.Ct. 357, 67 L.Ed. 662, 664; Twombly v. Chicago, R. I. & T. Ry. Co., Tex.Civ.App., 31 S.W. 81, 82; Mississippi & M. R. Co. v. Byington, 14 Iowa 572, 574–575; Glassburn v. Deer, 143 Ind. 174, 41 N.E. 376, 379; Baltimore, O. & C. R. Co. v. Johnson, 84 Ind. 420; 30 C.J.S. Eminent Domain § 345, p. 23; 2 Am.Jur. 980, § 218; 18 Am.Jur. 1016, § 373; annotation, 169 A.L.R. 996.

In Pool v. Butler, 141 Cal. 46, 74 P. 444, the condemners deposited the amount of the interlocutory judgment with the clerk within 30 days after its entry. The condemnees did not accept the money but moved for a new trial and on its denial appealed and did not abandon all defenses except for greater compensation. The court said the condemnees could not demand or obtain the money until the appeal had been decided, and continued (141 Cal. at pages 48, 49, 74 P. at page 445):

> "If they [the condemnees] had applied to the court for an order directing the clerk to pay over the money, it could not have been granted pending the motion for a new trial, or at any time after the appeal was taken until the judgment was affirmed or the appeal dismissed. The court had no power to make the requisite order for the payment of the money, the judgment having been suspended by the appeal, which was a refusal to accept the money, or to treat the judgment as a final determination of the rights of the parties, though it was in form final. * *
>
> "* * * Pending the motion for a new trial, and later, pending the appeal, it is clear that plaintiffs were not bound to pay or deposit the damages assessed upon the trial; and it is equally clear by the motion and the appeal that the defendants refused to accept payment, at least until they had exhausted all their resources to defeat the condemnation, and during all that time the plaintiffs had the right to abandon the enterprise and refuse to pay the compensation assessed by the court. It is contended, however, that, having deposited the money with the clerk of the court, they [the condemners] could not withdraw it, and that upon the affirmance of the appeal the defendants were entitled to receive it. I think plaintiffs had the right to abandon at any time before the defendants were willing to receive it, or were in a position to demand it."

At bar, defendants filed notice of intention to move for a new trial the day before the deposit was made.

Donegan v. City of Los Angeles, 109 Cal. App. 673, at page 685, 293 P. 912, at page 916 states:

> "In 10 Ruling Case Law, page 209, we find the rule as to accepting awards in eminent domain proceedings worded as follows: 'Where, however, a land owner accepts a sum awarded to him as damages in condemnation proceedings, he is estopped from taking and prosecuting an appeal from the award.'"

In People v. Goodsell, 24 Cal.App.2d 538, 75 P.2d 545, the condemner in possession from the filing of the proceeding paid the amount of the award as fixed by the interlocutory judgment and a few extra dollars to the clerk of the court. The amount of the award with interest from the date of the judgment was paid to the defendant and received and accepted by her from the clerk of the court. Thereupon the defendant gave notice of appeal from that part of the judgment which failed to order the payment of interest to her from and after the date on which plaintiff took possession of the property. The court stated (24 Cal.App.2d at page 540, 75 P.2d at page 546):

> "When, therefore, the defendant consented to accept a judgment in that specific sum, she must be deemed to have waived her claim for interest. Conlin v. Southern Pac. R. Co., 40 Cal.App. 743, 747, 182 P. 71. It is an accepted rule that, when a party consents to and acquiesces in a judgment as entered, and thereafter accepts and retains the fruits of the judgment, which would not have been entered but for his acquiescence, he may not attack that judgment on appeal."

In Mt. Shasta Power Corp. v. Dennis, 66 Cal.App. 186, 225 P. 877, judgment of condemnation was entered on September 22, 1922. The same day the condemner filed notice of intention to move for a new trial. On September 29, 1922 the condemner paid into court for the condemnees the amount of the judgment and costs and filed a written statement saying that by so doing it did so without prejudice and without waiving its right to prosecute its motion for a new trial or its right to appeal. On October 9, 1922 the money deposited by the condemner was, on order of the court, paid to the condemnees. On October 20, 1922 the condemnees filed a satisfaction of the judgment. On October 23, 1922, on motion of the condemner, an order was made authorizing it to take possession of the property on depositing an additional $3,000; the condemner deposited the $3,000 and took possession. On December 18, 1922, the motion for a new trial was denied. On January 6, 1923 the condemner filed its notice of appeal. Dismissing the appeal on motion of the condemnees the court stated (66 Cal.App. at pages 190, 191, 225 P. at page 879):

> "Plaintiff had the option of paying the damages awarded and taking possession or appealing from the judgment and remaining out of possession until the final determination of the compensation to be paid. * * * The fact that a party may find it more profitable to comply with a judgment and accept the fruits thereof than to suffer the losses incident to an appeal cannot be said to render such compliance compulsory. The necessities of the plaintiff and its intention in making payment and taking possession, however, are not decisive of the case. In taking possession, the plaintiff was exercising a statutory right, and the effect of its acts must be measured by the provisions of the statute. In taking the fruits of the judgment under the authority of the statute, the plaintiff could not impose conditions upon defendants' acceptance of the money paid which are not provided by the statute. It is not perceived that the plaintiff's attempt to limit the effect of its payment and entry is material. Its statement, in connection with the payment of the money into court, that the same was deposited 'without prejudice to * * * its right to appeal from said judgment' is of no value in determining the question of its right to appeal, a right which is wholly dependent upon the statute. Ordinarily, the voluntary compliance with a judgment

> and the acceptance of the fruits thereof by a party are inconsistent with a right of appeal by such party. * * * The Constitution (article 1, § 14) provides: 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for the owner.' Such compensation 'is not paid into court *for him* until he can take it.'" See G. H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 398, 31 P.2d 372; In re Estate of Ayers, 175 Cal. 187, 165 P. 528.

[10, 11] The reversal on the first appeal was unqualified and unconditional without further order or direction. All issues in the case including the question of compensation were set at large. The effect of an unqualified reversal is to remand the cause for a new trial; the parties in the trial court have the same rights which they originally had; the cause is at large for readjudication of all issues involved in the case; it is in the same position as if it had never been tried, with the exception that the opinion of the court on appeal must be followed as far as applicable. Hall v. Superior Court, 45 Cal.2d 377, 381, 289 P.2d 431; Weightman v. Hadley, 138 Cal.App. 2d 831, 835–840, 292 P.2d 909. The benefits of the judgment and order from which defendants appealed were put in jeopardy by the appeal. On the new trial following the reversal, the compensation awarded might well have been less than that found by the jury at the first trial, and defendants under their stipulation would have been required to pay plaintiff the difference between the lesser award and the amount withdrawn. Defendants could not take the deposit without giving up their right to appeal and thus surrendering the possibility of an increased award. In that situation the courts hold that interest continues to run.[5]

What we have said is fatal to plaintiff's contention that the deposit stopped the running of interest. Vallejo & N. R. Co. v. Reed Orchard Co., 177 Cal. 249, 170 P. 426, and City of Los Angeles v. Oliver, 110 Cal. App. 248, 294 P. 760,[6] cited by plaintiff, are not in point. Those cases and this one are materially different. In them the money was paid into court for the benefit of the condemnee pursuant to the provisions of section 1254 on an order of court. Los Angeles, P. & G. Ry. Co. v. Rumpp, 104 Cal. 20, 37 P. 859, also cited by plaintiff, is factually not apposite. In that case the condemner paid the damages into court, the condemnee received the money and filed an abandonment of all defenses to the action except her claim for greater compensation. The condemner then took possession. Authorities from other jurisdictions cited by plaintiff are of no value in view of the requirements of section 1254.

[12] Defendants also assert the final order of condemnation entered November 16, 1956 was prematurely signed and entered and that it was erroneous.[7] The point

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[5] See Neilson v. Chicago & N. W. Ry. Co., 91 Wis. 557, 64 N.W. 849, 850; A. Gettelman Brewing Co. v. City of Milwaukee, 245 Wis. 9, 13 N.W.2d 541, 548; Hayes v. Chicago, R. I. & P. R. Co., 239 Iowa 149, 30 N.W.2d 743; Beal v. Iowa State Highway Comm., 209 Iowa 1308, 230 N.W. 302, 303; Miller v. City of Scottsbluff, 155 Neb. 185, 50 N.W.2d 824; Alloway v. City of Nashville, 88 Tenn. 510, 13 S.W. 123, 127, 8 L.R.A. 123; Miltimore v. City of Augusta, 140 Kan. 520, 38 P.2d 675, 679; Missouri River, Ft. S. & G. R. Co. v. Owen, 8 Kan. 409, 416 [Reprint pages 274, 280]; Moll v. Sanitary Dist. of Chicago, 228 Ill. 633, 81 N.E. 1147, 1148; Schnull v. Indianapolis Union R. Co., 190 Ind. 572, 131 N.E. 51, 54; State v. Hamer, 211 Ind. 570, 199 N.E. 589, 595; Parks v. Dallas Terminal Ry. & Union Depot Co., 34 Tex.Civ.App. 341, 78 S.W. 533, 534; Housing Authority v. Dixon, Tex. Civ.App., 250 S.W.2d 636, 637–638; 18 Am.Jur. 916, § 276.

[6] See City of Los Angeles v. Oliver, 102 Cal.App. 299, 283 P. 298.

[7] The final order was presented to and signed by the presiding judge, not the judge who tried the case, without notice to defendants.

is good. "The plaintiff must, within thirty days after *final judgment,* pay the sum of money assessed." Code Civ.Proc. § 1251. Emphasis added. "The term 'judgment' as used in this title means the judgment determining the right to condemn and fixing the amount of compensation to be paid by the plaintiff. The term 'final judgment' as used in this title means such judgment when all possibility of direct attack thereon by way of appeal, motion for a new trial, or motion to vacate the judgment has been exhausted." Code Civ.Proc. § 1264.7. It is only after payment is made as provided in section 1251 that the final order of condemnation may be rendered unless the parties agree otherwise; a copy of the order must be filed in the office of the recorder of the county, "and thereupon the property described therein shall vest in the plaintiff." Code Civ.Proc. § 1253. As we have seen, the interest on the $15,187.20 had not been deposited into court or paid to defendants. Further, the interlocutory judgment entered October 30, 1956 decreed that plaintiff pay into court for the benefit of defendants $9,891.20 and interest thereon at 7 per cent from February 1, 1951 to September 26, 1955 and from June 4, 1956 to date of the deposit. On November 5, 1956 plaintiff deposited $13,404.34 into court: $9,891.20 the amount of the verdict, $54.70 costs, and $3,458.44 interest. The final order of condemnation was signed and filed the same day. Interest at 7 per cent on $9,891.20 from February 1, 1951 to September 26, 1955 and from June 4, 1956 to November 5, 1956 is $3,511.92,[8] not $3,458.44. The deposit should have been $13,457.82.[9] Thus, at the time the final order was entered on November 16, 1956 the interlocutory judgment had not been complied with and was not final. Southern Public Utility Dist. v. Silva, 47 Cal.2d 163, 165, 301 P.2d 841.

The interlocutory judgment of condemnation entered October 30, 1956, titled "Judgment in Condemnation," and the final order of condemnation entered November 16, 1956, are reversed; and the superior court is directed to amend its findings of fact and

[8] Calculation of interest on $9,891.20 is as follows:

February 1, 1951 to September 26, 1955 is 4 years, 7 months, 25 days:

1 year	$692.38		
4 years		$2,769.52	
1 month	57.70		
7 months		403.90	
25 days		48.08	
			$3,221.50

June 4, 1956 to November 5, 1956 is 5 months, 1 day:

5 months		$ 288.50	
1 day		1.92	
			$ 290.42
			$ 3,511.92

[9]

Principal	$9,891.20
Interest thereon from February 1, 1951 to September 26, 1955	3,221.50
Interest on $9,891.20 from June 4, 1956 to November 5, 1956 (date of deposit)	290.42
Costs	54.70
	$13,457.82

conclusions of law and render a judgment of condemnation in conformity to the views expressed in this opinion.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

* * *

161 Cal.App.2d 657

Anthony RUPP, Plaintiff and Respondent,

v.

William SUMMERFIELD, Defendant and Appellant.

Civ. 22947.

District Court of Appeal, Second District, Division 1, California.

June 26, 1958.

Action for damages for malicious prosecution. Judgment for plaintiff in the Superior Court of Los Angeles County, George A. Dockweiler, J., and the defendant appeals. The District Court of Appeal, Lillie, J., held that an objection to the introduction of a transcript of the criminal proceedings was insufficient and that the instructions given were either not erroneous or not prejudicial.

Judgment affirmed.

1. Appeal and Error 🔑231(3)

In action for malicious prosecution, where defendant objected to transcript of criminal proceedings against plaintiff on the ground that it was irrelevant or immaterial when it was objectionable as containing hearsay but defendant made no objection on that ground at the trial, defendant waived his objection on appeal.

2. Trial 🔑83(2)

An objection to evidence upon the ground that it is incompetent, irrelevant and immaterial is too general to include the objection and it calls for hearsay.

3. Trial 🔑83(1)

When inadmissible evidence is offered, the opposing party must object and specifically state the grounds of his objection in such a manner that it clearly informs the court of the point on which a ruling is desired and the proponent of the defect to be corrected.

4. Appeal and Error 🔑231(1)

An objection specifying the wrong grounds or a general objection amounts to a waiver of all grounds not urged.

5. Trial 🔑255(4)

Where evidence is admissible for a limited purpose, court's duty to instruct the jury to that effect does not arise until counsel requests such an instruction and unless such a request is made the right to complain on appeal is waived.

6. Trial 🔑255(4), 258(1)

In action for malicious prosecution, where defendant did not request an instruction on the limited effect of evidence of preliminary criminal proceedings against the plaintiff, the court was not required of its own motion to so instruct, and defendant by objecting to the evidence did not in effect request a limiting instruction.

7. Appeal and Error 🔑882(12)
Malicious Prosecution 🔑72(1)

In action for malicious prosecution, plaintiff's requested instruction respecting the giving of knowingly false testimony at a preliminary hearing as basis for liability for malicious prosecution was authorized under the evidence and was not ground for complaint in view that the instruction was a corollary of defendant's own proposed instructions.

8. Appeal and Error 🔑1064(1)
Malicious Prosecution 🔑72(1)

In action for malicious prosecution, an instruction that a person giving information to the police leading in normal course of procedure to arrest and prosecution of the plaintiff which information is false may be held liable for malicious prosecution should have contained the word "knowingly", but failure to include it was not prejudicial error, where the issue of "knowledge" as such was not involved. West's Ann.Code Civ.Proc. § 475; West's Ann.Const. art. 6, § 4½.

9. Malicious Prosecution ⚿72(1)

In action for malicious prosecution, plaintiff's instruction respecting the liability for doing an illegal or wrongful act was not improper because omitting question of knowledge of falsity of the information given by the defendant where the entire theory of the defense did not include the issue of knowledge.

10. Malicious Prosecution ⚿72(1)

An instruction stating the rule that a person may be liable for malicious prosecution if he sets the law in motion even though he did not sign the criminal complaint was not improper as not considering that a person may make a false report to the police in good faith where such was covered by the defendant's proposed instruction.

11. Malicious Prosecution ⚿18(5), 30

One knowingly pressing a baseless criminal charge acts without probable cause and is guilty of malice as a matter of law.

12. Malicious Prosecution ⚿72(1, 4)

In action for malicious prosecution instruction that one knowingly pressing baseless criminal charge acts without cause and is guilty of malice as a matter of law was properly given under the evidence.

13. Malicious Prosecution ⚿72(4, 5)

In action for malicious prosecution, plaintiff's instruction was not improper as a direction to jury that oppression, fraud, or malice existed and as authorizing the jury to award plaintiff damages for loss of earnings and loss of time which are one and the same, especially in view of other instructions given.

14. Appeal and Error ⚿928(1)

The appellate court will adopt the construction of an instruction which will support rather than defeat the judgment, if it is reasonably susceptible to such an interpretation.

15. Malicious Prosecution ⚿72(5)

In action for malicious prosecution, plaintiff's instruction was not objectionable as allowing plaintiff both the value of his time and loss of his earnings by permitting a duplication of damages where the instruction made a clear distinction between special and general damages.

16. Trial ⚿295(1)

Instructions must be considered as a whole.

◆

William John Hyland, III, Beverly Hills, for appellant.

Harry P. Glassman, San Francisco, for respondent.

LILLIE, Justice.

Defendant appeals from a judgment entered pursuant to a jury verdict awarding plaintiff $3,000 general damages and $2,000 punitive damages in a malicious prosecution action.

The basis for plaintiff's claim was a criminal prosecution in which he was charged with grand theft and which was dismissed by the court after a preliminary hearing at which defendant and appellant herein testified.

On this appeal, appellant makes no claim that the evidence was insufficient to support the judgment or that the damages were excessive, but submits error on the part of the trial court in admitting into evidence the transcript of the preliminary hearing and in giving certain instructions to the jury.

Plaintiff and defendant had what might be described as an intimate and close personal friendship. Almost immediately after they met, defendant gave plaintiff expensive presents, clothing, money and jewelry. He opened a joint bank account with plaintiff, giving him access, at one time, to close to $4,500 of his money. He paid for a Jaguar and Cadillac for plaintiff and rented him an apartment, partially furnishing it. They traveled extensively and when in Los Angeles defendant was a constant nightly visitor of plaintiff.

Plaintiff testified that in January of 1955, while having dinner at a restaurant, defendant gave him for his birthday his Patek

Phillipe gold wristwatch and band valued at approximately $800, which plaintiff later took to a jeweler, under his own name, to have the band adjusted. Thereafter he wore the watch both in and out of the defendant's presence. On the night defendant gave him the watch he returned with plaintiff to his apartment and stayed the night. He told plaintiff that to "convince his wife" that the watch had been lost, he would report its disappearance to the police. That evening, or the next day, defendant reported the watch "lost and possibly stolen" to the sheriff's department and filed a claim with the insurance company, from which he recovered $850.

Witness James O'Brien testified that in the Spring of 1955 while having dinner with plaintiff and defendant, defendant called attention to the watch on plaintiff's wrist and asked him how he liked the watch he had given him.

In June, defendant's wife objected to the relationship and plaintiff decided to go to San Francisco. He told defendant he was leaving him and asked him for money for transportation, which defendant refused. To raise the necessary funds plaintiff, in his own name, pawned the wristwatch in question and a television set in Hollywood and moved to San Francisco. In July or August, 1955, the police told defendant that the watch had been recovered and had been pawned in the plaintiff's name. Immediately thereafter, a warrant was issued charging plaintiff with having stolen defendant's watch. Plaintiff was arrested in San Francisco and held in custody approximately six weeks.

On September 23, 1955, a preliminary hearing was had in the municipal court at which time defendant Summerfield testified and denied having given the watch to plaintiff Rupp. The court dismissed the criminal action against Rupp on the ground there was not reasonable or probable cause to believe he had committed the crime of grand theft.

In the instant action defendant's sole defense was that at no time had he given plaintiff the wristwatch in question.

At the trial, plaintiff's counsel offered in evidence the transcript of the preliminary hearing and the following colloquy took place:

> "Mr. Glassman: * * * I will ask that this be marked as the plaintiff's exhibit in evidence, your Honor.
>
> "The Court: No. 1.
>
> "Mr. Hyland: Your Honor, I would like to make a query as to the admissibility of the exhibit. I think it is probably material as showing the outcome of that preliminary hearing. The fact that the State did dismiss the charges against Mr. Ruff (sic), but the exhibit, for the purposes of the testimony contained therein, I think, is wholly irrelevant and immaterial to this issue here.
>
> "The Court: Overruled."

Appellant now claims that the court erred in admitting the transcript of the preliminary hearing because of its *hearsay* nature. At the trial in the court below, appellant's "objection" to the introduction of the transcript took the form of a statement to the court, after the trial judge had marked it as an exhibit, in which he admitted its materiality to show the outcome of the preliminary hearing, conceding its admission for that purpose and said, "* * * but the exhibit, for the purposes of the testimony contained therein, I think, is wholly *irrelevant* and *immaterial* to this issue here." (Emphasis added.)

[1, 2] Obviously, if the transcript was objectionable at all, it was objectionable not because it was irrelevant or immaterial as stated by appellant, but because it contained hearsay. However, he made no objection on that ground at the trial. Under the authorities, it is clear that having failed to object in the court below, he waived his objection on appeal. It is well-settled that an objection to evidence upon the ground that it is incompetent, irrelevant and immaterial is too general to include the objection that it calls for hearsay. In Keim v. D. B. Berelson & Co., 105 Cal.App. 2d 154, at page 162, 233 P.2d 123, at page

128, the court stated: "The objection which appellants made when the question was asked ('incompetent, irrelevant and immaterial') was too broad reasonably to include, and to present to court and opposing counsel, the specific objection that the question called for hearsay. 'It is well settled that when a general objection to the admission of certain evidence is overruled by the trial court, the party against whom the ruling is made cannot raise for the first time on appeal a specific objection thereto, unless the evidence is not admissible for any purpose.'"

[3, 4] When inadmissible evidence is offered, the opposing party must object and specifically state the grounds of his objection in such a manner that it clearly informs the court of the point on which a ruling is desired and the proponent of the defect to be corrected. An objection specifying the wrong grounds, or a general objection, amounts to a waiver of all grounds not urged. Bank of America National Trust & Savings Ass'n v. Taliaferro, 144 Cal.App.2d 578, 301 P.2d 393; Keim v. D. B. Berelson & Co., supra, 105 Cal.App.2d 154, 233 P.2d 123.

[5] If the transcript was admissible for any purpose, and appellant concedes that it was, it was properly received. However, he urges that if the evidence was admissible for a limited purpose the court should have so instructed the jury, and cites various authorities to the effect that the court had the duty to instruct the jury on the limited effect or purpose of the evidence. With the authorities cited there is no argument, but they also hold that the court's duty does not arise until counsel requests such an instruction, and unless such request is made the right to complain on appeal is waived. Hatfield v. Levy Brothers, 18 Cal.2d 798, 117 P.2d 841; Lewis v. Southern Pacific Co., 98 Cal.App.2d 358, 362, 220 P.2d 431; Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850.

[6] The record is clear that appellant did not request, propose or submit to the trial court an instruction on the limited effect or purpose of the evidence in question. The court need not of its own motion so instruct. Appellant's suggestion that by objecting to the evidence he had in effect requested a limiting instruction is entirely without merit—first, because he has no proper "objection" in the record and, second, because such a contention is completely contrary to the well-established rule that the opponent of offered evidence, even though he properly objects to its introduction, must request the limiting instruction or he waives his right.

[7] Appellant's second point on appeal involves the giving of plaintiff's requested jury instructions Nos. 9, 8, 4, 3, 6 and 11. Appellant complains that plaintiff's requested instruction No. 9 which reads, "A person who knowingly testifies falsely at a preliminary hearing in a criminal prosecution may be held liable for malicious prosecution. It is no defense that the person was subpoenaed to testify at such preliminary hearing," is a direction to the jury that if it finds appellant testified falsely at the preliminary hearing, he was as a matter of law liable; and that the law requires more than perjury for malicious prosecution. It is not true, as suggested by appellant, that the sole basic element of an action for malicious prosecution is the initiation of a criminal proceeding, for which he cites Prosser, Torts, 860 (1st Ed. 1941). Dean Prosser continues, at page 865 in his text on Torts, and on which appellant remains silent: "On the other hand if he advises or assists another person to begin the proceeding, ratifies it when it is begun on his behalf, or takes any active part in directing or aiding the conduct of the case he will be responsible," and makes it clear, at page 866, that knowingly giving false information to the police constitutes advising or assisting another to begin the proceeding.

The evidence in the instant case clearly shows, and the jury so found, that the defendant was not merely a witness at the preliminary hearing but initiated the proceeding by knowingly making a false report to law enforcement officers and that he intentionally and knowingly testified falsely at the preliminary hearing. In addition, the instruction is a corollary of appellant's own proposed instruction No. 15 which was given and reads: "One who merely participates in the original proceeding as a fair witness in the course of litigation is not deemed responsible therefor so as to be required to defend himself in an action for malicious prosecution." Viewing the evidence as a whole and the numerous full and detailed instructions given on malice, lack of probable cause, and definitions thereof, it is difficult to see how the jury could have understood the instruction in the manner in which appellant construes it. We find no error in giving plaintiff's proposed instruction No. 9.

[8] Appellant submits that the court erred in giving plaintiff's proposed instruction No. 8 which reads: "A person who gives information to the police which in the normal course of police procedure leads to the arrest and prosecution of the plaintiff, which information is false, may be held liable for malicious prosecution," in that it leaves out the essential element that a person must "knowingly" give false information in order to give rise to a cause of action. As an abstract statement of the law, the word "knowingly" should have been included in the instruction in Sandoval v. Southern Cal. Enterprises, Inc., 98 Cal.App.2d 240, 219 P.2d 928; however, an examination of the record in the instant case discloses that the failure to include it in instruction No. 8 was not prejudicial error. The issue of knowledge, as such, was not involved and we do not believe that prejudice resulted from this error or that any different result was probable had it not been committed. Cal.Const. Sec. 4½, art. VI; Code of Civil Procedure, Sec. 475. The question of appellant's "knowledge" of the falsity of his report to police was not and could not, under the evidence, have been an issue in the case for the reason that plaintiff claimed defendant gave him the watch and then reported it to the police to have been lost or stolen; whereas defendant claimed he did not give the watch to plaintiff and that the report he made to police was true. The theory of the appellant's defense in the court below did not at any time include the issue of knowledge. Although the instruction as given may have been erroneous as an abstract statement of law, as applied to the whole evidence and the issues at bar, it is clear that no prejudice resulted. Smith v. Southern Pac. Co., 138 Cal.App.2d 459, 292 P.2d 66. In Adams v. American President Lines, 23 Cal.2d 681, at page 688, 146 P.2d 1, at page 5, the court stated: "* * * while an instruction gives the law of the case to the jury, its applicability and correctness cannot be divorced from the evidence in the case. The courts will not consider an instruction as merely an abstract statement of legal principles. (Citations.) It must be measured by the circumstances of the case in which it was given."

[9] Appellant urges that plaintiff's proposed instruction No. 4, although an appropriate test of liability in an action for negligence, is improper in a malicious prosecution case and that plaintiff's requested instruction No. 3 reiterated the defect. No. 4 reads: "The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately brought about by its intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts causing the damage were the necessary or legal and natural consequences of the wrongful act. In this regard you are instructed that it is illegal to make a false report to a police officer." No. 3 reads: "You are instructed that one who sets the law in motion by making a false statement to police is liable for malicious prosecution, even though he did not sign the criminal complaint. Thus, if you find that the defendant William Summerfield made a false statement to the police concerning the disappearance of his watch, it will be no defense for the defendant Summerfield that he did not sign the criminal complaint against the plaintiff."

[10] That portion of instruction No. 4 objected to by appellant appears to have been taken from the rule laid down in the case of Ray Wong v. Earle C. Anthony, Inc., 199 Cal. 15, 247 P. 894, a malicious prosecution action. Appellant again raises the question of knowledge of the falsity of the information, but again the entire theory of appellant's defense did not include the issue of knowledge. His own testimony at the trial was that he gave truthful information to the police and there is not a shred of evidence that he unknowingly gave false information, nor has such a claim ever been made. Instruction No. 3 merely states the rule that a person may be liable for malicious prosecution if he sets the law in motion even though he did not sign the criminal complaint. Centers v. Dollar Markets, 99 Cal.App.2d 534, 222 P.2d 136; Blancett v. Burr, 100 Cal.App. 61, 279 P. 668; Bernstein v. Maimes, 126 Cal.App. 2d 468, 272 P.2d 529; Siffert v. McDowell, 103 Cal.App.2d 373, 229 P.2d 388. Appellant complains that the instruction does not consider that a person making a false report to the police may have done so in good faith. This was adequately covered in appellant's own proposed instruction No. 6 which was given and which reads: "A person who has reasonable ground for belief that another person committed crime, and in good faith charges commission of such crime, cannot be held liable in a malicious prosecution action notwithstanding that such other person proves at the trial of the criminal action that he is innocent, or that no crime in fact was committed."

[11, 12] In complaining of plaintiff's proposed instruction No. 6 that "One who knowingly presses a baseless criminal charge acts without probable cause and is guilty of malice as a matter of law" and which is a principle of law well settled in White v. Brinkman, 23 Cal.App.2d 307, 73 P.2d 254, he does not urge that the instruction does not correctly state the law, but that there is no evidence in the case that defendant pressed this criminal charge. There is ample evidence in the record that defendant made a false report to the police that his watch had been lost or stolen after he gave it to the plaintiff, and then subsequently assisted in the prosecution of plaintiff, first, by not advising law enforcement officers of the truth and, second, by testifying falsely at the preliminary hearing.

[13, 14] Plaintiff's proposed instruction No. 11 reads as follows:

> "The basis of an action for malicious prosecution is the protection of the individual from the damages caused by unjustifiable criminal prosecution. In assessing damages in a case such as this, if you should find that the plaintiff is entitled to damages, you should award the plaintiff any money which he has lost as a result of the prosecution, including his loss of earnings, the attorney's fees he has incurred, and the monetary value of any property which he has lost as a result of the prosecution.
>
> "In addition, you may award the plaintiff monetary damages to compensate him for the loss of time which he has sustained as the result of the prosecution, the deprivation of his liberty, the injury to his reputation or character, the injury to his credit, and the mental suffering and anguish which he has sustained as a result of the prosecution. In this case, the plaintiff has prayed for exemplary or punitive damages, and you are instructed that in an action such as this where the defendant has been guilty of oppression, fraud or express or implied malice, the plaintiff may recover in addition to the actual damages which he has sustained damages for the sake of example and by way of punishing the defendant."

Appellant contends that this instruction constitutes a direction to the jury that oppression, fraud or malice existed; and that it authorized the jury to award plaintiff damages for loss of earnings and loss of time which are one and the same.

First of all, this instruction dealt exclusively with the subject of damages and in reading it with the others given by the trial court, it is obvious that the jury was instructed that it could award damages only if it found plaintiff was entitled to a verdict. To even consider this instruction, it was necessary for the jury to first find that malice existed. The court made it clear in other instructions given before those on damages that malice was a question of fact and set out in detail what elements plaintiff had to prove before a verdict could be rendered in his favor. Under the circumstances, it is difficult to see how the jury could believe that the issue of malice had been taken from it. Appellant's construction of the instruction is a strained one and wholly unreasonable. This court will adopt the construction of an instruction which will support rather than defeat the judgment if it is reasonably susceptible to such interpretation. Mullanix v. Basich, 67 Cal. App.2d 675, 155 P.2d 130; Smith v. Southern Pac. Co., 138 Cal.App.2d 459, 292 P.2d 66.

[15] There is no merit to appellant's second point that in allowing a person both the value of his time and loss of earnings is to permit a duplication of damages. In setting out special damages, the instruction mentioned earnings lost during incarceration. In the next paragraph authorizing general damages, by the use of the phrase, "loss of time," it is obvious it does not mean "loss of earnings." It only directed the jury to place a monetary value upon the time lost away from plaintiff's normal pursuits in addition to money lost in the form of salary or wages. It is a clear distinction between special and general damages.

[16] Most of the appellant's alleged errors related to instructions, and in each instance he has taken the instruction in question out of context and quoted a portion therefrom without reference to others given. Instructions must be considered as a whole. Examining the instructions as a whole, which the law requires (Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522, Shook v. Beals, 96 Cal.App.2d 963, 217 P.2d 56, 18 A.L.R.2d 919, and Yazzolino v. Jones, 153 Cal.App.2d 626, 315 P.2d 107), it is clear that the jury was not mislead into returning a verdict upon erroneous principles of law. The record itself is so clear on the factual issues that it is obvious that no miscarriage of justice under article VI, section 4½ of the State Constitution resulted.

Judgment affirmed.

WHITE, P. J., and FOURT, J., concur.

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161 Cal.App.2d 323

John MASTERSON, John Reddy and John Nelson, individually and as co-partners doing business under the co-partnership name of Masterson, Reddy & Nelson, Plaintiffs and Respondents,

v.

PIG'N WHISTLE CORPORATION, a corporation, John E. Savage and August J. O'Connor, Defendants and Appellants.

Civ. 22539.

District Court of Appeal, Second District,
Division 3, California.
June 16, 1958.

Hearing Denied Aug. 13, 1958.

Action for damages for malicious prosecution of a suit for breach of contract. Judgment for plaintiffs in the Superior Court of Los Angeles County, V. P. Lucas, J., and the defendants appealed. The District Court of Appeal, Shinn, P. J., held that there was no waiver of defendants' right to complain of the giving of instructions on probable cause and that where the question was one of law, it was error to submit it to the jury but no harm resulted therefrom, where evidence established as a matter of law that there was no probable cause; that question of malice was for jury; and that a defendant was not entitled to be relieved of liability on ground that he acted in his capacity of attorney for the corporate defendant where they relied in good faith on his advice.

Judgment and order appealed from affirmed.

1. Malicious Prosecution 🔑56

In order to maintain action for malicious prosecution, plaintiffs must prove a favorable termination of the former suit, want of probable cause, and malice.

2. Malicious Prosecution 🔑25(1)

"Probable cause" in malicious prosecution is synonymous with "reasonable cause" and one who commences a civil suit acts upon probable cause, if he has an honest belief founded upon facts sufficiently strong to justify his belief that grounds exist for the proceeding.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause" and "Reasonable Cause".

3. Malicious Prosecution 🔑25(1)

"Probable cause" in malicious prosecution is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true and where the circumstances are such as to satisfy a reasonable man that there is no basis for the suit, probable cause is lacking.

4. Malicious Prosecution 🔑25(3)

Fact that a lawsuit was unsuccessful would not standing alone justify an inference that it was brought without probable cause.

5. Malicious Prosecution 🔑25(1)

In action for malicious prosecution of a suit against plaintiffs for breach of contract, defendants acted upon probable cause if they believed in good faith that the corporate defendant had grounds for a lawsuit against the plaintiff and their belief was one that could reasonably have been entertained.

6. Appeal and Error 🔑882(12)

In action for malicious prosecution, record did not establish that the defendants waived their rights to complain of giving of instructions on probable cause by requesting instructions of their own, where defendants strenuously maintained that the jury should not be permitted to pass upon the issue and after the court stated that it intended to submit the matter to the jury, defendants offered a number of instructions on the subject, some of which were given, and some refused.

7. Appeal and Error 🔑882(12)

Where a party is unable to induce the court to accept his view of the law, the fact that he requests instructions in accordance with the court's ruling does not preclude him from assigning error.

8. Malicious Prosecution 🔑71(2)

In action for malicious prosecution, if there is dispute concerning the existence of facts relied on to establish want of probable cause, the court must then determine as a matter of law whether such facts warrant an inference of want of probable cause, but where the evidence bearing thereon is in conflict, it is for the jury to determine whether facts exist which warrant or reject an inference of probable cause.

9. Appeal and Error 🔑1062(1)
Malicious Prosecution 🔑71(2)

In action for malicious prosecution in instituting an action for breach of contract against the plaintiff where there was no dispute as to what was said and done by the parties nor as to the facts upon which defendant relied in bringing the suit, the question of probable cause was a question of law and it was error to submit it to the jury but no harm resulted therefrom where the evidence established as a matter of law that there was no probable cause for the suit.

10. Evidence 🔑77(5)

Where person conducting negotiations for defendant was not called to testify as to such negotiations by the defendant, it was to be presumed that his testimony, if given, would have been adverse to the defendants. West's Ann.Code Civ.Proc. § 1963, subd. 5.

11. Malicious Prosecution ⚷30

In action for malicious prosecution, the word "malice" denotes an improper motive, and malice is sufficiently established if it appears that the former suit was commenced in bad faith to annoy or harass the adverse party.

See publication Words and Phrases, for other judicial constructions and definitions of "Malice".

12. Malicious Prosecution ⚷71(3)

In action for malicious prosecution in instituting a breach of contract action against the plaintiffs, whether malice existed was a question of fact for the jury.

13. Malicious Prosecution ⚷32

In action for malicious prosecution, in instituting a breach of contract action against the plaintiffs the jury could have inferred malice from the want of probable cause.

14. Appeal and Error ⚷996

In action for malicious prosecution, it is not the function of the appellate court to weigh the inference of probable cause against other justifiable inferences or the evidence tending to prove absence of malice.

15. Malicious Prosecution ⚷25(2), 55, 56

Reliance upon the advice of counsel given in good faith and based upon a full and fair statement of the facts may afford the client a complete defense to an action for malicious prosecution but it is an affirmative defense and may be shown under a general denial in the answer but the burden of establishing it is upon the defendant.

16. Malicious Prosecution ⚷64(2)

In action for malicious prosecution in instituting a breach of contract action against the plaintiffs, evidence did not establish defense of defendants in relying on the good faith of attorney in bringing the action.

17. Malicious Prosecution ⚷25(1)

In action for malicious prosecution in instituting a breach of contract action, as to the attorney advising the defendant, attorney may not be held liable in damages for malicious prosecution where upon the facts stated to him by his client he advises the latter erroneously that he has a good cause of action.

18. Malicious Prosecution ⚷76

In action for malicious prosecution in instituting a breach of contract action where attorney advising defendant owned stock in the defendant corporation and he and another were in control of the corporation's affairs and he did not seek any instructions upon the theory that he acted only as counsel for the corporate defendant, he was not entitled to be relieved of liability in damages.

◆

George J. Hider, Los Angeles, for appellants.

Fendler & Lerner, Harold A. Fendler, Don Lowry, Beverly Hills, for respondents.

SHINN, Presiding Justice.

The plaintiffs in this action are John Masterson, John Reddy and John Nelson, suing individually and as partners doing business under the partnership name of Masterson, Reddy & Nelson. The defendants are Pig'n Whistle Corporation and two of its officers and directors, John E. Savage, President, and August J. O'Connor, Secretary. The action is for damages for malicious prosecution of a suit for breach of contract. In a jury trial, plaintiffs were awarded damages against all defendants in the sum of $48,341.29. Defendants appeal from the judgment entered upon the verdict and the denial of their motion for judgment notwithstanding the verdict.

In the fall of 1950, plaintiffs were engaged in the business of originating, producing and distributing radio and television programs in the Los Angeles area. They developed a television show called "Animal Fair," featuring trained animals, and offered it to Ad Associates, Pig'n Whistle's authorized advertising agency, for sponsorship by the corporation. Negotiations were carried on between John Nelson, on behalf of the partnership, and Gordon Horney, representing the agency. On October 31, 1950, the board of directors of Pig'n Whistle passed a resolution authorizing the sponsorship of "Animal Fair" for a period of 13 weeks, on condition that Pig'n Whistle have a "preferential right for renewal for additional thirteen weeks on the same station, for the same hour and program."

The following day, November 1, Pig'n Whistle agreed to sponsor "Animal Fair" in the Los Angeles area, the program to be broadcast over Station KNBH on Wednesday nights from 7 to 7:30 p. m. for a period of 13 successive weeks, commencing November 8, 1950, at a production cost to Pig'n Whistle of $450 a week for the first 6 weeks and $600 a week for the remaining 7 weeks. The agreement consisted of a typewritten advertising order signed by Horney, containing the above provisions, and a two-page letter agreement subscribed by Horney, Nelson and Savage, whereby plaintiffs undertook to produce the program and to provide suitable scripts and performers for each show. At the foot of the order, under the heading "Special Instructions," appeared the following: "It is understood Ad Associates has the option to renew this agreement for a successive 13-week cycle at $600.00 per week." (The sums to be paid Masterson, Reddy & Nelson were separate and apart from the cost of air time, for which Pig'n Whistle agreed to pay the station $600 a week.)

On December 20, Nelson sent Horney a letter "to confirm our verbal understanding as regards our program Animal Fair currently on KNBH, 7:00–7:30 PM Wednesday nights." We have set forth the letter in the margin.[1]

On January 31, 1951, Variety, a daily newspaper devoted to news of the entertainment world, announced that the Ralston Purina Company was scheduling a new television show called "Pets and Pals Animal Fair," to be broadcast over 62 stations in the American Broadcasting Company television network, commencing March 4 or 11. The article referred to the show as a "Masterson-Reddy-Nelson package."

The next day, February 1, the board of directors of Pig'n Whistle authorized renewal of "Animal Fair" for the additional 13-week period contemplated in the November 1 agreement. On February 13, Horney sent plaintiffs a type-written advertising order, headed "Confirmation of Agreement"; the order renewed Pig'n Whistle's sponsorship for a 13-week cycle ending May 2. The order also provided: "It is understood Ad Associates has the option to renew this agreement for a successive 13-week cycle at $600.00 per week." Three days later, Horney sent plaintiffs the following telegram: "Client and myself feel disposed to protect rights to use of Pets and Pals Animal Fair name and format."

Nelson replied to Horney by letter dated February 23, accepting, on behalf of the partnership, renewal of the order until May 2. However, with respect to the request for an option for a third 13-week period, Nelson wrote: "I am afraid that, in view of the confused state of affairs at present, we cannot go along with you in that, at this time."

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[1] "Dear Gordon:

"This is to confirm our verbal understanding as regards our program Animal Fair currently on KNBH, 7:00–7:30 PM Wednesday nights. Under the terms of our present contract and agreement, as long as the program is sponsored by Pig'n Whistle, we grant this client the exclusive right to sponsor the program in the Los Angeles area only. It is further understood by both parties that whatever rights the client or station may have in the program may not be assigned or transferred. Also, it is clearly understood that the format, title and all rights in this program are the property of Masterson, Reddy & Nelson and revert automatically to us when and if the Pig'n Whistle gives notice of cancellation. This, of course, is what you have always understood but we feel we should put this in writing. Will you please sign the attached copy in the space provided for your signature and return it to me."

Meanwhile, John Masterson had been negotiating with the Gardner Advertising Company with a view toward sponsorship of "Animal Fair" on a national basis by Gardner's client, the Ralston Purina Company. These negotiations commenced in December 1950. On February 28, 1951, plaintiffs entered into a written contract with Gardner to produce "Animal Fair," to be retitled "Your Pet Parade," over the American Broadcasting Company television network. The contract was to extend for 5 years, divided into consecutive 13-week cycles, and was cancellable by Gardner upon written notice given at least 35 days prior to the last scheduled broadcast date in any 13-week cycle. Plaintiffs were to receive $3,400 a week during the initial cycle, and thereafter were to receive payments on a graduated scale rising to $6,800 a week during the last year of the contract. The agreement with Gardner also provided that plaintiffs were to furnish: "The exclusive television rights in and to the program, and the right to telecast the same throughout the United States, except in Los Angeles, California, where Producer shall have the right to continue the current broadcasting of the program series until Producer arranges for the discontinuance or other disposition thereof."

The first broadcast of "Your Pet Parade" was scheduled for Sunday, March 11. On March 16, Nelson sent a letter to Horney, informing him that "our present contract commitments require us to terminate our arrangement with you, at the earliest possible date" and in replying to the request for a third series that "it will not be possible for us to present the show for you after the completion of the present cycle." Nelson also wrote: "Frankly, the Agency of the national sponsor of 'Your Pet Parade' was reluctant to enter into any deal that did not give it an immediate exclusive throughout the country. It was only after considerable discussion that we were able to persuade the Agency to go along with us at all. Since it was to our own interest to continue with you, we naturally made every effort to obtain an arrangement whereby the two programs could be broadcast, concurrently, but that just wasn't possible. In view of the above you will appreciate that our arrangement will end with the 26th program; that is after the program of May 2, 1951."

April 2, 1951, O'Connor sent a letter to plaintiffs, signing it in his capacity as Secretary of Pig'n Whistle. We have set forth the letter in the margin.[2]

A meeting of the board of directors of Pig'n Whistle was held the following day, April 3. According to the minutes of the meeting, Savage reported that, in his opinion, plaintiffs were seeking to deprive the corporation "of its exclusive rights of the showing of this television show in violation of its agreement." O'Connor told the board that: "It appeared that on November 1, 1950 the Pig'n Whistle had entered into a written contract with Masterson, Reddy & Nelson for the exclusive right to show this television show in the metropolitan area of Los Angeles with the right to the exclusive showing of this show for successive periods of thirteen weeks so long as the Pig'n Whistle Corporation desired to do so * * *." O'Connor stated, further, that plaintiffs did not intend to renew the contract for a third cycle of 13 weeks and that they had entered into an agreement with the Ralston Purina Company to show "Animal Fair" or a similar program in the Los Angeles area. He informed the board that he had written to plaintiffs, advising them of Pig'n Whistle's intention to protect its right to the exclusive showing of "Animal Fair." The board thereupon passed a resolution authorizing O'Connor, as attorney for the corporation, to take whatever legal action was necessary to enforce the contract with Masterson, Reddy & Nelson.

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[2] "Gentlemen:

"Pig'n Whistle Corporation has a contract with you dated November 1, 1950 for the exclusive showing of 'Animal Fair' so long as it elects to sponsor same. You acknowledged this agreement by letter dated December 20, 1950.

" 'Under the terms of our present contract and agreement, as long as the program is sponsored by Pig'n Whistle, we grant this client the exclusive right to sponsor the program etc.'

"In that letter you further point out that neither party to the agreement can assign or transfer their rights and state that the rights and title of Masterson, Reddy & Nelson in the program upon cancellation by Pig'n Whistle reverts to Masterson, Reddy & Nelson. As you know, there has been no cancellation by Pig'n Whistle. We are informed that you have breached this contract because some other person is in a position to pay you more money therefor and that it is your intention to grant this new client exclusive rights to the showing of this particular program in this metropolitan area. This will inform you that Pig'n Whistle Corporation will protect its exclusive rights under its agreement with you and will hold all parties interested liable for any invasion of its rights. If you attempt to violate this agreement in this area, legal action will be filed against you and any other participating parties to enjoin such breach. Please govern yourselves accordingly.

"Pig'n Whistle Corporation
O'Connor
By ______________
Secretary"

On April 13, Horney wrote plaintiffs at their New York office, informing them that his client intended to bring proceedings to restrain any breach of the contract. Plaintiffs consulted their New York attorneys, who advised them, in a lengthy written opinion, that they were under no obligation to Pig'n Whistle after May 2. Nelson sent a copy of the opinion to Savage, stating in a covering letter that plaintiffs would be governed by their lawyers' advice.

May 4, 1951, O'Connor sent a letter to Station KNBH, advising that Pig'n Whistle had the exclusive right to sponsor "Animal Fair" in Los Angeles, and stating that the corporation would consider any showing of kinescopes of the same or a similar program over KNBH as rendering valueless its $37,000 investment in the show and as a breach of contract on the part of Masterson, Reddy & Nelson. The sales manager of the station, one Norman, made a written offer to Pig'n Whistle to accept continued sponsorship of "Animal Fair" at a production cost of $900 a week, but the offer was refused.

On June 25, 1951, Pig'n Whistle filed an action against plaintiffs, as partners and individually, seeking $81,700 damages for breach of contract. In its amended complaint, which was verified by O'Connor as Secretary of the corporation, Pig'n Whistle alleged: (1) On or about November 1, 1950, the parties entered into a contract which was partly oral and partly in writing. The contract provided that "Animal Fair" was to be produced and broadcast "for a cycle of 13 successive weeks and for further cycles of 13 weeks as long as plaintiff should desire to sponsor said show," and that Pig'n Whistle was to have "The exclusive right to sponsor the show named Animal Fair in the Los Angeles area as long as plaintiff should continue to sponsor the same." (2) Pig'n Whistle renewed the contract for a second 13-week cycle and during the 26 weeks of its sponsorship "Animal Fair" became a valuable advertising asset. (3) Pig'n Whistle notified Masterson, Reddy & Nelson of its desire to sponsor "Animal Fair" for a third 13-week cycle, but they failed and refused to broadcast the program under the sponsorship of Pig'n Whistle after the expiration of 26 weeks. (4) Pig'n Whistle's expenditure of $31,710 on "Animal Fair" has been rendered entirely valueless on account of this failure and refusal, and the corporation has been damaged in that amount. In a second cause of action, Pig'n Whistle sought recovery of an additional $50,000 damages, representing loss of benefits to its advertising program.

Masterson, Reddy & Nelson answered, denying that they had agreed to give Pig'n Whistle the right to sponsor "Animal Fair" for so long as it desired to do so, and alleging that the written contract of November 1, 1950, granted Pig'n Whistle a single option to renew "Animal Fair" for a single additional 13-week cycle.

Trial of the action was to the court, which made findings and entered judgment in favor of Masterson, Reddy & Nelson.

In their complaint in the present action, plaintiffs allege that Savage and O'Connor were and are the sole officers and directors of Pig'n Whistle, and that the acts of the corporation were "instigated and caused to be done by said individual defendants and [were] done and committed pursuant to the direction and control of said individual defendants, and not otherwise." It is alleged that the former action was instituted wrongfully, maliciously and without probable cause, for the purpose of harassing plaintiffs and preventing them from performing their written contract with the Gardner Advertising Company. It is also alleged that Pig'n Whistle's averments respecting the November 1 agreement were false and defendants knew, or should have known, that they were false. Plaintiffs further allege that Pig'n Whistle's claim of $81,710 damage was false and was made in bad faith. The prayer is for recovery of (1) $8,341.29, representing legal and other expenses necessarily incurred by plaintiffs in defending the former action; (2) $60,000 damages for injury to plaintiffs' business, reputation and credit, and for their mental suffering and distress; (3) $150,000 exemplary damages. A second cause of action alleges a conspiracy on the part of defendants to prevent Masterson, Reddy & Nelson from performing the contract with Gardner.

The answer denies that O'Connor and Savage were the sole directors of Pig'n Whistle, denies the existence of a conspiracy, and denies that the former action was filed wrongfully, maliciously or without probable cause. It alleges that Pig'n Whistle brought the breach of contract action for the sole purpose of adjudicating a dispute between the parties.

The evidence at the trial consisted of the letters, documents and telegrams to which we have already referred, together with the testimony of various witnesses.

John Nelson testified that it was the intention of the partnership eventually to offer "Animal Fair" to a national sponsor. Negotiations for the Pig'n Whistle contract were carried on solely with Horney. Horney never requested that his client be given the right to sponsor the program indefinitely. Nelson wrote his letter of December 20, 1950, after a conversation with Horney on or about that date. He told Horney that Masterson, Reddy & Nelson were trying to sell "Animal Fair" to an eastern sponsor and that he wanted a letter to show to prospective advertisers, setting forth the understanding of the parties that Pig'n Whistle had exclusive television rights in Los Angeles for 26 weeks but had no rights in "Animal Fair" after May 2, 1951; the letter would also serve to protect Pig'n Whistle against "the invasion" of the Los Angeles area by an eastern sponsor prior to May 2nd. Horney said it was a good idea, so Nelson prepared the letter, which was based on their conversation, and sent it to him, requesting him to return a signed copy. Horney promised to sign the copy or to have it signed by Savage, but he did not do so. The first time Nelson saw a copy of the letter with Horney's signature was at the trial of the former suit in 1954. On cross-examination, Nelson said that the purpose of the letter was "to protect them [Pig'n Whistle] after 26 weeks, and so on."

Nelson also testified that beginning in November 1950, kinescopes of "Animal Fair" were made in the presence of Savage and Horney. The witness told Horney that the films were to be shown to prospective eastern sponsors and the latter's only objection was that he did not receive an adequate screen credit. Around February 10, 1951, Nelson telephoned Horney, informing him of the potential sale of "Animal Fair" to the Ralston Purina Company. Nelson assured him that his client would be protected until May 2nd. He asked Horney to inquire of Savage whether the two programs might run concurrently in Los Angeles for the last 6 or 7 weeks of the Pig'n Whistle contract and Horney replied that "he didn't see how there possibly could be any objection." The witness was not sure whether he had told Horney of the clause in the Gardner contract providing that "Your Pet Parade" would not be shown in Los Angeles until May 2nd.

Nelson testified further that within 30 days or so after the filing of the former suit Gardner cancelled its contract with Masterson, Reddy & Nelson. The partnership incurred legal and other necessary expenses totalling $8,341.29 in defending the suit. Had Gardner not cancelled "Your Pet Parade", the partnership would have made a profit of $50,000 during the following 26 weeks; plaintiffs had made a profit of over $13,000 while "Your Pet Parade" was on the air. The program was worth $50,000 prior to cancellation, but was valueless thereafter. Plaintiffs' business reputation was clouded by the lawsuit and the partnership dissolved in 1954 due to dissension among the partners.

John Masterson testified by deposition that he attempted to resell "Your Pet Parade" following cancellation by Gardner, but was unable to do so. He assumed that Nelson had told Horney of the clause in the Gardner contract to which we have referred.

Roland Martini, Vice President of Gardner, testified by deposition that his client, the Ralston Purina Company, was disturbed by the Pig'n Whistle litigation and that cancellation of the contract was at least partly due to the lawsuit. Martini and two other advertising agents, a Mr. Tatum and a Mr. Wolfe, testified on behalf of plaintiffs that Masterson, Reddy, & Nelson had had an excellent reputation for honesty in the television industry prior to June 25, 1951, but that their reputation was affected adversely by the suit.

O'Connor and Savage were called by plaintiffs pursuant to section 2055 of the Code of Civil Procedure. Savage and his wife owned approximately 60% of the stock of Pig'n Whistle and O'Connor owned 5000 shares. O'Connor was also attorney for the corporation, and had been a member of the board of directors and Secretary-Treasurer for eight years. Savage was chairman of the board of directors. It was stipulated that O'Connor and Savage "had a practical working control of Pig'n Whistle during the spring of 1951."

Upon being questioned by plaintiffs' counsel as to his knowledge of the written order dated November 1, 1950, O'Connor at first stated that he did not see the order until the trial of the former suit in July 1954. Upon being reminded that the order had been introduced as an exhibit, in his presence, at a deposition of Savage taken in January 1952, the witness admitted seeing it at that time. When shown his own letter dated April 2, 1951, O'Connor denied having seen the order of November 1, 1950, before writing the letter. Counsel for appellants then offered to stipulate that O'Connor had the order in his file as early as January 18, 1951, and O'Connor admitted reading it on that date. O'Connor stated that Horney had consulted him regarding the telegram of February 16, 1951, and he had advised that it should be sent. He stated his belief that part of the November 1, 1950, agreement consisted of a verbal understanding, confirmed by Nelson's letter of December 20th, that Pig'n Whistle should have an indefinite number of successive options to renew the program. He admitted acting in his capacity as an officer of Pig'n Whistle at all times from January through June 1951.

While being examined by counsel for plaintiffs, Savage admitted knowing of the publicity regarding sale of "Animal Fair" to a national sponsor at the time Pig'n Whistle authorized renewal of the original order. He stated that from November 1950 through April 1951, Pig'n Whistle sustained business losses in excess of $64,000; the corporation made profits of only $29,000, all in December 1950. In April 1951, the last month of broadcasting, Pig'n Whistle lost over $22,000, while in April 1950 it made a profit of nearly $2,000.

When asked whether he harbored any feeling of ill will against plaintiffs, Savage replied that he did not. He stated: "I don't suppose that he [Nelson] has mistreated me, but I would not treat anybody like he treated me" and "If Masterson would have been connected with this deal, we would have had no difficulty." He admitted being asked at a deposition hearing whether he knew that when the contractual period expires, a sponsor has no further rights in a television program, and having answered: "Not exactly, no. There is a little honor among thieves." The witness stated that he was not referring to Masterson, Reddy & Nelson as thieves.

O'Connor also testified briefly for the defense. He stated that at the time he prepared the complaint in the former action he believed the suit had merit and believed that plaintiffs had made a contract with Ad Associates for the benefit of Pig'n Whistle under which the latter had the exclusive right to sponsor "Animal Fair" so long as it desired to do so. He had no knowledge of the clause in the Gardner agreement excluding "Your Pet Parade" from Los Angeles. He believed Pig'n Whistle had suffered $81,700 damages as the result of plaintiffs' refusal to continue the program for a third cycle. His only object in filing suit was to recover the damages to which he thought Pig'n Whistle was entitled.

At the close of the evidence, appellants made a motion for a directed verdict; the motion was denied by the court. As we have said, plaintiffs were awarded damages in the sum of $48,341.29. The jury made no award of punitive damages. Appellants made a motion for judgment notwithstanding the verdict and the motion was likewise denied.

[1] In order to maintain an action for malicious prosecution, plaintiffs were required to prove (1) a favorable termination of the former suit; (2) want of probable cause; and (3) malice. Jaffe v. Stone, 18 Cal.2d 146, 1114 P.2d 335, 135 A.L.R. 775.

In discussing the questions presented on the appeal, we will first consider appellants' contention that their motions for a directed verdict and for judgment notwithstanding the verdict should have been granted for the reason that the evidence established probable cause as a matter of law.

[2, 3] Probable cause is synonymous with reasonable cause. One who commences a civil suit acts upon probable cause if he has an honest belief, founded upon facts sufficiently strong to justify his belief, that grounds exist for the proceeding. Hudson v. Zumwalt, 64 Cal.App.2d 866, 872, 149 P.2d 457. Probable cause has been defined as "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." Centers v. Dollar Markets, 99 Cal.App.2d 534, 540, 222 P.2d 136, 141. And, where the circumstances are such as to satisfy a reasonable man that there is no basis for suit, probable cause is lacking. Metzenbaum v. Metzenbaum, 121 Cal.App.2d 64, 68, 262 P.2d 596.

[4, 5] The fact that the lawsuit was unsuccessful would not, standing alone, justify an inference that it was brought without probable cause. Haydel v. Morton, 8 Cal.App.2d 730, 733, 48 P.2d 709, and cases cited; Lotts v. Whitworth, 76 Cal.App.2d 601, 605, 173 P.2d 823. Pig'n Whistle acted upon probable cause if Savage and O'Connor believed, in good faith, that the corporation had grounds for a lawsuit against Masterson, Reddy & Nelson and their belief was one that could reasonably have been entertained. In other words, there was probable cause if the facts known to O'Connor and Savage warranted them in believing that Pig'n Whistle had a contract with plaintiffs to sponsor "Animal Fair" for an indefinite series of 13-week cycles, that plaintiffs were guilty of a breach of contract, and that Pig'n Whistle thereby sustained $81,700 damages.

The court gave a number of instructions defining probable cause explaining the elements of probable cause. It is not contended that the instructions which were given contained misleading or inapplicable statements of the law. Appellants argue, in this connection, that there was no conflict in the evidence regarding probable cause and that under well established rules the question should not have been submitted to the jury. Plaintiffs argue, on the other hand, that appellants waived their right to complain of the giving of instructions on probable cause by requesting instructions of their own. They also argue that as there was a conflict in the evidence relating to probable cause, the question was properly left for the determination of the jury.

[6, 7] We find no substance to plaintiffs' contention that there was a waiver. In arguing his motion for a directed verdict, counsel for appellants strenuously maintained that the jury should not be permitted to pass upon the issue of probable cause. After the court stated that it intended to submit the matter to the jury, defense counsel offered a number of instructions on the subject, some of which were given and some refused. The course adopted by counsel did not constitute a waiver of the right to claim error. It is settled that where a party is unable to induce the court to accept his view of the law, the fact that he requests instructions in accordance with the court's ruling does not preclude him from assigning error. Dowd v. Atlas Taxicab etc. Co., 69 Cal.App. 9, 14, 230 P. 958; Williamson v. Pacific Greyhound Lines, 93 Cal.App.2d 484, 488, 209 P.2d 146.

[8] The rules relating to the determination of probable cause are well stated in the leading case of Ball v. Rawles, 93 Cal. 222, at page 227, 28 P. 937: "In order to maintain an action for malicious prosecution, the plaintiff must establish malice on the part of the defendant, and also a want of probable cause. Malice is always a question of fact for the jury; but whether the defendant had or had not probable cause for instituting the prosecution is always a matter of law, to be determined by the court. If the facts upon which the defendant acted are undisputed the court, according as it shall be the opinion that they constituted probable cause or not, either will order a nonsuit (or direct a verdict for the defendant) or it will submit the other issues to the jury; but, whether admitted or disputed, the question is still one of law, to be determined by the court from the facts established in the case. If the facts are controverted they must be passed upon by the jury before the court can determine the issue of probable cause, but the question of probable cause can never be left to the determination of the jury." Thus, if there is no dispute concerning the existence of the facts relied on to establish want of probable cause, the court must then determine as a matter of law whether such facts warrant an inference of want of probable cause, but where the evidence bearing on the question of probable cause is in conflict, it is for the jury to determine whether facts exist which warrant or reject an inference of probable cause. Torney v. Peterson, 109 Cal.App. 560, 565, 293 P. 653; Singleton v. Singleton, 68 Cal. App.2d 681, 691, 157 P.2d 886; Siffert v McDowell, 103 Cal.App.2d 373, 377, 229 P.2d 388; Bernstein v. Maimes, 126 Cal. App.2d 468, 477, 272 P.2d 529.

[9] We agree with appellants that there were no disputed issues of fact to be resolved by the jury on this phase of the case. There was no dispute as to what had been said and done by the parties nor as to the facts upon which Pig'n Whistle relied in bringing suit. The question for decision was whether, upon the uncontroverted evidence, Savage and O'Connor had reason to believe the allegations of their complaint were true. That was a question of law, and it was error to submit it to the jury.

[10] But no harm can have resulted from the error, for the evidence established as a matter of law that there was no probable cause for suit. It was an inescapable conclusion from the evidence that the officers of Pig'n Whistle had no reasonable grounds for believing that the corporation had an option to sponsor the program for a third cycle of broadcasts. The agreement of the parties was contained in Horney's order of November 1, 1950 and Nelson's

letter of December 20th. Neither document lends any support to a view that Pig'n Whistle was to have an indefinite series of renewals. The order expressly provides for but a single option, and O'Connor was aware of its terms at least 5 months before Pig'n Whistle brought suit. The resolution of the board of directors of October 31, 1950, expressly stated that the contract should have a provision "giving the corporation preferential right for renewal for additional thirteen weeks on the same station, for the same hour and program." Horney's order exercising the option for a second 13-week series did not assert a right to a third series or an indefinite number. It was no more than a request for an option for a third series. Nor can Nelson's letter of December 20 be interpreted as providing for more than one option. It is true that O'Connor testified to his belief that the letter confirmed an earlier verbal agreement between Horney and Nelson, but no basis for such a belief was disclosed in his testimony. O'Connor had no personal knowledge of the conversations between Nelson and Horney. Nelson testified that nothing was said to him about continuation of "Animal Fair" beyond May 2, 1951. There was no evidence to the contrary. Horney was not called to testify as to his negotiations with Nelson. If his testimony was not available, appellants should have disclosed that fact. It is to be presumed that his testimony, if given, would have been adverse to appellants. Code Civ.Proc. § 1963, subd. 5; Breland v. Traylor Eng. etc. Co., 52 Cal.App.2d 415, 426, 126 P.2d 455; Gonzalez v. Southern Pacific Co., 157 Cal.App.2d 733, 321 P.2d 865. It could only be assumed that if Horney had testified he would not have contradicted Nelson's testimony. The fact, if it be a fact, that neither Horney nor Pig'n Whistle was informed that "Your Pet Parade" was not to be shown in Los Angeles prior to May 2 would furnish no rational basis for an inference that Pig'n Whistle's rights were to extend beyond that date. And in view of the undisputed fact that Pig'n Whistle suffered losses approximating $35,000 during the 26 weeks of broadcasting, it is difficult to see a basis for the claim that it was greatly damaged through loss of "Animal Fair."

The next contention to be considered is that there was no evidence that appellants were actuated by malice. The argument is without merit.

[11–14] In an action for malicious prosecution, the word "malice" denotes an improper motive, and malice is sufficiently established if it appears that the former suit was commenced in bad faith to vex, annoy or harass the adverse party. Centers v. Dollar Markets, supra, 99 Cal.App.2d 534, 541, 222 P.2d 136. Whether malice existed was a question of fact to be resolved by the jury from all the circumstances in evidence. Grove v. Purity Stores, Ltd., 153 Cal.App.2d 234, 241, 314 P.2d 543. We have already stated the evidence at some length and we need not repeat it. The jury could have inferred malice from the want of probable cause. Singleton v. Singleton, supra, 68 Cal.App.2d 681, 696, 157 P.2d 886, and cases cited. It is to be presumed that the jury drew that inference. To be sure, the issue should not have been submitted to the jury, but having determined that there was no probable cause, the jury's approach to the issue of malice was the same as it would have been had the court made that decision and submitted to the jury only the issues of malice and damages. Inasmuch as the jury could, and evidently did infer malice from want of probable cause, we cannot say, as a matter of law, that there was no evidence of malice. It was for the jury to determine whether an inference of malice should be drawn from the absence of probable cause. It is not our function to weigh that inference against other justifiable inferences or the evidence tending to prove absence of malice. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212; Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; In re Estate of Gillett, 73 Cal.App.2d 588, 598, 166 P.2d 870.

The final contention to be considered is an argument on behalf of O'Connor that he acted in his capacity of attorney for Pig'n Whistle, and on behalf of Pig'n Whistle and Savage that they relied in good faith on O'Connor's advice.

[15, 16] Reliance upon the advice of counsel, provided it is given in good faith and is based upon a full and fair statement of the facts by the client, may afford the latter a complete defense to an action for malicious prosecution. 32 Cal.Jur.2d 74. But it is an affirmative defense. It may be shown under a general denial in the answer (Walker v. Jensen, 95 Cal.App.2d 269, 275, 212 P.2d 569, and cases cited), but the burden of establishing it is upon the defendant. Diggs v. Arnold Bros., Inc., 132 Cal.App. 518, 523, 23 P.2d 71. No instructions were requested by Savage and Pig'n Whistle relating to this theory of the case. The argument is obviously an afterthought, and a sufficient answer to it is that Savage did not testify that he relied upon legal advice given by O'Connor in deciding to sue.

[17, 18] As to O'Connor, it is of course true that an attorney may not be held liable in damages for malicious prosecution where, upon facts stated to him by his client, he advises the latter erroneously that he has a good cause of action. Murdock v. Gerth, 65 Cal.App.2d 170, 179, 150 P.2d 489. However, O'Connor owned stock in Pig'n Whistle and it was stipulated that he and Savage were in control of the corporation's affairs. He did not seek any instructions upon the theory that he acted only as counsel for Pig'n Whistle and it was not a necessary conclusion from the evidence that he acted in that capacity rather than as Secretary of Pig'n Whistle. Moreover, the implied finding that he was actuated by malice renders it immaterial whether he acted in one capacity or the other.

The judgment and order appealed from are affirmed.

PARKER WOOD, J., and PATROSSO, J. pro tem., concur.

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161 Cal.App.2d 596

Robert W. GREENBLATT, Petitioner and Appellant,

v.

Russell S. MUNRO, Director of Alcoholic Beverage Control, Respondent.

No. 18000.

District Court of Appeal, First District, Division 1, California.

June 24, 1958.

Rehearing Denied July 24, 1958.

Mandamus proceeding to reverse action of Department of Alcoholic Beverage Control, affirmed by Alcoholic Beverage Control Appeals Board, revoking liquor license. The Superior Court, City and County of San Francisco, John B. Molinari, J., denied application, and licensee appealed. The District Court of Appeal, Bray, J., held that fact that female employee of licensee solicited patrons to buy her drinks did not render licensee guilty of violating statute prohibiting persons from loitering in licensed premises for the purpose of soliciting the purchase of alcoholic beverages.

Judgment affirmed in part and reversed in part with instructions.

1. Intoxicating Liquors ⚷108(5)

In proceeding against liquor licensee on charge of violating rule prohibiting female employees from soliciting drinks, testimony of person solicited need not be corroborated.

2. Intoxicating Liquors ⚷106(4)

In a proceeding under Department of Alcoholic Beverage Control rule prohibiting a liquor licensee's female employees from soliciting alcoholic drinks, it is immaterial whether the drink solicited is actually purchased.

3. Criminal Law ⚷45

A person is guilty of solicitation where he solicits another to commit a crime, even though the crime solicited is never committed.

4. Evidence ⚷317(2)

In proceeding to punish for violation of Department of Alcoholic Beverage Control rule prohibiting liquor licensees' female employees from soliciting alcoholic drinks, statements of these female employees in soliciting drinks, and questions posed by bartender to such an employee as to whether she wanted a drink were admissible to show what was said, and were not excluded by the hearsay rule. West's Ann.Gov. Code, § 11513.

5. Intoxicating Liquors ⚷108(5)

In proceeding against liquor licensee on charge of violating rule prohibiting female employees from soliciting alcoholic drinks, evidence that licensee's bartender had asked female employee, who had solicited patron to buy her a drink, whether she wanted a "screwdriver", an alcoholic drink, gave rise to disputable presumption that female employee had been served an alcoholic drink, and presumption prevailed where not controverted.

6. Intoxicating Liquors ⚷132

That female employee of licensee solicited patrons to buy her drinks did not render licensee guilty of violating statute prohibiting persons from loitering on licensed premises for the purpose of soliciting the purchase of alcoholic beverages. West's Ann.Pen.Code, § 303a.

7. Intoxicating Liquors ⚷108(10)

Where, in proceeding before Department of Alcoholic Beverage Control, licensee was charged with permitting female employees to solicit drinks in violation of Department rule, but was not charged with loitering, under penal statute prohibiting persons from loitering to solicit drinks, it could not be assumed that Department, which found licensee guilty on both counts, found loitering. West's Ann.Pen.Code, § 303a.

8. Intoxicating Liquors ⚷108(4)

Accusations before the Department of Alcoholic Beverage Control need not be as precise as those in a criminal proceeding, but they must disclose to the licensee the particular offense with which he is charged, at least to the extent of stating the essential elements of that offense.

9. Intoxicating Liquors ⚷108(10)

Where Department of Alcoholic Beverage Control properly found liquor licensee guilty of violation of rule, but improperly found him guilty of violation of penal statute, and revoked his license, reviewing court in mandamus proceeding remanded matter for reassessment of penalty, in absence of a showing that the same penalty would have been imposed for the violation of the rule.

10. Administrative Law and Procedure ⚷229

Generally, courts have no jurisdiction over a matter arising in an administrative agency until the administrative processes afforded by law have been exhausted.

11. Administrative Law and Procedure ⚷229

A party appearing before an administrative agency may not make a skeletal presentation of facts with expectation that he may make a full and more complete showing before the courts.

12. Appeal and Error ⚷169

Generally, questions not raised in the trial court will not be considered on appeal, but this rule is subject to exception where fundamental error or gross irregularity is involved.

13. Administrative Law and Procedure ⚷229

Rule requiring the exhaustion of admininstrative remedies before resort to courts has exceptions, as when application of the rule would cause irreparable injury, when the administrative relief is inadequate, or when injustice would result.

14. Intoxicating Liquors ⚷108(10)

Where Department of Alcoholic Beverage Control properly found liquor licensee guilty of violation of rule, but improperly found him guilty of violating penal statute, and imposed maximum penalty of revocation of license, although it might not have imposed this penalty had it known of its error, court considered error in finding on penal statute, even though error was not raised before Department or in lower court in mandamus proceeding.

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Walter H. Duane, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Wiley W. Manuel, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Appellant appeals from a superior court judgment denying his application for a peremptory writ of mandate in which appellant sought to reverse the action of the Department of Alcoholic Beverage Control affirmed by the Alcoholic Beverage Control Appeals Board.

Questions Presented.

1. Sufficiency of the evidence. The main contention in this respect is that the findings were based solely upon hearsay evidence and that therefore the evidence was insufficient.

2. Was there a violation of section 303a, Penal Code?

3. Does the rule requiring exhaustion of administrative remedy bar consideration by this court of question 2?

Record.

Appellant is the holder of an on-sale liquor license at a place in San Francisco known as the Robin Hood. He was charged with six counts of violation of liquor control regulations. The hearing officer dismissed all but count III and count V, and found that under count III appellant was guilty of violating rule 143 of the department, in knowingly permitting Anna, employed by him, to solicit at said place Donald Madsen for an alcoholic beverage, to wit, champagne, and that under count V appellant was guilty of violating rule 143 and section 303a, Penal Code, in knowingly permitting Grace, a cigarette girl employed by him, to solicit Richard Gerisch for about ten "screwdrivers," a mixed drink containing orange juice and vodka, an alcoholic beverage. The department adopted the hearing officer's findings, imposed a 60 day suspension of license for the count III violation, and revoked appellant's license for the count V violation.

Evidence.

About 10 p. m. September 27, 1955, Madsen, a department agent, entered the Robin Hood, taking a seat at a table. Anna, an entertainer employed by appellant, was drinking an undisclosed beverage with two other patrons. Leaving them, she joined Madsen. Thereafter Anna at least three times asked Madsen to buy her champagne. Madsen refused but did buy her three "mists" which Anna said contained brandy, vodka and orange juice. The price for each was $1.25. Appellant testified that a "mist" as served in his place contained orange juice only.[1]

December 21, 1955, about 1 a. m., Gerisch, in military uniform, having just been released from the army, entered the Robin Hood. Grace, employed there as a cigarette girl, approached and asked him to buy her a drink. Gerisch ordered a "Seagrams seven, seven-up." The bartender asked Grace if she wanted a "screwdriver." She said that she did. Gerisch paid 90 cents for his drink and $1.20 for hers. During his stay there Grace asked him for a drink four times. He actually bought her about 10 or 12. He left at 2 a. m. "feeling good." He had spent $130 in that time. He put his money on the bar and didn't watch it. He thinks he was short-changed. There was evidence showing that appellant's feminine employees were free to mingle with the patrons at the bar and drink beverages solicited from the patrons. Appellant was on the premises and observed Gerisch buying Grace drinks. Within a few days thereafter appellant discharged Grace, solicitation of drinks being one of the factors, but an indirect one. The fact that both Grace and Anna had solicited drinks was brought to his attention and he discharged them both. Appellant testified that a "screwdriver" as served in his place contained orange juice and vodka. He had instructed the girls not to solicit patrons to buy them alcoholic drinks although the girls could have nonalcoholic drinks.

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[1] Part of count III alleged that Anna solicited the purchase of two "mists" and that they were alcoholic beverages. The hearing officer and the department found that the alcoholic character of "mists" was not proved.

1. Sufficiency.

[1–3] Petitioner contends[2] that Madsen's testimony is not sufficient to support the count III findings, because (1) it was not proved that a "mist" contains alcohol, and (2) that no champagne was actually served, and (3) Madsen's testimony was hearsay and therefore not sufficient. As to (1), the findings were in favor of appellant on this point, and were not used as a basis for suspension. As to (2), there can be no denial that champagne is an alcoholic drink. In a charge of soliciting to buy it is immaterial whether the drink solicited is actually purchased. Rule 143, Alcoholic Beverage Control Act, provides: "No on-sale retail licensee shall permit any female employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any alcoholic beverage, any part of which is for, or intended for, the consumption or use of such female employee * * *" It is the soliciting of the drink that constitutes the offense charged here.[3] There appear to be no cases discussing this precise question as it applies to rule 143. However, the analogy of the criminal law applies. There a person is guilty of solicitation where he solicits another to commit a crime, even though the crime solicited is never committed. "It is complete when the solicitation is made, and it is immaterial that the object of the solicitation is never consummated, or that no steps are taken towards its consummation." People v. Burt, 1955, 45 Cal.2d 311, 314, 288 P.2d 503, 505, 51 A.L.R.2d 948; see also 14 Cal.Jur.2d 224.

As to (3), appellant contends that the statements made to Madsen by appellant's employees were hearsay as to him, and that section 11513, Government Code, requires more than hearsay evidence. That section states: "* * * Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

While Anna's statement to Madsen as to the fact that a "mist" contains alcoholic liquors was hearsay, her statements and those of Grace which constituted solicitations were not hearsay. We are not concerned with the truth of what the girls said but with the fact that they made the statements.

It is stated in VI Wigmore on Evidence, 3rd ed., pp. 177–178, that "The theory of the Hearsay rule * * * is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra-judicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted*, the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the Hearsay rule." (See also 19 Cal.Jur.2d 109.)

In People v. Henry, 1948, 86 Cal.App.2d 785, 195 P.2d 478, the defendant was accused of attempting to obtain narcotics by fraud and misrepresentation. In rejecting the defendant's contention that the trial court erred in admitting certain testimony, the court said (86 Cal.App.2d at page 789, 195 P.2d at page 480): "With respect to the telephone conversations between the pharmacist and the first-named drug store and an unknown person and that between the pharmacist at the second drug store and an unnamed person, only one party to the respective conversations testified and of course the appellant was not a party thereto. There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay, but as original evidence." See also People v. King, 1956, 140 Cal.App.2d 1, 294 P.2d 972.

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[2] It is not clear from appellant's briefs as to whether he contends that the testimony of Madsen and Gerisch requires corroboration. It does not. See Oxman v. Dept. of Alcoholic, etc., Control, 1957, 153 Cal.App.2d 740, 749, 315 P.2d 484. Actually appellant corroborated Gerisch, at least to some extent, when he testified that he saw Gerisch purchase drinks for Grace and that "screwdrivers" contained vodka.

[3] Rule 143 also prohibits the licensee from permitting any female employee to accept any alcoholic beverage purchased upon the premises for her use.

In Werner v. State Bar, 1944, 24 Cal.2d 611, 150 P.2d 892, the statements of the petitioner's wife as related by three witnesses were held not to be hearsay. The court said that the hearsay rule does not forbid the admission of evidence that a statement has been made when the making of the statement is significant irrespective of the truth or falsity of its content.

In Head v. Wilson, 1939, 36 Cal.App.2d 244, 97 P.2d 509, it was held that a telephone call to the hospital was not hearsay as it was not introduced for its truth, but only to show that it was made and acted upon. The issue there was whether an ambulance was responding to an emergency call at the time it was involved in an accident.

[4] In the instant case the statements of the bartender and female employees were not introduced for truth of the contents but only to show what was said, for what was said is part of the violation itself. It made no difference whether the female employees wanted the beverages or not as long as they did ask the witness to purchase the beverages. As the violation is the solicitation, such can only be accomplished by words.

As to count V, appellant contends that it was not proved that Grace was served an alcoholic drink. The bartender asked her if she wanted a "screwdriver" and she said she did. As we have heretofore pointed out, it is not necessary that she actually received the drink. Here, however, there is proof that she did receive an alcoholic drink.

[5] Since it was indicated by the bartender that he was serving Grace a "screwdriver," there is a disputable presumption that she was served an alcoholic drink which presumption prevails until controverted and may support a finding. Griswold v. Dept. of Alcoholic Beverage Control, 141 Cal.App.2d 807, 811, 297 P.2d 762. In Mercurio v. Dept. of Alcoholic, etc., Control, 144 Cal.App.2d 626, 634–635, 301 P.2d 474, at page 481, it is said: "If the bartender were to serve soft drinks when alcoholic beverages were called for, then there would be a violation of section 382, Penal Code, which prohibits the sale of any article of drink, different from the one called for, without informing the purchaser of the difference." There is no evidence offered by appellant that an alcoholic drink was not served to Grace. On the contrary he testified that in his establishment a "screwdriver" consisted of vodka and orange juice. Also considered in the Mercurio case as an element in support of the finding that alcoholic beverages were solicited by female employees was the fact that the licensee fired such employees and the bartender upon discovering, through the accusation, that they were drinking on the job. The appellant here also testified to taking the same course of action.

Appellant makes the same contention as to count V that he made as to count III, namely, that the testimony of solicitation was hearsay. As heretofore shown, there is no merit to this contention.

2. Section 303a, Penal Code.

[6] While the evidence under both counts supports the finding of violation of

rule 143, it does not support a violation of section 303a, Penal Code. That section makes it unlawful "in any place of business where alcoholic beverages are sold to be consumed upon the premises, *for any person to loiter in* or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverage for the one begging or soliciting." (Emphasis added.) Count V of the accusation charged appellant with knowingly permitting his employee Grace, a cigarette girl, to solicit a certain patron for "screwdrivers." At the commencement of the accusation which charged appellant with six counts of violation appears "Rule violated 143 Other law violated 303a Penal Code." However, in count V, no reference is made to "loitering" which is an integral part of the offense stated in section 303a. The hearing officer's findings adopted by the department found in the language of the charge. Section 303a does not deal with the *licensee* of a place of business where liquor is sold. It prohibits *any person from loitering* in such a place *to solicit* the purchase of alcoholic drinks. Assuming that a person employed by a licensee as a cigarette girl could "loiter" in the place where she is hired to work, and assuming that in some way section 303a could apply to the employer (appellant was not charged either with a violation of the section himself or with permitting his employee to violate that section) there is no finding here that Grace did "loiter in or about said premises." It was found that the licensee permitted her to solicit a certain patron for alcoholic drinks, but it was not found that he permitted her to "loiter" for such purpose. Thus because of lack of charge and of findings there could be under no circumstances of the case a violation of section 303a.

Respondent contends that under the doctrine of implied findings (see Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co., 1946, 72 Cal.App.2d 638, 648, 165 P.2d 741; Bartholomae Oil Corp. v. Seager, 35 Cal.App.2d 77, 80, 94 P.2d 614; Wheeler v. Gregg, 90 Cal.App.2d 348, 360, 203 P.2d 37), we must assume that the department, in stating that under count V appellant violated section 303a, Penal Code, thereby found (without mentioning them) all of the essential elements of the offense as described in that section, including the requirement of "loitering."[4]

[7, 8] We cannot assume, however, that the department found as a fact an element of a crime that was not even charged, to wit, loitering. While accusations before the department do not have to be as precise as those in a criminal proceeding, they do have to disclose to the licensee the particular offense with which he is charged, at least to the extent of stating the essential elements of that offense.

[9] The department erroneously determined that the acts found under count V violated both rule 143 and section 303a, Penal Code, and revoked appellant's license for such violations. We have no way of knowing whether the department would have revoked the license had it known that the acts found did not constitute a violation of section 303a. The matter will have to be remanded to the department to reassess the penalty under count V for a violation of rule 143.

3. Exhaustion of Administrative Remedy.

[10, 11] Respondent contends that because appellant did not raise the question of the violation of section 303a, Penal Code, in either the Department of Alcoholic Beverage Control or the Alcoholic Beverage Control Board of Appeal, he did not exhaust his administrative remedy, and that moreover, he did not raise the question in the trial court, and therefore this court may

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[4] This would include a finding, too, that the employer, under section 303a, was a person loitering in the premises for the purpose of soliciting the purchase of alcoholic beverages—a manifest absurdity.

not consider the question. Generally speaking it is a well accepted rule of law that the courts have no jurisdiction over a matter arising in an administrative agency until the administrative processes afforded by law have been exhausted. See Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Alexander v. State Personnel Bd., 22 Cal.2d 198, 137 P.2d 433. Also it has been held that before a party to a proceeding before the Department of Alcoholic Beverage Control can seek judicial review of a decision of that department he must prosecute an appeal before the Alcoholic Beverage Control Appeals Board. See Fiscus v. Dept. of Alcoholic Beverage Control, 155 Cal.App.2d 234, 317 P.2d 993. Moreover, a party appearing before an administrative agency may not make a skeletal presentation of facts with the expectation that he may make a full and more complete showing before the courts. See Dare v. Bd. of Medical Examiners, 21 Cal.2d 790, 799, 136 P.2d 304; West Coast Home Improvement Co. v. Contractors', etc., Bd., 72 Cal.App.2d 287, 297, 164 P.2d 811; Vaughn v. Board of Police Com'rs, 59 Cal.App.2d 771, 781, 140 P.2d 130.

[12] Likewise it is a general rule that questions not raised in the trial court will not be considered on appeal. (See 3 Cal.Jur.2d § 140, p. 604.) However, this rule is subject to exception "where fundamental error or gross irregularity is involved." (3 Cal.Jur.2d § 141, p. 605; see exceptions there set forth.)

[13] Likewise, the general rule of exhaustion of administrative remedies has its exceptions. (See 2 Cal.Jur.2d § 185, p. 308; § 189, p. 314.) One exception is where irreparable injury will result if an administrative hearing is permitted to proceed and its orders made effective without prior judicial interference. Abelleira v. District Court of Appeal, supra, 17 Cal.2d 280, 296, 109 P.2d 942, 132 A.L.R. 715. Inadequacy of administrative relief is another exception. United States v. Superior Court, 1941, 19 Cal.2d 189, 196, 120 P.2d 26. In Gaylord v. City of Pasadena, 175 Cal. 433, 440, 166 P. 348, the court held that the plaintiff, who had refused to comply with an order of the city electrician under an ordinance giving the latter the power to order wiring changed in any building, was not required under the circumstances of the case to exhaust his administrative remedy of appeal to the city council before appealing to the courts. While the opinion does not discuss the basis for the ruling, it appears that the real ground for this exception to the general rule of exhaustion of administrative remedy was that such exception was necessary in fairness and equity. "* * * the rule by which a court declines to consider issues not raised below is not rigidly and undeviatingly applied, and exceptional circumstances may prompt the reviewing court to consider questions of law not pressed or passed upon by the administrative agency, where injustice might otherwise result." (42 Am.Jur. § 236, p. 676.)

The situation in our case is well expressed in Hormel v. Helvering, 312 U.S. 552, 556–557, 61 S.Ct. 719, 721, 85 L.Ed. 1037: "Ordinarily an appellate court does not give consideration to issues not raised below. * * * Recognition of this general principle has caused this Court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the Board of Tax Appeals. * * * There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See Blair v. Oesterlein Machine Co., 275 U.S. 220, 225, 48 S.Ct. 87, 88, 72 L.Ed. 249.

"Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

[14] Our case cries aloud for the application, in the interests of justice and fairness, of the exception to the general rule. In count III petitioner was charged with, and found guilty of permitting his employee Anna to solicit the purchase of an alcoholic beverage. In count V petitioner was charged in almost identical language, of permitting his employee Grace to solicit the purchase of an alcoholic beverage. The department further found (and properly so) that in each of these counts petitioner violated rule 143. The penalty applied for the count III violation was suspension of petitioner's license for 60 days. The penalty applied to the count V violation for identically the same type of violation as that in count III was revocation of petitioner's license, the severest penalty that the department could impose. As pointed out before, the department considered that the acts under count V were also a violation of section 303a, Penal Code. As we have shown they were not. While possibly the department, had it known that section 303a was not involved here, might have had the power to impose the severe penalty of revoking the license for a second violation of rule 143 only, we have no way of knowing that it would have done so. Certainly before the petitioner's license is revoked the department should know that it is dealing with a violation of rule 143 only. Thus it may very well be that were we not to apply the exception to the exhaustion of remedy rule, petitioner would suffer the extreme penalty of losing his license, when if the true situation were known to the department he might not do so. In all fairness and justice, then, the case must be returned to the department for re-valuation of the penalty under count V.

The judgment as to count III is affirmed. As to count V, it is reversed with instructions to the Department of Alcoholic Beverage Control to reassess the penalty.

PETERS, P. J., and FRED B. WOOD, J., concur.

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161 Cal.App.2d 594

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Raul MACIAS, Defendant and Appellant.

Cr. 1351.

District Court of Appeal, Fourth District, California.

June 23, 1958.

Defendant was convicted of robbery and burglary. From judgment rendered by the Superior Court of San Diego County, Clarence Harden, J., defendant appealed. The District Court of Appeal, Mussell, J., held that robbery and burglary may both be committed in the same transaction and culprit may be prosecuted for both, and thus, where accomplices of defendant entered a market with intent to commit theft therein, they completed commission of crime of burglary and when one subsequently took money from market operator's possession unlawfully by means of force and fear, they committed robbery.

Affirmed.

1. Criminal Law ⚷29

Robbery and burglary may both be committed in the same transaction and culprit may be prosecuted for both, and thus, where persons entered a market with intent to commit theft therein, they completed commission of crime of burglary and when one subsequently took money from market operator's possession unlawfully by means of force and fear, they committed robbery.

2. Criminal Law ⚷1119(4)

Contention that error and impropriety occurred in arguments of counsel to jury could not be considered on appeal where reporter's transcript did not contain the arguments.

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Mansfield A. Mills, El Cajon, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was charged with the crimes of Burglary and Robbery in an information filed by the District Attorney of San Diego county. The information contained two counts. In the first count it was alleged that on or about September 10, 1957, the appellant did wilfully enter Nagem's Market in San Diego with intent to commit theft, and in the second count it was alleged that appellant on said date did wilfully, unlawfully and feloniously, and by means of force and fear and against the will of Julia Nagem, take from her person and possession $30.29. A jury trial resulted in verdicts finding appellant guilty of Burglary in the first degree and guilty of Robbery in the second degree. Judgment was then pronounced and appellant was sentenced to imprisonment in the state prison for the terms prescribed by law and the sentences were ordered to run concurrently. He appeals from the judgment of conviction.

On September 10, 1957, appellant and Wanda Kirkpatrick drove to the home of appellant's mother in a 1941 Chevrolet automobile. While appellant was in his mother's house, Alonzo Ojeda and Joseph Delaney got in the car with Wanda and when appellant came out, he got in the driver's seat and they all headed downtown. After some discussion about how and where they could obtain some money which they needed to purchase narcotics, Delaney suggested that they rob Nagem's Market. Appellant then drove to the market and Wanda, Delaney and Ojeda got out and entered it. Appellant parked the car in the alley and waited for them to come out.

Upon entering the market, Ojeda and Wanda approached the counter, asked for cigarettes, and Delaney went over to the frigidaire. When Julia Nagem, who operated the market, opened the cash register to make change, Delaney approached, grabbed her and threw her down, breaking two of her ribs. Meanwhile, Ojeda and Wanda took money from the cash register, after which Ojeda, Wanda and Delaney ran out of the market and to the Macias car, which was then in motion. Macias drove toward Tiajuana and the car was stopped near the border by deputy sheriffs.

On the day following his arrest, appellant was questioned by a police officer and stated to him that he left his mother's house and drove around with Wanda, Ojeda and Delaney; that they went by or near Nagem's Market and Delaney suggested that they go in and steal some money from the cash register; that Ojeda, Wanda and Delaney went into the market and he (Macias) drove around the block and waited for them; that after they came out they all left in the car and drove toward the border with the intention of spending the money obtained for narcotics in Mexico.

[1] Appellant suggests two contentions on appeal. The first is "That appellant was wrongfully convicted of both the crimes of burglary and robbery, which said crimes were joined as separate counts in the same information, and the evidence as to which said crimes disclosed one continuing series of acts." There is no merit in this contention. The crime of burglary was complete when the parties entered the market with intent to commit theft therein, and the robbery was committed when money was taken from the complaining witness's possession unlawfully and by means of force and fear. Robbery and burglary may both be committed in the same transaction and culprit may be prosecuted for both. People v. Candelaria, 153 Cal.App.2d 879, 884, 315 P.2d 386.

[2] Appellant's second contention "That there was impropriety or other error in the arguments of the counsel to the jury.", cannot be considered by us on appeal. The reporter's transcript does not contain the arguments of counsel made to the jury and they are not part of the record on appeal. Ross v. Lightner, 139 Cal.App.2d 756, 759, 294 P.2d 59.

Counsel for appellant, appointed by this court, applied for and obtained permission to file a report in lieu of an opening brief.

In this report counsel states that he represented appellant at the trial of the instant action; that he has reviewed the record and that it is his opinion that the conviction of appellant of the two crimes charged does not constitute reversible error. Further that he has searched his recollection of the arguments to the jury and recalls nothing therein which would constitute reversible error.

Judgment affirmed.

GRIFFIN, Acting P. J., and McCABE, J. pro tem., concur.

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161 Cal.App.2d 560

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Donald Charles ROLLINS, Defendant and Appellant.
Cr. 6118.

District Court of Appeal, Second District,
Division 2, California.
June 23, 1958.

Prosecution for possession of heroin. From adverse judgment of the Superior Court, Los Angeles County, Maurice C. Sparling, J., the defendant appealed. The District Court of Appeal, Ashburn, J., held that where police officers received information from two informants whom they had found to be reliable, that person in certain apartment was selling heroin and officers obtained pass key from landlady and opened apartment door part way and saw such person and defendant and when door was stopped by chain, officers informed occupants they were under arrest whereupon defendant ran toward room thought to be bathroom and officers forced door chain and one of them grabbed defendant's hand as he reached for narcotic paraphernalia which was on cover of toilet, officers had reasonable cause for arrest of defendant and defendant's action afforded them good ground for forcing door and making an immediate entry in order to forestall destruction of evidence, and fact that officers had made no effort to procure search warrant during period of two days following receipt of information from first informant was immaterial.

Affirmed.

1. Criminal Law 🔑1144(13)

In considering sufficiency of evidence to sustain conviction, reviewing court must accept as established all evidence, inferences and intendments favorable to state's case.

2. Poisons 🔑9

Evidence was sufficient to sustain conviction for possession of heroin. West's Ann.Health & Safety Code, § 11500.

3. Arrest 🔑63(4)

Searches and Seizures 🔑3(1)

Where police officers received information from two informants whom they had found to be reliable, that person in certain apartment was selling heroin and officers obtained pass key from landlady and opened apartment door part way and saw such person and defendant and when door was stopped by chain, officers informed occupants they were under arrest whereupon defendant ran toward room thought to be bathroom and officers forced door chain and one of them grabbed defendant's hand as he reached for narcotic paraphernalia which was on cover of toilet, officers had reasonable cause for arrest of defendant and defendant's action afforded them good ground for forcing door and making an immediate entry in order to forestall destruction of evidence, and fact that officers had made no effort to procure search warrant during period of two days following receipt of information from first informant was immaterial. West's Ann.Health & Safety Code, § 11500.

4. Arrest ⚷63(3)

Fact that police were on the trail of another person thought to be committing a crime at time of their entrance into such person's apartment did not prevent their taking cognizance of crime being committed therein by defendant.

5. Poisons ⚷4, 9

Possession, which violates statute prohibiting possession of heroin, may be constructive as well as physical and it may be proved by circumstantial as well as direct evidence. West's Ann.Health & Safety Code, § 11500.

6. Poisons ⚷9

In prosecution for possession of heroin found in possession of defendant, who made dash for bathroom when police officers entered apartment of another person who they had been informed was selling heroin, defendant's conduct in fighting to get his hands on heroin found in bathroom while other person sat quietly on couch coupled with other surrounding circumstances and defendant's later admission that he had purchased capsules, furnished adequate evidence of his own possession. West's Ann.Health & Safety Code, § 11500.

7. Criminal Law ⚷245

Where during preliminary hearing defendant requested leave to examine officer on voir dire with respect to reliability of officer's informants and court stated he thought it was a matter of cross-examination and at beginning of trial defendant informed court that he wished to waive a jury and submit case to court on transcript of preliminary proceedings and testify at a later date, and it was stipulated that case might be determined by court upon testimony taken at preliminary examination and any stipulations entered into at preliminary examination should be deemed stipulations entered into at trial, and case was aided on that basis, submission of cause upon record of preliminary hearing effected a waiver of any objection that defendant might have had with respect to ruling upon his counsel's suggestion of a voir dire examination.

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Julius Blank, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant appeals from a judgment convicting him of possession of heroin in violation of § 11500, Health and Safety Code. Through counsel appointed by the court he makes two primary contentions, (1) that the court erred in denying voir dire examination of the arresting officers concerning reliability of their informants and the reasonableness of their belief that a felony had been or was being committed, and (2) that the evidence is insufficient to sustain a finding of guilty on the charge of possession.

[1] In considering the latter contention we must accept as established all evidence, inferences and intendments favorable to respondent's case (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778).

[2, 3] Defendant's arrest occurred on July 15, 1957, at about 8:30 p. m., in the apartment of William McCormick in the Strange Apartments at Third and Witmer Streets in the city of Los Angeles. Police Officers Jones and O'Grady had received on July 13th information from a confidential informant, whom they had found reliable, that McCormick was an addict who was selling heroin in that apartment. Officer O'Grady had previously made an arrest upon the basis of information received from this first informant and found him reliable. About a half hour before the arrest on the 15th a second informant told the officers of McCormick's said activities. Fifteen arrests had been made pursuant to information furnished by this person; in twelve cases the result had been conviction for sales of narcotics and in three cases conviction for possession. Of course the officers, both of whom knew

of these results (Jones said twelve or thirteen cases), considered this informant reliable. Believing that McCormick was then in possession of heroin in that apartment and engaged in selling same, the officers, without obtaining a search warrant, procured a pass key from the landlady and opened the door part way.[1] O'Grady was in the lead and Jones right behind him. Immediately in front of them and in plain sight was defendant Rollins who was standing; seated on a couch and within their view was McCormick. A chain was on the door; when it stopped the opening the officers informed both occupants that they were under arrest. At once Rollins ran toward a room that the officers thought to be the bathroom and they were correct. They forced the door chain and O'Grady pursued Rollins to the bath and grabbed his hand as he reached for narcotics paraphernalia which was on the cover of the toilet,—capsules containing heroin, a spoon, several needles, a finger stall, etc. Rollins and O'Grady struggled to get possession of this evidence and both came to rest upon the floor with defendant in handcuffs and both of them injured. One capsule of heroin and the rest of the paraphernalia were seized by the officers. McCormick sat on the couch throughout the entire episode. While still in the apartment Rollins was asked if he had purchased the narcotic from McCormick. He said he had not, that he had bought it on Temple Street. Officer O'Grady saw scab formations on defendant's arms such as addicts usually bear, formed by injections of drugs; these were about three to five days old. Defendant's eyes were pinpointed, which fact the witness testified to be an indication that he was a user of narcotics. McCormick was arrested at the same time as Rollins but the charge against him was dismissed at the conclusion of the preliminary hearing.

When the officers used the pass key in McCormick's apartment door they had reliable information and believed that he was then and there engaged in selling narcotics. When they saw Rollins run for the bathroom at the mention of arrest they were confirmed in that belief, thinking that he had bought from McCormick. Thus they had reasonable cause for arrest of McCormick and Rollins' speedy and suspicious action afforded them good ground for forcing the door and making an immediate entry in order to forestall destruction of the evidence. People v. Moore, 140 Cal.App.2d 870, 873, 295 P.2d 969. In these circumstances the fact that they had made no effort to procure a search warrant during the period of two days following the receipt of information from the first informant is immaterial. People v. Winston, 46 Cal.2d 151, 162–163, 293 P.2d 40; People v. Sayles, 140 Cal.App.2d 657, 660, 295 P.2d 579.

[4–6] The fact that the police were on the trail of McCormick at the time of their entrance did not prevent their taking cognizance of any other crime then and there observed by them (People v. Roberts, supra, 47 Cal.2d 374, 379, 303 P.2d 721),—in this instance possession by Rollins who made a desperate effort to take physical possession before police could reach the narcotic and the equipment for administering the same. There was some substance in the spoon and O'Grady testified that he thought that Rollins or McCormick was preparing a "fix." Possession which violates the statute may be constructive as well as physical. People v. White, 50 Cal.2d 428, 325 P.2d 985; People v. Blinks, 158 Cal.App.2d 264, 322 P.2d 466. It may be proved by circumstantial as well as direct evidence. People v. Blinks, supra, 158 Cal.App.2d at page 267, 322 P.2d at page 468; People v. Magdaleno, 158 Cal.App.2d 48, 322 P.2d 89. Defendant, though denying that he knew of the presence of the narcotic, testified that "[a]s a matter of fact, if I had known that the evidence was in there, I could have destroyed it. That is how close I was to it." His fighting to get his hands on the drug while McCormick sat quietly on the couch, coupled with the other surrounding circumstances and his later admission that he had purchased the capsules, furnished adequate evidence of his own possession.

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[1] The State does not and need not contend that the landlady's consent would bind the tenant. See, People v. Roberts, 47 Cal.2d 374, 377, 303 P.2d 721.

[7] Counsel contends that there was prejudicial error in the court's denial of leave to examine officer Jones on voir dire with respect to the reliability of his informants. He was the first of the police officers to testify. The ruling occurred during the preliminary examination. After the officer had told of the two informants and the statements made by them and had arrived at the fact of using the pass key to open the door, the following occurred: "Mr. Levie: Your Honor, I wonder if I might take the witness on voir dire as to the reliability of the information that he acted upon. The Court: Oh, I think it is a matter of cross examination. Proceed." At the beginning of the trial in the superior court counsel for defendant said: "Mr. Levie: Your Honor, the defendant wishes to waive a jury and submit the case to the Court on the transcript of the preliminary proceedings, and testify at a later date." The prosecutor offered the following stipulation: "This matter may be determined by the Court upon the testimony taken at a preliminary examination, the Court to read and consider the transcript thereof with the same force and effect as though the witnesses that testified there testified here under oath, and it may be deemed they did so testify; Any stipulations entered into at the preliminary examination be deemed stipulations entered into here, and People'_ Exhibit 1 entered in evidence there to be received as People's Exhibit 1 in evidence here, reserving the right of either side to introduce such additional evidence as the Court deems proper." Defendant's counsel said: "So stipulated." People's Exhibit 1 is the seized heroin. The case proceeded upon that basis and the stipulation was not withdrawn. That submission of the cause upon the record of the preliminary hearing effected a waiver of any objection that defendant might have had with respect to the ruling upon his counsel's suggestion of a voir dire examination. People v. Decker, 155 Cal.App.2d 165, 169–170, 317 P.2d 135.

Regardless of such waiver, the ruling, if it had occurred in the superior court, could not be held prejudicial. Procedurally, the request for voir dire examination as to the reliability of informants was in order and should have been granted. In a jury trial the ruling could have been seriously prejudicial. The proper procedure is for the court to hear such evidence in the absence of the jury and to determine the question of whether the police were justified in relying upon the informer, to do so in advance of evidence of what occurred in the way of search and seizure. People v. Gorg, 45 Cal.2d 776, 780–781, 291 P.2d 469; People v. Lawrence, 149 Cal.App.2d 435, 446–447, 308 P.2d 821. But this was a non-jury trial. The request was not repeated in the superior court, and defense counsel was not restricted in his cross-examination. He brought out as best he could all the matters which present counsel claims to have been the proper subject of voir dire examination, and the result of the cross-examination was to establish the reliability of the informants. The claim of error in this matter is not meritorious. The argument of error in receiving evidence of the search and seizure and in refusing to strike such evidence must fail of fruition. The officers had reasonable grounds for belief that a felony had been committed; they were justified in forcing the door in the circumstances confronting them; the search and seizure were reasonable and fruitful and appellant has no legitimate complaint concerning the same.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

161 Cal.App.2d 493

Horace O. WARFIELD, Plaintiff, Cross-Defendant and Appellant,

v.

Vladimir R. BASICH and Olga V. Basich, his wife, Defendants, Cross-Complainants and Respondents.

No. 17376.

District Court of Appeal, First District, Division 1, California.

June 20, 1958.

Hearing Denied Aug. 13, 1958.

Suit to quiet title to an alleged easement over the defendants' property wherein defendant cross-complained to quiet title against the plaintiff's claims. From a judgment in favor of defendants in the Superior Court, City and County of San Francisco, George W. Schonfeld, J., the plaintiff appeals. The District Court of Appeal, Bray, J., held that the evidence failed to establish an implied easement for ingress and egress over the defendants' land to the plaintiff's land and that in view of the express agreement of predecessors of the parties, no implied easement could be claimed.

Judgment affirmed.

1. Easements 🔑36(3)

In suit to quiet title to an alleged easement over the defendants' property, evidence sustained finding that use of garageway, garage turntable, tradesmen's entrance and passageway and pipes on defendant's lot was by way of a reciprocal license or agreement and consent by defendants and their predecessors and that all agreements had terminated and that no easement existed.

2. Easements 🔑16

Where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the easement or the portion sold with all the benefits and burdens that appear at the time of the sale to belong to it, as between it and the property which the vendor retains, and no easement exists so long as the unity of possession remains.

3. Easements 🔑18(1)

"Strict necessity" is not an element of an implied easement for use of a passageway and all that is needed is that it be proved that the claimed easement is reasonably necessary to the beneficial enjoyment of the land granted.

4. Easements 🔑15

The purpose of the doctrine of "implied easements" is to give effect to the actual intent of the parties as shown by the facts and whether there is an implied easement depends upon the intent of the parties.

See publication Words and Phrases, for other judicial constructions and definitions of "Implied Easements".

5. Easements 🔑15

Necessary for the implied grant of an easement is a separation of title implying a unity of ownership at some time as the foundation of the right before the separation takes place; the use giving rise to the easement must have been so long continued and so obvious as to show that it was intended to be permanent; and claimed easement must reasonably be necessary to the beneficial enjoyment of the land granted.

6. Easements 🔑22

An "obvious or apparent use" is one, with respect to claim of an easement for passageway, that is visible on the servient parcel or an artificial permanent structure on the servient parcel.

See publication Words and Phrases, for other judicial constructions and definitions of "Obvious Or Apparent Use".

7. Appeal and Error 🔑712, 931(1)

Where trial judge viewed the premises at the request of the parties, what he observed is not a part of the transcript of the record, but it is evidence which the appellate court must assume supports his findings.

8. Trial 🔑375

A trial judge's view of the premises is evidence which may be used alone or with other evidence to support the findings.

9. Easements 🔑16

An implied easement comes into existence where there is a severance of one parcel from another and the parties are silent as to the then use of one of the severed parcels by the other.

10. Easements ⚷15

Where the parties expressed in a written agreement their intentions with respect to claimed easement, the law would not imply an easement.

11. Easements ⚷15

In suit to quiet title to an easement over defendants' property to a garage, plaintiff could not claim an implied grant of easement, where at time of conveyance of lot to the predecessor of plaintiff and at about the same time, the grantor and grantee entered into a separate agreement covering the same subject matter as the claimed easement which indicated no intent to grant the easement claimed.

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Melvin Cohen, Albert Picard, San Francisco (Burton M. Greenberg, San Francisco, of counsel), for appellant.

Barfield & Barfield, San Francisco, for respondents.

BRAY, Justice.

Plaintiff sued to quiet title to certain alleged easements over defendants' property. Defendants cross-complained to quiet title against plaintiff's claims. Plaintiff appeals from the judgment in favor of defendants.

Question Presented.[1]

Does the evidence establish an implied easement for ingress and egress over defendants' land to plaintiff's land?

Evidence.

Both plaintiff's lot and that of defendants' originally belonged to one Bibbero. In 1911 he caused a four flat building to be erected on the lot now belonging to plaintiff. It bore four numbers, one of which was 2961. It had no garage but a large basement. It has a tradesmen's entrance which was closed off in 1913. In 1937 it was converted into a guest house and bears the common number 2961. In 1913 on the lot now owned by defendants Bibbero constructed a two flat building commonly known as 2949.[2] It had a large garage entranceway and also a tradesmen's entrance. There is no common wall between the buildings. When Bibbero constructed the flats on defendants' lot, sufficient excavation was made so that the basement of plaintiff's lot could be used as a garage. Fire doors were put between the openings in the basement so that the opening could be closed if so desired in the future. At the same time the tradesmen's entrance into plaintiff's lot was closed but left so that it could be reopened. Bibbero owned both lots until 1942, during all of which time the tradesmen's entrance and the garage entrance of defendants' lot was used to get into plaintiff's lot. A turntable had been constructed on defendants' lot to enable cars to get into plaintiff's garage. The hot water and heat system were on defendants' lot and ran into plaintiff's. Each lot, however, had its own sewer to the street. In 1942, Max de Hess purchased both lots and kept them for approximately two years, during which time he leased them separately. During that time the tenants of both lots used the entranceway on defendants' lot and the garage on plaintiff's lot. The last persons to own both lots at once were Sam Sankowich and his wife. They only held the properties for a short time, selling August 31, 1944, plaintiff's lot to Rosa Aston and defendants' lot on November 13th to Mary Glenn.

Rosa Aston in 1933 had leased one of the flats on plaintiff's lots from Bibbero. When Bibbero converted the building into one unit she leased it and operated it as a guest house, continuing to lease it from the subsequent owners until 1944 when she purchased it from the Sankowiches. Her leases from the successive owners contained provisions covering the use by her and her tenants of the garageway, turntable and tradesmen's entrance. Heat and water was also provided for, she paying two-thirds of the cost. She also paid a sum for maintenance of the garage, and was given four stalls in the garage on the property she was leasing.

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[1] The complaint contains four alleged causes of action: (1) rights through conveyance from a common grantor; (2) rights through prescription; (3) rights through implied easement; (4) rights through easement of necessity. At oral argument plaintiff, by stipulation, abandoned counts 1, 2 and 4, and also claims to any rights other than those of ingress and egress and use of garage.

[2] For clarity the 2961 property will be referred to as plaintiff's lot, and the 2949 property as defendants' lot.

One Hutton who leased defendants' lot from 1939–1945 testified that to the best of his recollection there were no provisions in his lease regarding the garage or entranceway. He used the entranceway and turntable to park his car in the garage on plaintiff's lot, under some understanding with Bibbero, his first lessor.

The deed by which Mrs. Aston purchased plaintiff's lot from the Sankowiches is dated August 31, 1944, acknowledged September 5th, and recorded September 6th. On September 1st she entered into an agreement with Sam Sankowich which, in addition to covering the supplying of heat and hot water to her property (plaintiff's lot) from the facilities on defendants' lot, stated that it was agreed that the entrance, exit and turntable should be available at all times to both parties and their tenants and that Sankowich should be allotted sufficient space to garage four automobiles, as well as for entrance and exit to tradespeople serving either building.[3] Mrs. Aston was to bear two-thirds of the cost of repair or maintenance of the turntable during the term of the agreement, which was to run from September 1, 1944, to August 31, 1947. When Mary Glenn purchased defendants' lot from Sankowich he assigned this agreement to her. Before its expiration, Miss Glenn and Mrs. Aston entered into a similar agreement for a term ending August 31, 1950.[4]

In December, 1946, Mrs. Aston hired plaintiff to manage her guest house. In January, 1948, she sold the lot to plaintiff and assigned to him her agreement with Miss Glenn. About nine months later, concluding that it would be more economical to install his own hot water and heating system, he notified Miss Glenn that he would terminate the agreement as of November 22, 1948. She consented.

In November, 1954, defendants purchased their lot from Miss Glenn. Shortly thereafter plaintiff asked to rent some of the stall place used by defendants in the garage. Defendants refused, stating that they were going to reconstruct the garage. Plaintiff stated that he had an easement in the garage and they could not reconstruct. Thereupon defendants wrote plaintiff informing him that defendants intended to close the wall between the properties and giving him 60 days to make other arrangements.

[1] The trial court found that the use of the garageway, garage, turntable, trades-

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[3] This portion of the agreement was preceded by the following clauses: "In addition to the above agreement as to heat and hot water service, it is further agreed as regards the operation for joint use of garage and the entrance and exit thereto now jointly located in both buildings.

"Inasmuch as the major portion of garage space is in the basement of building of the second party and the entrance and exit as well as turn-table necessary to the operation of the garage is in building owned by first party and is at present jointly used by both parties, it is agreed as follows:"

[4] The language of this agreement varied somewhat from that of which it was a renewal. It stated: "And the parties hereto do further declare and agree that inasmuch as the major portion of garage space is in the basement of said building of the party of the second part, and the entrance and exit as well as turn-table necessary to the operation of the garage is in the said building of the party of the first part, and is at present jointly used by the parties hereto, it is hereby further agreed and understood between the parties hereto that said entrance and exit, as well as the use of the tun-table [sic] *shall at all times during the term of this agreement* be available to both the first and second party hereto, their respective tenants or persons designated by either for access to or egress from said garage space * * *" (Emphasis added.)

men's entrance and passageway and the pipes on defendants' lot was by way of reciprocal license or oral or written agreement and by consent of defendants and their predecessors; that all agreements have terminated and that no easement existed, and quieted defendants' title as against plaintiff's claims.

Was There An Implied Easement?

[2] Plaintiff contends that there was. The law of easements by implication is well settled. It is expressed in Cave v. Crafts, 1878, 53 Cal. 135, 139, quoting from Lampman v. Milks, 21 N.Y. 505: "'The rule of common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains. * * * No easement exists so long as the unity of possession remains, because the owner of the whole may at any time rearrange the quality of the several servitudes; but upon severance by the sale of a part, the right of the owner to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale.'"

[3] "Strict necessity" is not an element of an implied easement in the type of case before this court. See Cheda v. Bodkin, 1916, 173 Cal. 7, 158 P. 1025; Restatement, Property, § 476, Comment g; Thompson on Real Property, Perm. Ed., 1939, §§ 502, 503; Tiffany, Real Property, 3rd ed., § 786. In California all that is needed is that it be proved that the claimed easement is "reasonably necessary to the beneficial enjoyment of the land granted." Fischer v. Hendler, 1942, 49 Cal.App.2d 319, 322, 121 P.2d 792, 793.

[4–6] The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by the facts and circumstances of the case, and whether or not there was an implied easement depends upon the intent of the parties. Fristoe v. Drapeau, 1950, 35 Cal.2d 5, 8, 215 P.2d 729; Peet v. Schurter, 1956, 142 Cal.App.2d 237, 242, 298 P.2d 142; see also Restatement, Property, § 476, Comment a. Necessary for the implied grant of an easement are the following: (1) A separation of title which implies a unity of ownership at some time as the foundation of the right. (2) Before the separation takes place, the use which gives rise to the easement must have been so long continued and so obvious as to show that it was intended to be permanent. (3) The claimed easement must be reasonably necessary to the beneficial enjoyment of the land granted. Fischer v. Hendler, supra, 49 Cal.App.2d at page 322, 121 P.2d 792; Orr v. Kirk, 1950, 100 Cal.App.2d 678, 681, 224 P.2d 71; Beem v. Reichman, 1918, 36 Cal.App. 258, 263, 171 P. 972. An obvious or apparent use is one that is visible on the servient parcel or as sometimes referred to, an artificial or permanent structure on the servient parcel. Swarzwald v. Cooley, 1940, 39 Cal.App.2d 306, 307, 324–325, 103 P.2d 580.

There is no doubt that the evidence of the instant case could be said to be sufficient to establish the three elements. However, here the trial court found against the plaintiff in that there was no intent to grant any easement and that the use was by permission and consent. Thus, in order to reverse the judgment, under plaintiff's contention, this court would have to hold that, notwithstanding such a finding, the facts show as a matter of law that plaintiff was entitled to the claimed easement. See Orr v. Kirk, supra, 100 Cal.App.2d at pages 681–682, 224 P.2d 71. In short, it is a fact question. Moreover, an implication can only be made in connection with a conveyance. (Idem.)

In the instant case the implied grant of an easement could only have occurred at the time of the severance from the common owner. That would have been at the time of the conveyance to Mrs. Aston by Sankowich. But the evidence showed that at practically the same time the grantor and grantee entered into a separate agreement covering the same subject matter as the claimed easement. Thus, this is sufficient, notwithstanding the other elements being present, to support a finding that there was no intent to grant an easement. In fact, such an agreement manifested the express intent of the parties and leaves nothing for implication.

Although the deed was dated August 31, 1944, it was not acknowledged until September 5th and recorded September 6th. The agreement is dated September 1st. Obviously the two documents were executed almost simultaneously. Moreover, at the expiration of the term set forth in this agreement, a similar one was executed by the then owner of the two lots. This latter agreement was assigned to plaintiff when he purchased his lot from Mrs. Aston.

Plaintiff contends that the first agreement constituted an acknowledgment of an easement then existing and merely provided for the apportionment of the cost of the operation of the hot water system and for stalls in the garage. However, this contention overlooks the fact that the agreement was made as a part of the transaction under which the property was first divided and that no implied easement could come into effect when the rights of the parties were being determined by contract. Moreover, that the predecessors in interest of the parties themselves interpreted the rights between the parties to be contractual is clearly demonstrated by the language in the second agreement which definitely stated that "said entrance and exit, as well as the use of the tun-table [sic] shall at all times during the term of this agreement be available to both the first and second party hereto * * *" The limitation to the term of the agreement is completely inconsistent and incompatible with any right by easement.

These facts support, if they do not compel, an inference that plaintiff knew at the time of the purchase that the permitted uses were temporary and by express agreement and not by easement. See Peet v. Schurter, supra, 142 Cal.App.2d 237, 298 P.2d 142, where the finding of the trial court that there was no implied easement was held to be sufficiently established by evidence that the plaintiff's predecessor in title was advised by the grantor that the use was only temporary and that plaintiff knew of the temporary character of the use at the time of purchase.

[7, 8] Moreover, "The trial judge viewed the premises at the request of the parties. What he observed is not part of the transcript of the record, but it is evidence which this court must assume supports the findings." Ng v. Warren, 1947, 79 Cal.App.2d 54, 57, 179 P.2d 41, 43; Owsley v. Hamner, 1951, 36 Cal.2d 710, 719, 227 P.2d 263, 24 A.L.R.2d 112. (The two cases involved easements by implication.) And it has also been said that a trial judge's view of premises is evidence which may be used alone or with other evidence to support the findings. McCarthy v. City of Manhattan Beach, 1953, 41 Cal.2d 879, 889, 264 P.2d 932.

[9–11] An implied easement comes into existence where there is a severance of one parcel from another and the parties are silent as to the then use of one of the severed parcels by the other. The law then assumes that the parties would have expressed an intent under the circumstances to continue the one parcel subservient to the other. Here, however, the parties were not silent. They expressed in a written agreement their intentions. Thus, the law may not imply an easement.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

161 Cal.App.2d 369

PEOPLE of the State of California, acting by and through the Department of Public Works, Plaintiff and Appellant,

v.

Kenji MURATA, Takeo Murata, Daisaku Murata, Ume Murata, Augustus B. McDavid, also known as Augustus Bone McDavid, Guy Utley McDavid, Anna K. Stoll, Standard Oil Company of California, a corporation, Shell Oil Company, a corporation, Security-First National Bank of Los Angeles, a corporation, as Trustee, Doe One to Doe Fifty, Defendants.

Kenji Murata, Takeo Murata, Daisaku Murata and Ume Murata, Respondents.

Civ. 22978.

District Court of Appeal, Second District, Division 2, California.

June 18, 1958.

Rehearing Denied July 14, 1958.

Hearing Denied Aug. 13, 1958.

Proceeding by the state to condemn land. From a judgment of the Superior Court, Los Angeles County, William E. Fox, J., the state appealed. The District Court of Appeal, Herndon, J., held, inter alia, that in proceeding to condemn parcels of realty for harbor freeway right of way, refusal to give requested instructions that purchase price paid by governmental agencies for other property was not proper basis for determining market value of property involved since such sales are in nature of a compromise and are affected by elements which do not enter into similar transactions made in ordinary course of business was error requiring reversal so that parties might try issue of value according to new rule adopted by the Supreme Court.

Reversed.

1. Eminent Domain 🔑222(4), 262(5)

In proceeding to condemn parcels of realty for harbor freeway right of way, refusal to give requested instructions that purchase price paid by governmental agencies for other property was not proper basis for determining market value of property involved since such sales are in nature of a compromise and are affected by elements which do not enter into similar transactions made in ordinary course of business was error requiring reversal so that parties might try issue of value according to new rule adopted by the Supreme Court.

2. Evidence 🔑142(1)

In condemnation proceedings, evidence of prices paid for similar property in vicinity, including prices paid by condemner is admissible as evidence of value, and a wide discretion must be granted the trial judge in determining admissibility of evidence of other sales, and laying of appropriate foundations should be required to keep admission of such evidence within safeguarding limits.

3. Eminent Domain 🔑202(1)

In condemnation proceeding, evidence of price paid by condemner should be admitted as evidence of value only after trial judge has been satisfied that price paid was sufficiently voluntary to be a reasonable index of value.

4. Trial 🔑235(7)

Appropriate instructions to guide jury in application and evaluation of expert testimony are essential.

5. Eminent Domain 🔑262(5)
Evidence 🔑359(3)

In condemnation proceeding, exclusion of photographs portraying the subject property in a flooded condition which were offered to prove the seriousness of the drainage problem affecting the property and its value for residential purposes constituted prejudicial error where admittedly there had been no substantial change in conditions to which the prior flooding was attributed and photographs clearly illustrated the potential danger to which the land was subject and hence were relevant to issue of value.

6. Eminent Domain 🔑202(1)

In condemnation proceeding, exclusion of photographs portraying subject property in a flooded condition offered to prove seriousness of drainage problem affecting property and its value to residential purposes was not proper on theory that photographs were merely cumulative evidence of conditions which were thoroughly described by oral testimony, especially in light of fact that court received in evidence photographs offered by landowners which showed little or no indication of flooding after heavy rainstorms several years after the offered photographs had been taken.

7. Evidence ⚷560

The value of opinion evidence of a witness may be tested by showing that upon a former occasion he expressed a different opinion, or made statements inconsistent with opinion expressed.

8. Evidence ⚷560

Expert opinions as well as other opinions ordinarily admissible, if inconsistent with those expressed on the stand, are receivable.

9. Evidence ⚷560

In condemnation proceeding, state should have been permitted to cross-examine a witness for landowners to show that witness had testified in 1954 trial of landowners' action for damages against persons who caused flooding of land that as of spring of 1953, market value of a 15 acre parcel of property involved was $1500 per acre whereas in the trial involved the witness placed the 1956 value of the same 15 acres at figures ranging from a low of $10,000 to a high of $43,500 per acre, and trial court's sustaining of objection to such proposed line of cross-examination on ground that state was going into collateral matters operated unduly to restrict the cross-examination.

◆

George C. Hadley, Hugh R. Williams, Richard G. Rypinski and Charles E. Spencer, Jr., Los Angeles, for appellant.

Hodge L. Dolle and J. Marion Wright, Los Angeles, for respondents.

HERNDON, Justice.

This condemnation case went to the jury on June 17, 1957, just four days before the Supreme Court filed its opinion in County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680. The state appeals from the judgment on the verdict awarding defendants a total of $610,763 for nine parcels of real property totalling approximately fifty-three acres. The property was taken for the Harbor Freeway right of way. The date of valuation was January 4, 1956. At that time the land was being used for agricultural purposes. Apparently there was substantial agreement that the highest and best use to which most of the land was adaptable was for residential subdivision. However, defendants point to evidence that the staff of the County Regional Planning Commission had recommended a change of zone to permit commercial uses with respect to certain portions of the property fronting on Florence Avenue. Defendants contended that these portions would be adaptable to commercial development.

The state's first assignment of error is based on the refusal of the trial court to give substantially the same cautionary instructions (relative to prices paid by governmental agencies in purchases of other properties) the refusal of which was held to be reversible error in County of Los Angeles v. Faus, supra, 48 Cal.2d 672, 675–676, 312 P.2d 680. We have concluded that the application of the law as enunciated in the Faus decision requires a reversal of the judgment at bar. This conclusion is fortified by the presence in the record of other prejudicial errors hereinafter discussed.

In the instant case, none of the expert witnesses professed to rely upon purchase prices paid by governmental agencies for any specific parcels of property in arriving at their opinions as to the value of the subject property. However, counsel for defendants, in cross-examining one of the state's experts, brought to the attention of the jury the amount which the state had paid for an adjacent parcel of land referred to as the "Stoll" property. The Stoll property was needed for the same freeway project, and, indeed, at the time it was purchased was one of the several parcels under condemnation in the instant action.

The following testimony was given by the state's valuation expert Baker under cross-examination, after he had identified a Mr. Thomason as an appraiser for the state:

"Q. So when you exchanged ideas and information and data with Mr. Thomason, Mr. Thomason undoubtedly told you two appraisers that he had in 1955 for the State of California Division of Highways appraised the Stoll property which is the two orange groves just next to the Murata property, didn't he? A. Yes, I understood he made an appraisal of that property.

"Q. He told you he appraised it for approximately $15,000.00 an acre in 1955? A. It may be overall; it varied.

"Q. Yes. A. Overall the piece north and—the piece north of Florence.

"Q. Overall, $15,000.00? A. I think that is approximately right, but I am not—I don't have his appraisal here.

"Q. *Did you learn that the State of California paid in excess of $15,000.00, the Division of Highways paid in excess of $15,000.00 an acre for Mr. Stoll's, for the property just next to the Murata property?*

"Mr. Hadley: Just a moment. To which we object as incompetent, irrelevant and immaterial, and not a proper test of the knowledge and credibility of this witness. It is merely an attempt to get in the price paid for the other land by the State of California. There is nothing in the question to show that there is a degree of comparability, and if it is to be a proper test of the knowledge and credibility of the witness, he should ask the witness preliminarily whether or not the Stoll property is comparable to the property here under consideration.

"Mr. Dolle: It is proper under the City of Los Angeles—

"The Court: Objection overruled.

"Q. By Mr. Dolle: You knew that, didn't you? A. *I knew generally the price paid by the State for the Stoll property,* yes.

"Q. All right. Now, you said you talked to Mr. Stoll. Do you recall testifying to that yesterday? A. Yes * * * I did testify to that.

"Q. *Do you wish to testify that Mr. Stoll felt that the appraisal and price paid was the fair market value of the property?*

"Mr. Hadley: Just a moment. That is incompetent, irrelevant, immaterial, and argumentative.

"Mr. Dolle: He talked to Mr. Stoll and he so testified.

"Mr. Hadley: Let's have the question.

"The Court: Read the question. (The reporter read the question.)

"Mr. Dolle: I will reframe the question.

"Q. Mr. Stoll you identified yesterday as being connected with the Tillman & Reeder Real Estate office in the immediate area, didn't you? A. That is right.

"Q. You talked to Mr. Stoll, didn't you? A. Yes, I talked with him.

"Q. In this conversation, in talking with Mr. Stoll, *did you seek to learn whether or not Mr. Stoll felt that the price that the State of California paid and Mr. L. D. Thomason's appraisal on his property was the fair market value of it?*

"Mr. Hadley: That is objected to as being incompetent, irrelevant and immaterial.

"The Court: *Overruled.*

"The Witness: No, I didn't make any investigation of how he felt about it. I was in that office for information on sales listings and the use of the property but Mr. Stoll—*I didn't question Mr. Stoll on it, but he didn't volunteer they were unhappy or make any complaint about it.*"

Subsequently, in the cross-examination of the same witness, counsel for defendants elicited the following testimony with reference to the acquisition of 12.64 acres of land by the school district referred to as the "Paddison School site":

"Q. You found that the school—how many acres did you find? A. 12.64 acres.

"Q. You found that they paid $10,000.00 an acre for that land? A. No, my information is they acquired it in the latter part of 1954 for $9,710.00 per acre.

"Q. The latter part of 1954 for how much an acre? A. $9,710.00 per acre

* * *

"Q. *Did you find on that Paddison property then from your investigation that the school had taken an option on the property earlier, the Paddison property, at a lower price and had held off for a while, then had later sought to enforce the option but were unable to do so at the lower price because of the increase in values, and had to pay almost twice as much as they had the option for?*

"Mr. Hadley: Just a minute, Mr. Baker. That is based upon the assumption of facts which counsel is assuming is a fact for the purpose of asking the question. It is not proper cross examination.

"The Court: If this witness knows.

"Mr. Hadley: It is the same type of question—*I would like to have the further objection to any and all sales with respect to sales that are between private individuals and public agencies as not representing the market value, Your Honor, and we would request at this time in advance of any jury instructions at the conclusion of the case that the purpose of this line of examination is to test the knowledge and credibility of the witness, and that any sale which is referred to which involves an agency of the Government which has the power of eminent domain is not a fair criterion of the value.*

"Mr. Wright: Your Honor,—

"The Court: *I will instruct the jury at the proper time in these matters.*

"Mr. Dolle: Your Honor, may I point out to the court—

"The Court: Proceed with your question, counsel.

"Mr. Hadley: My objection may go to this?

"The Court: *Overruled.*"

It was later developed that the price of $9,710 per acre paid by the school district was actually paid pursuant to a judgment in a condemnation action. The matter of the school district acquisition terminated with the following colloquy between court and counsel:

"Mr. Dolle: The witness said the price paid was $9,710.00. That is where I got the price. I didn't know anything about the judgment. He used the information some way or another.

"The Court: Actually there wasn't a purchase then?

"Mr. Hadley: That is right.

"Mr. Dolle: Under the City of Los Angeles v. Cole I am permitted on cross examination to inquire into acquisition by a public agency, particularly so when the witness under direct examination said he considered them.

"Mr. Hadley: Well, now, he didn't consider it. He said that he investigated and found—the consideration of his sales are expressed in 23 sales upon Plaintiff's Exhibit 16." Counsel for appellant correctly states that the record does *not* indicate that the witness had relied upon these particular transactions in arriving at the opinions expressed by him on direct examination.

During their arguments addressed to the trial judge with reference to the propriety of these questions concerning prices paid by the governmental agencies for other acquisitions, counsel on both sides made repeated references to the decision in City of Los Angeles v. Cole, 28 Cal.2d 509, 170 P.2d 928. The cautionary instructions requested by the state and refused by the trial court were as follows:

"You are instructed that the purchase price paid by any agency of the government, including a school board, is not a proper basis for determining the market value of the property here in question. Such sales are not a fair criterion of value for the reason that they are in the nature of a compromise. The fear of the one party or the other to take the risk of legal proceedings ordinarily results in the one party's paying more or the other party's taking less than is considered to be the fair market value of the property. For these reasons such sales are not proper evidence of value in any case, whether in a proceeding by the same condemning party or otherwise."

"What the State of California has paid for other property is not competent evidence of market value. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by the element which does not enter into similar transactions made in the ordinary course of business. The fear of one party or the other to take the risk of legal proceedings may result in the one party paying more, or the other taking less, than is considered to be the fair market value of the property. For these reasons such sales are not competent evidence of value, whether in a proceeding by the State of California or otherwise. You are, therefore, instructed that if any witness has been questioned concerning such sales, such questions were permitted only for the purpose of testing the fairness or honesty of the opinion given by such witness as to the market value. You are not to consider such testimony for the purpose of arriving at the actual market value of the subject property, but only for the purpose of determining the weight and credibility to be given by you to the testimony of such witness in relation to the market value of said property."

It will be observed that the foregoing requested instructions were essentially the same in substance as those involved in City of Los Angeles v. Cole, supra, 28 Cal.2d 509, 170 P.2d 928, and County of Los Angeles v. Faus, supra, 48 Cal.2d 672, 312 P.2d 680.

[1] It is our view that refusal of these instructions was serious error under the decisional law prevailing at the time of trial and therefore that there should be a reversal in this case for the same basic reason that the judgment in the Faus case was reversed, that is to say, "so that the parties herein may try the issue of value according to the [new] rule [therein] adopted." 48 Cal.2d at page 676, 312 P.2d at page 683. Paraphrasing the language of the last paragraph of the Faus decision, 48 Cal.2d at page 681, 312 P.2d at page 687, as it would apply to the case at bar: "It is apparent that this lawsuit was tried by the trial judge and the attorneys for both parties under rules of law which are now repudiated. The new and presently effective rules will be available to both parties upon a retrial."

[2, 3] Under the new rules enunciated in Faus, "evidence of the prices paid for similar property in the vicinity, including prices paid by the condemner" is held admissible as evidence of value. However, we interpret the Faus decision as holding also that a "wide discretion" must be granted the trial judge in determining the admissibilty of evidence of other sales; that the laying of appropriate foundations should be required to keep the admission of such evidence "within safeguarding limits" and that evidence of the price paid by a condemner should be admitted as evidence of value only after the trial judge has been satisfied "that the price paid was sufficiently voluntary to be a reasonable index of value". The foregoing interpretation of Faus is based upon the language quoted with approval from McCormick on Evidence (1954), section 166, p. 348, as set forth in the opinion at pages 678 and 679 of 48 Cal.2d, at page 684 of 312 P.2d.

[4] It is very doubtful, to say the least, that the trial judge in the exercise of the "wide discretion" allowed him in applying the standards of admissibility prescribed by the Faus decision could have held admissible as evidence of fair market value the prices paid by the state for the Stoll property and by the school district for the Paddison School site. If evidence concerning these acquisitions, and the prices paid therefor, conceivably might have been held admissible, either on direct or cross-exam-

ination, for any legitimate purpose within the limits prescribed by Faus, it surely would have been incumbent upon the trial court to give appropriate instructions to advise the jury as to the purpose for which the evidence might properly be considered. Appropriate instructions to guide the jury in the application and evaluation of expert testimony are no less essential under the new rules than they were under the old.

Under the law as it was understood prior to the Faus decision, instructions of the nature here requested and refused would clearly have been necessary. Justice Spence, in his dissenting opinion in Faus, refers to the decision in City of Los Angeles v. Cole, 28 Cal.2d 509, 170 P.2d 928, and to circumstances there involved, as follows:

"In the Cole case, the property involved was in an area which had been designated for a Civic Center, and much of the property required for that purpose had been acquired or was being acquired. Many condemnation proceedings had been commenced. In other words, all property was being acquired under condemnation or the immediate threat of condemnation. The condemner was, in reality, buying under compulsion and the sellers were selling under compulsion. Under these circumstances and 'in the light of the evidence adduced,' we held in the Cole case that it was proper to instruct the jury that '*the price paid by plaintiff condemner* for other property is not a proper basis for determining the market value of the property here in question,' and that 'the price fixed by an agreement between the owner of property and *a public corporation seeking to condemn* his land by virtue of eminent domain cannot be taken as a criterion of the market value of other land in the vicinity.'" 48 Cal.2d at page 682, 312 P.2d at page 686.

Respondents, in an effort to distinguish the Cole and Faus cases from the case at bar, point out that the valuation witnesses for the owners in the Cole case and for the county in the Faus case considered and largely relied upon acquisitions by public agencies having the power to condemn in arriving at their opinions as to market value, whereas *respondents'* expert witnesses expressly refrained from predicating their opinions as to market value on sales to entities possessing the power of eminent domain.

We believe, however, that it would be most unrealistic to assume that the jury was uninfluenced by the testimony elicited by respondents in their cross-examination of the state's witness concerning the prices paid by the state and by the school district for the neighboring properties. The prejudice to the state resulting from the inquiries into the circumstances of the Stoll acquisition was aggravated by the fact that defendants were permitted, over plaintiff's objection, to show that the state had paid an amount in excess of its own appraisal figure to acquire the property. The state quite apparently was under the necessity of acquiring the Stoll property, either by purchase or by condemnation in the pending action. It was buying the property under compulsion. In other words, the purchase of the Stoll property amounted to a compromise settlement of the pending action as to that parcel.

Manifestly it was respondents' deliberate purpose to impress the jury with the idea that the price paid by the state for the adjoining Stoll property was representative of the fair market value of land very similar to the subject property. This is made unmistakably clear by counsel's questions propounded to the witness Baker asking whether the witness had learned "*that Mr. Stoll felt that the appraisal and price paid was the fair market value of the property*". The purpose and probable effect of this line of inquiry is self-evident.

We turn now to the state's contention that the trial court erred in refusing to admit into evidence certain photographs portraying the subject property in a flooded condition. The state offered these photographs to prove the seriousness of the drainage problem affecting the property and its value for residential purposes.

It was the state's contention that before the land could be used for subdivision purposes it would be necessary to solve the drainage problem by making adequate provision for the disposal of waters naturally flowing onto the property from higher lands to the north, and also the waters originating within its own boundaries. It was the defendants' position that the drainage difficulties could be remedied with only a relatively small outlay. Consequently, a very considerable part of the testimony related to the hydrography of the property and to the frequency and the extent of the flooding conditions.

It appears that during the winter and spring of 1952–1953 the Murata property had been subjected to rather serious flooding due in part to the diversion of drainage waters from certain new subdivisions which had been completed upon lands lying to the north. The Muratas brought suit against the county, the state, and the subdividers seeking an injunction designed to prevent the future discharge of these waters upon the Murata land. Prior to trial, the state and county were dismissed from this suit and the case afterward assumed the aspect of an action for damages. The case came on for trial in 1954 and the Muratas recovered a substantial award of damages from the subdividers of the land to the north to compensate for the detriment to the Murata property resulting from the flood hazard caused by the activities of the defendant subdividers.

In the 1954 trial of the damage action, the Muratas introduced into evidence a number of photographs showing the flooded condition of their property as it had appeared at certain times during the winter and spring of 1952–1953. The purpose, of course, was to prove the extent of the flood damage to which the property had been subjected. At the trial of the instant case the state offered to introduce the same photographs after first laying the foundation that nothing had been done to alter any of the essential conditions affecting the drainage problem. The trial court sustained defendants' objections to these offers apparently on the theory that their admission would present the danger of "getting off into collateral matters".

[5, 6] We hold that the rulings rejecting the photographs were prejudicially erroneous. Admittedly there had been no substantial change in the conditions to which the prior flooding was attributed. The photographs clearly illustrated the potential danger to which the land was subject, and, therefore, were relevant to the issue of value. Respondents' sole answer to this assignment of error is that the photographs were merely cumulative evidence of conditions which were thoroughly and adequately described by oral testimony. This answer is insufficient and especially so in the light of the fact that the court received in evidence photographs offered by defendants which showed little or no indication of flooding after heavy rainstorms in 1956.

The state next complains that the trial court erred in unduly restricting its cross-examination of the defendants' expert witness Frisbie. It appears that Mr. Frisbie testified as an expert witness for the Muratas in the 1954 trial of their above mentioned action to recover damages for the flooding of their property. To establish the elements of damage in the prior action, Frisbie testified to his opinion as to the value of the subject property both before and after the creation of the conditions to which the flooding was attributed.

In the trial of the instant action, Frisbie testified that as of January 4, 1956, the Muratas' property was worth from $10,000 to $43,560 per acre, or a total of $889,330. On cross-examination, counsel for the state propounded the following question to Mr. Frisbie: "Q. Now, Mr. Frisbie, you had in mind then that in 1953 you valued this property, all of the property owned by the Muratas, regardless of the separateness of ownership between the family from parcel to parcel, but considering it all part of one large holding and before any damage occurred, you evaluated that holding, the entire holding, at the fair market sum of $250,000.00?" After defendants' objection was overruled, the witness answered the quoted question in the affirmative. In response to further questions, Frisbie testified that to his knowledge no measures had been taken to protect the property from the conditions giving rise to the permanent damage concerning which he had testified in 1954.

Thereupon counsel for the state informed the court of his intention further to cross-examine Frisbie concerning his 1954 testimony. Counsel declared in substance that if permitted he would show that Frisbie had testified in the 1954 trial that as of the spring of 1953 the market value of a fifteen-acre parcel of the subject property was $1,500 per acre, whereas in the instant trial, he placed the 1956 value of the same fifteen acres at figures ranging from a low of $10,000 to a high of $43,500 per acre on various portions thereof. Counsel further offered to show that Frisbie's 1953 valuation of the remaining thirty-five acres was $4,650 per acre.

The court sustained defendants' objection to this proposed line of cross-examination, declaring: "You are going to get into collateral matters which can be extremely serious here. I am confident you have gone as far as you can. At least I don't feel it is proper for you to go any further."

[7–9] We conclude that this ruling operated unduly to restrict the cross-examination. It is well settled that "[t]he value of the opinion evidence of a witness may be tested by showing that upon a former occasion he expressed a different opinion, or made statements inconsistent with the opinion expressed." 27 Cal.Jur. 155, § 128; 70 C.J. 1053, § 1239; 98 C.J.S. Witnesses § 581, p. 555; San Diego Land & Town Co. v. Neale, 88 Cal. 50, 67, 25 P. 977, 11 L.R.A. 604; People v. Donovan, 43 Cal. 162, 165–166. It is the almost universal rule "[t]hat *expert opinions,* as well as other opinions ordinarily admissible, if inconsistent with those expressed on the stand, are receivable." (3 Wigmore, Evidence, (3d ed. 1940) 733, § 1041.) We recognize, of course, that the testimony of the witness in the damage action related to values as of the spring of 1953, whereas the date of valuation in the instant case was January 4, 1956. Nevertheless, we think the former testimony of the witness related to a valuation date sufficiently proximate to that of the instant case that the jury should have been permitted to consider whether the opinions were consistent and reconcilable in the light of such reasons and explanations as the witness might have given (cf. People v. Donovan, supra, 43 Cal. 162, 166).

Viewed separately, each of the errors above discussed is deemed substantially prejudicial; and viewed in combination, we think they clearly operated to deprive appellant of a fair trial. Other contentions advanced by appellant need not be discussed since they relate to matters unlikely to be presented upon a retrial.

The judgment is reversed.

FOX, P. J., and ASHBURN, J., concur.

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161 Cal.App.2d 679

James H. WAYLAND and Noma L. Wayland, husband and wife, Plaintiffs and Respondents,

v.

STATE of California and the Department of Employment, Defendants and Appellants.

Civ. 9317.

District Court of Appeal, Third District, California.

June 26, 1958.

Quiet title action. The Superior Court, Shasta County, Albert F. Ross, J., rendered judgment adverse to defendants, and defendants appealed. The District Court of Appeal, Peek, J., agreeing with a recent Federal Court decision in an analogous case, held that it is inaccurate to describe a sale under power contained in deed of trust as "private sale"; and held that, in view of Unemployment Insurance Code section giving certificate of tax indebtedness the "force, effect and priority of a judgment lien," lien for unemployment insurance taxes could be extinguished by sale of property under power contained in trust deed as well as by judicial foreclosure.

Affirmed.

Taxation ⟹514

It is inaccurate to describe a sale under power contained in deed of trust as "private sale"; and in view of Unemployment Insurance Code section giving certificate of tax indebtedness the "force, effect and priority of a judgment lien," lien for unemployment insurance taxes could be extinguished by sale of property under power contained in trust deed as well as by judicial foreclosure. West's Ann.Unempl.Ins.Code, § 1703; West's Ann.Civ.Code, §§ 2931a, 2924b; West's Ann.Code Civ.Proc. § 692.

Edmund G. Brown, Atty. Gen., by Irving H. Perluss, Asst. Atty. Gen., and Vincent P. Lafferty, Deputy Atty. Gen., for appellants.

Newton & Lopez, Redding, for respondents.

PEEK, Justice.

The defendants appeal from an adverse judgment in an action to quiet title, which judgment specifically decreed that defendants' lien for unpaid unemployment insurance taxes was extinguished by a previous foreclosure sale under a deed of trust.

The record, which comes before us upon an agreed statement, shows that in January, 1946, the then owners of the real property involved, Mr. and Mrs. Harry Davis, executed a deed of trust wherein they were named as trustors, and one A. F. Dobrowsky was named as a beneficiary. In January, 1948, defendants, pursuant to section 45.10 of the Unemployment Insurance Act, now section 1703 of the Unemployment Insurance Code, recorded a certificate of lien to secure payment of delinquent taxes owed by Davis to the defendant Department of Employment. The lien was subsequently extended by the filing and recordation of a second certificate. In October, 1950, the Davises being in default, the trustee sold the property under the power of sale contained therein to the beneficiary who in turn subsequently sold the property to plaintiffs. Thereafter plaintiffs brought their action pursuant to the provisions of section 2931a of the Civil Code against the defendants to quiet their title to said real property.

Section 2931a provides in part as follows: "In all actions brought to determine conflicting claims to real property, * * * or to foreclose a deed of trust, mortgage, or other lien upon real property upon which exists a lien to secure the payment of taxes or other obligations, to the State of California, other than taxes upon such real property, the State of California may be made a party, and in such action the court shall have jurisdiction to determine the priority and effect of the liens described in the complaint in or upon the property, but the jurisdiction of the court in such action shall not include a determination of the validity of the tax giving rise to the lien or claim of lien * * *"

It should also be noted that section 45.10 of the Unemployment Insurance Act provided that the lien created by the recordation of the certificate of tax indebtedness shall have "the force, effect, and priority of a judgment lien."

The sole question presented on this appeal is stated in the record to be: "Was the lien of the defendants extinguished by the sale of the property under the power of sale contained in the deed of trust?"

Defendants properly concede the priority of the deed of trust and that had this been a private lien or judgment, there would be no basis for complaint. However it is argued that the doctrine of sovereign immunity, when considered in relation to said section 2931a, demonstrates that the Legislature intended judicial foreclosure to be the exclusive procedure to extinguish a tax lien of the state; that the right to foreclose under a power of sale is a private contract right between the parties; that the state, not being a party thereto, is not bound by a "private sale" because the state was not a party to the trust deed, was not afforded a statutory right to bid upon and purchase such property at the sale, and hence the extrajudicial sale did not extinguish the tax lien.

Defendants argued further that although section 1703 provides that the lien therein set forth shall have the "force, effect, and priority of a judgment lien," that does not identify the tax lien of the state with the lien of a private judgment creditor such as could be foreclosed by a sale under a power.

Subsequent to the filing of their closing brief, defendants' counsel addressed a letter to this court wherein with most commendable candor he referred to the case of United States v. Boyd, 5 Cir., 246 F.2d 477, certiorari denied, 355 U.S. 889, 78 S.Ct. 261, 2 L.Ed.2d 188, stating, "While the decision is contrary to the position taken by the Appellant, State of California, it is being brought to the attention of the Court by the Attorney General in the interest of justice." In that case it was held that a federal lien for taxes is extinguished by foreclosure under a power of sale contained in a prior deed of trust. Additionally the court specifically noted the contrary conclusion in Metropolitan Life Insurance Company v. United States, 6 Cir., 107 F.2d 311, the case primarily relied upon by defendants herein, stating: "Neither the result nor the reasoning of that case seems satisfactory." 246 F.2d at page 482.

We cannot agree with the very earnest argument made by defendants. The Legislature created the lien in question in the manner set forth in the applicable statutory provisions presumably with full knowledge of the consequences of its action. Therefore, as the court noted in the Boyd case, it is inconceivable that the Legislature being so fully aware of the widespread use of the trust deed in property financing, enacted section 2931a with the intent of declaring the commonly accepted statutory procedures for sale under power invalid as against a tax lien of the state and thereby forcing all property foreclosures into the courts. Hence, in the absence of a more definite indication of legislative intent, we should avoid a construction which would only add to the obvious confusion that would result from adherence to the contention of defendants.

In addition we do not believe that the portion of section 1703 of the Unemployment Insurance Code, providing that the certificate of tax indebtedness shall have "the force, effect, and priority of a judgment lien" can be as narrowly construed as do defendants. Their argument in this regard is that by use of the specific words, "force, effect, and priority," the Legislature intended the lien to resemble a judgment lien in the three specified characteristics, and then only in a strict, literal sense. While it is true, as defendants contend, that the Legislature could just as easily have declared such a lien to be a judgment lien for all purposes, the fact that it did not do so in this particular instance does not necessarily mean that the words used should be as strictly construed as do defendants. The term "force and effect" is of common, everyday usage. Certainly, then, such words must be read in their common, accepted meaning; that is, by giving to something the force and effect of something else is to give equality to each.

Finally, and again as the court noted in the Boyd case, it is inaccurate to describe a sale under the power contained in a deed of trust as a private sale. In accordance with the provisions of section 692 of the Code of Civil Procedure, notice of the intended sale must be posted at certain designated places for a definite period of time, and a like notice must be published for a similar period. And under the terms of section 2924b of the Civil Code, copies of such notice may be had on request.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

161 Cal.App.2d 407

George A. HAGGERTY, Plaintiff and Appellant,

v.

The CITY OF OAKLAND, a municipal corporation, Defendant and Respondent.

Civ. 17681.

District Court of Appeal, First District, Division 1, California.

June 19, 1958.

Taxpayer's action for injunction and declaratory relief. The Superior Court, Alameda County, Richard H. Chamberlain, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that lessee's interest, under lease for 10 year term to commence upon completion of building, was not, at its inception, vested, and that lease was violative of rule against perpetuities, even though it required lessor to construct building with "due diligence."

Reversed.

Bray, J., dissented in part.

1. Municipal Corporations 🔑268, 722

Construction of building with banquet and convention facilities for lease to private concerns is a proper municipal function.

2. Municipal Corporations 🔑268

As a general rule, a municipality may erect stadiums and auditoriums for various uses, including conventions, without violation of any constitutional or charter restrictions and without exceeding charter or corporate powers.

3. Municipal Corporations 🔑268, 722

The board of port commissioners of the city of Oakland had power under city charter to construct and lease convention hall and banquet building in port area, and fact that facilities could be rented to groups other than commerical associations did not detract from public purpose served thereby or invalidate project. St.1911, p. 1551, § 212(2, 4, 15, 17, 24, 26) as added by St.1927, p. 1978.

4. Municipal Corporations 🔑57

A governmental body may effectively ratify what it could theretofore have lawfully authorized.

5. Municipal Corporations 🔑722

It was not necessary to validity of ordinance, delegating to board of port commissioners of city of Oakland authority to construct and lease banquet and convention facilities in port area and confirming and ratifying action of board in that respect, that city council submit lease to competitive bidding. St.1911, p. 1551, § 212(15, 27) as added by St.1927, p. 1978; St.1911, p. 1551, § 212a as added by St.1955, p. 4167; St 1911, p. 1551, § 39.

6. Municipal Corporations 🔑722

There being substantial public purpose for which lease of convention hall and banquet building in port area was made, board of port commissioners had wide discretion in determining what adjuncts might be permitted which would adhere to advantage of city in operation of main facility.

7. Municipal Corporations 🔑722

Where only use over which there appeared to be no right of control reserved by board of port commissioners was use of premises for preparing foods and beverages for consumption off premises, lease of convention hall and banquet building in port area was not invalid for lack of proper controls. St.1911, p. 1551, § 212(17) as added by St.1927, p. 1978.

8. Perpetuities ⚷3

1951 statute, giving effect to American common-law rule against perpetuities, did no more than put into statutory form rule already in effect by virtue of constitutional provision. West's Ann.Civ.Code, § 715.2; West's Ann.Const. art. 20, § 9.

9. Perpetuities ⚷4(1)

Leases fall within rule requiring estates to vest within prescribed period. West's Ann.Civ.Code, § 715.2; West's Ann.Const. art. 20, § 9.

10. Perpetuities ⚷4(2)

In determining whether or not rule against perpetuities applies, courts have no power to consider reasonable probabilities or possibilities or what has happened since creation of interest; and if, at time of creation of interest, there existed any possibility at all that interest involved might not vest within prescribed period, rule has been violated, and grant must fail. West's Ann. Civ.Code, § 715.2; West's Ann.Const. art. 20, § 9.

11. Perpetuities ⚷4(12)

The rule against perpetuities does not apply to a vested interest, even though that interest may not come into possession within period of rule. West's Ann.Civ.Code, §§ 694, 695.

12. Perpetuities ⚷4(1)

Lessee's interest, under lease for 10 year term to commence upon completion of building, was not, at its inception, vested, and lease was violative of rule against perpetuities, even though it required lessor to construct building with "due diligence". West's Ann.Civ.Code, § 715.2; West's Ann. Const. art. 20, § 9.

13. Perpetuities ⚷4(1)

If lease for years is granted to take effect on condition precedent which may not occur within period of rule against perpetuities, it violates rule and must fall. West's Ann.Civ.Code, § 715.2; West's Ann. Const. art. 20, § 9.

14. Perpetuities ⚷1

Courts are not permitted to relax rule against perpetuities or to create exceptions thereto. West's Ann.Civ.Code, § 715.2; West's Ann.Const. art. 20, § 9.

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Guidotti & Mellana, Oakland, for appellant.

J. Kerwin Rooney, Port Atty., Lloyd S. MacDonald, Deputy Port Atty., Oakland, for respondent.

PETERS, Presiding Justice.

This case was originally assigned to Mr. Justice Bray for the preparation of an opinion. Mr. Justice Wood and I agreed with everything contained in the tentative opinion prepared by Mr. Justice Bray, except that we disagreed with his proposed disposition of the point involving the rule against perpetuities. Except for the point involving the rule against perpetuities, the opinion that follows has been prepared and written by Mr. Justice Bray:

In a taxpayer's action for injunction and declaratory relief, plaintiff appeals from a judgment in favor of defendant.

Questions Presented.

1. Has the Board of Port Commissioners of the City of Oakland,[1] either directly under the city charter or through action of the city council, the power to construct and to lease a convention hall and banquet building in the port area?

2. Is the lease invalid (a) because of lack of proper controls; (b) because violative of the rule against perpetuities?

Record.

September 22, 1955, the board adopted resolution No. B4610. It declared that "public necessity and convenience and the interest of the Port" required that the city lease a building to be constructed in a certain portion of the Jack London Square area. The form of the lease as drawn by the port attorney was approved and the board secretary was directed to publish a notice calling for bids for the lease. April 23, 1956 the board adopted ordinance No. 957 awarding the lease to R. R. Goodman, doing business as Goodman Catering Company, the sole bidder. May 15th, plaintiff filed this action for a declaration that the board's action was illegal, beyond the scope of its authority, and asking for a permanent injunction to restrain the board from proceeding with the construction and lease.

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[1] Hereinafter called "the board."

May 21st, the board adopted resolution No. B4981, requesting the city council to delegate to it the power to construct, maintain and lease facilities necessary for convention, banquet, or exposition purposes in the port area, and to ratify and approve the proceedings theretofore taken by the board for the construction and leasing of such facilities. June 7th, the city council adopted ordinance No. 4951 C.M.S. After finding that the construction of the proposed building was a necessary and desirable municipal project and that the leasing thereof was in the public interest, the ordinance conferred upon, delegated to and vested in the board the power to construct, maintain, operate and/or lease "such improvements, structures and facilities as shall be necessary or convenient, in its judgment and discretion, for convention, banquet or exposition purposes" in the port area. "The said Board shall further have and exercise and is hereby vested with all the powers, duties and functions in connection therewith as fully and completely as it would have, had such improvements, structures and facilities been expressly mentioned and set forth in the provisions of Article XXV of the Charter of the City of Oakland, and included therein as part of the facilities of the port, harbor and airport, the Council hereby finding and determining the same to be among the facilities and aids incidental to the development, promotion and operation of the port, harbor and airport and to the furtherance of commerce, transportation, shipping and navigation, and that such powers are necessary and convenient to carry out the general purposes of such Board." The ordinance then "ratified, confirmed and approved" the enactment of Port Ordinance No. 957 above mentioned. June 18th, the board adopted resolution No. 10004 approving the action of the city council in its ordinance No. 4951 C.M.S. supra, and accepting the powers and duties therein delegated and confirmed.

The lease is for a term of 10 years commencing from the completion of the building and requires the board to construct a convention hall and building, plans and specifications for which are on file with the board and approved by the city engineer, to cost approximately $250,000. Lessee agrees to install equipment and furnishings of a value of not less than $80,000, removable at end of lease, if lessee is not in default. The premises are to be used "for the operation of a convention and banquet hall * * * for the preparation, sale and consumption of food (including foods and beverages for consumption off the demised premises), alcoholic and non-alcoholic beverages, tobacco products, curios and novelties, and for purposes generally consistent therewith and incidental thereto." The premises are not to be used for any event attended by less than 100 persons if food or beverages are sold or consumed. The monthly rental is $1300 plus 4 per cent of gross receipts over $30,000 per month. Right to sublease is limited to a maximum of 10 days in any one case. The lessee is required to employ reasonable diligence "to promote and aid the commerce of the Port of Oakland and the use of its facilities. Other things being equal, * * * [lessee] shall ship through and receive through the municipal docks and terminals * * * all of the goods, materials and other commodities which it may be able to control or direct."

The trial court upheld the validity of the proposed construction and lease.

1. Power of Board.

The city charter[2] provides (§ 212) that the board "shall have the complete and exclusive power, and it shall be its duty for and on behalf of the City of Oakland: * * *

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[2] Stats.1911, p. 1551, as amended.

"(2) To make provision for the needs of commerce, shipping, and navigation of the port, to promote, develop, construct, reconstruct, alter, repair, maintain, equip and operate all waterfront properties including piers, wharves, sea walls, docks, basins, channels, slips, landings, warehouses, floating and other plants or works * * * and to establish, equip and operate all other facilities or aids incident to the development, protection and operation of the port, as may be deemed proper and desirable in its judgment, and it may modify its plans from time to time as the requirements of commerce, shipping and navigation may demand, and as part of such development and operation to provide for tugs, dredges, fireboats, barges, cold storage plants, and all other publicly owned facilities or appliances incident to the operation of the port, of such number and character, and in such places as the board may deem feasible and proper."

(4) To have control and jurisdiction of the port area and to "enforce therein general rules and regulations, to the extent that may be necessary or requisite for port purposes and harbor development, and in carrying out the powers" vested in the board.

"(14) To manage the business of the port and promote the maritime and commercial interests by proper advertisement of its advantages, and by the solicitation of business, within or without the port, within other states or in foreign countries, through such employees and agencies as it may deem expedient.

"(15) To acquire in the name of the City of Oakland by purchase, condemnation, gift, lease, or otherwise take over and hold all lands, property, property rights, leases, or easements, and personal property of every kind, necessary or convenient for the development and operation of the port, or for the carrying out of the powers herein granted to the Board."

"(17) To enter into contracts, agreements, leases, or stipulations, germane to the scope of its powers and duties. * * *

"(24) To adopt and enforce such ordinances, orders, regulations and practices as are necessary for the proper administration and discharge of its duties and powers, or for the management and government of the port, and its facilities. * * *

"(26) To have and exercise on behalf of the City of Oakland all the rights, powers and duties in respect to the subject matters herein provided for, that are now or which may hereafter be vested in the City, or any of its departments or officers, or which may be provided for by general law.

"(27) To do and perform any and all other acts and things which may be necessary and proper to carry out the general powers of the City, or any of the provisions of this Article, and to exercise all powers not in conflict with the Constitution of the State, or with this Charter, germane to the scope of its powers, purposes and duties." St.1911, p. 1551, § 212 as added by St.1927, p. 1978.

"Operation of Facilities.

"Sec. 212a. Notwithstanding any other provision of this Charter to the contrary, the Board shall not be required to directly operate all of the properties, facilities and utilities under its control or jurisdiction, and shall have the power to authorize the operation of any of such properties, facilities and utilities by a private person, firm, association, or corporation, whether by lease, franchise, license, assignment, permit or otherwise, upon such terms and conditions as the Board shall prescribe, which terms and conditions shall include control over the rates, charges and practices of said private party to the extent permitted by law." As added by St.1955, p. 4167.

[1–3] Plaintiff concedes that the city council under section 39 of the city charter dealing with its powers and under subdivision 15 of section 212[3] would have the authority to construct the proposed facility and to lease it, provided the lease contained proper controls[4] but contends that the board has no such power under the charter and that the city council cannot give it such power, as he claims that the construction and maintenance of a convention and banquet hall is not a port purpose.

We concur with the finding in ordinance No. 4951 C.M.S. that the construction of a convention and banquet building in the port area is a facility and aid "incidental to the development, promotion and operation of the port, harbor * * * and to the furtherance of commerce, transportation, shipping and navigation * * *" It gives trade, shipping and commercial associations a place to meet or hold conventions and exhibitions in Oakland's port area. By such activities the commerce of the port will be promoted by encouraging those associations to become familiar with the port and its assets. The port has already built extensive facilities to accommodate and promote commerce and navigation, which facilities are occupied by tenants engaged in industries related to port and airport activities. The proposed facility will provide a place for these tenants as well as all other interested persons, to meet, exchange ideas, exhibit their products and have the functions which are necessarily incidental to such meetings. The board is given broad powers to develop the harbor area and the promotion of commerce and shipping, and the proposed facility would contribute to such development. It would be a method of advertising the advantages of the port, of special value as the facility will be located in the very area of the port and harbor activities.

While it is true that the use of the facility is not limited to commercial associations and can be rented by other groups, such fact does not detract from its real purpose or the validity of the project. No facility of this kind in any city could expect to be used full time by commercial associations. There would be a considerable economic loss to the city if it were limited to that use. Good judgment would allow the use of the facility by other groups when not required by commercial associations, and therefore, such use would be incidental to the main purpose and "germane to the scope of its [the board's] powers and duties." (Charter, § 212, subd. 17.) See City and County of San Francisco v. Linares, 16 Cal.2d 441, 445, 106 P.2d 369, 371, pointing out that the creation of hotels and restaurants in public parks "' * * * has been generally recognized as ancillary to the complete enjoyment by the public of the property set apart for their benefit.'" The facility proposed in our case is likewise ancillary to the complete enjoyment by the public of the port properties.

The charter provisions give the board wide discretion in carrying out the powers entrusted to it. Courts cannot interfere with the action of the board unless it appears that the board has exceeded its powers or has abused its discretion. We find no such situation here.

Plaintiff's contention that under the charter, the city council and not the port is the governing body vested with general legislative authority to deal with port affairs is answered in City of Oakland v. Hogan, 1940, 41 Cal.App.2d 333, 344, 106 P.2d 987, 992: "Under our modern form of government, particularly in larger communities, legislative functions are often bestowed upon more than one commission or board, as for instance, boards of health, education, park, police, waterway or other public bodies, which give to the matters before them specialized study and enact and enforce ordinances in the interests of the public with the same effect and in the same manner as if enacted by the principal legislative body of the corporation. McQuillin on Municipal Corporations, 2d ed., Revised, vol. 2, pp. 742, 743, § 707. In the present case the 'Port Department' is not only a legislative body of the municipality of Oakland, but it is the body given exclusive control over port matters."

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[3] This subdivision empowers the board to transfer to the council any lands within the board's jurisdiction which it deems unnecessary for port purposes or harbor development.

[4] It is well established in California that the construction of a building with banquet and convention facilities and its leasing to private concerns by a municipality is a proper municipal function. Sacramento Chamber of Commerce v. Stephens, 212 Cal. 607, 299 P. 728; Futterer v. City of Sacramento, 196 Cal. 248, 237 P. 48. See, also, Harter v. San Jose, 141 Cal. 659, 75 P. 344, (city leasing portions of a public park for hotel purposes). The general rule is that a municipality may erect stadiums and auditoriums for various uses, including conventions, without a violation of any constitutional or charter restrictions and without exceeding charter or corporate powers. See 10 McQuillin, Municipal Corporations, 3rd ed., § 28.14, p. 33; 173 A.L.R. 415.

[4, 5] As the project is within the charter purpose of development of the harbor and port area, ordinance No. 4951 C.M.S. delegating to the board the authority to construct and lease banquet and covention facilities in the port area and confirming and ratifying the action of the board in that respect, ended any question of the power of the board under the charter to construct and lease the facility if any question existed. As said in Mott v. Horstmann, 36 Cal.2d 388, 224 P.2d 11, "It is the general rule that a governmental body may effectively ratify what it could theretofore have lawfully authorized. This rule has been applied to numerous situations involving municipal corporation contracts * * *". 36 Cal.2d at page 391, 224 P.2d at page 12. Thus, not only did the board have the power under the charter but if that were necessary, it was expressly delegated the power as an agency of the city.

Plaintiff contends the ratification was not properly made, relying on Mott v. Horstmann, supra, 36 Cal.2d 388, 224 P.2d 11, which holds "The doctrine of ratification is subject to the limitation that the subsequent ratification should be made with the same formalities required for the original exercise of the power." 36 Cal.2d at page 391, 224 P.2d at page 13. He claims that to make ordinance No. 4951 C.M.S. valid, the city council should have submitted the lease to competitive bidding. We can find in the charter no requirement that to delegate additional powers to an agency of the city or to ratify its acts any such procedure is necessary. The only formalities required in connection with the procedure of ratification are that the city shall act by ordinance (charter § 227, as added by St.1927, p. 1978) and that the board shall act by resolution (§ 210, as added by St.1927, p. 1978). These formalities were complied with. Section 178, as amended by St.1917, p. 1948, provides that no lease may be entered into except by ordinance to take effect 60 days after the ordinance granting it becomes final. This is to permit the filing of a referendum. Here the lease has not yet been entered into. No referendum was filed during the 60-day period.

2. (a) Controls in Lease.

[6, 7] Plaintiff contends that controls to insure that the use of the property will be in the public interest are lacking, bringing the cause within the rule of City & County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529, which held a proposed lease of garage facilities void for lack of controls by the municipality.

The instant case is distinguishable from the Ross case in that the lease provides definite controls. Some of these will be mentioned. Thus it provides that the premises shall be used for the operation of a convention and banquet hall and "Lessee shall not use or permit the demised premises to be used in whole or in part * * * other than as hereinabove set forth, except with the prior written consent of the Port evidenced by resolution of its board * * *" If food and beverages are to be served the use of the premises is limited to 100 or more people. This is applicable to any event, convention or banquet and appears to be in line with the public purpose. The lessee is bound to provide products and services equal to comparable establishments in the vicinity and at comparable reasonable prices and without discrimination. The port has the right to inspect "menus, lists and schedules of prices" and if any price is determined unreasonable or inappropriate for the services rendered or the item sold, the same must be modified as directed by the port. There is a provision that the lessee may sublet for convention or other purposes consistent with the uses defined in the lease, but not to exceed 10 days, and then only if three days' prior notification is given to the port manager and he does not disapprove the proposed sublease. The provision is that the lessee may sublet for limited periods not to exceed 10 days "for convention or other purposes consistent with the use of the demised premises as specified * * *, provided always, that at least three (3) days' prior written notice of intention to so sublet shall be given to the Port Manager of Lessor, *and the said Port Manager shall not during said three-day period disapprove said sublease* * * *" (Emphasis added.) While this clause might have been worded better, its plain meaning is that the lessee may sublet provided that within the three days after notice the port manager shall not disapprove the sublease, and that if he disapproves, the sublease may not be made. By this veto power the port manager, if desired, can require priority of sublease for conventions as distinguished from other uses of the premises. It is clear that the port has the right of control to see that the premises are used primarily for convention or banquet purposes and that the port has control of prices, charges, etc. The requirement that all subleases be upon notice to the port manager and his right to disapprove a sublease ensures that conventions desiring to use the premises and approved by the port manager will not be denied such use.

The only use over which there appears to be no right of control reserved by the port is the use of premises for preparing foods and beverages for consumption off the premises. The lessee is expressly given the right to carry on a private catering service from the premises. Such a service is an adjunct of the banquet facilities required to be furnished by the lessee and redounds to the benefit of the port in that it will obtain revenue as under the lease the receipts from such business will be included in the gross receipts for the purpose of determining the amount of rent. As there is a substantial public purpose for which the lease is made, the port as an administrative body has wide discretion in determining what adjuncts may be permitted which will inhere to the advantage of the city in the operation of the main facility.

The premises may not be used in violation of "any present or future laws, ordinances, general rules or regulations at any time applicable thereto of any public or governmental authority, including the City of Oakland or its Board of Port Commissioners, relating to sanitation or the public health, safety or welfare, or navigation and use of the harbor * * *" The premises are to be kept at all times in "a clean, wholesome and sanitary condition * *" The lessee's "rights hereunder are nonexclusive for the Port Area * * * the Port retains the right to lease or license restaurants, convention and/or banquet halls and other similar operations within the Port Area." "Lessee shall in good faith and with all reasonable diligence employ its best endeavors and all practical means to promote and aid the commerce of the Port of Oakland and the use of its facilities."

The controls above mentioned, as well as the others contained in the lease, meet the requirement of the Ross case, supra, 44 Cal.2d 52, 279 P.2d 529, that the municipal lease provide for control of rates, charges and practices of the lessee.

2(b) The Rule Against Perpetuities.

Plaintiff contends that, because the lease provides that it is not to commence until the completion of the building, which event is uncertain and indefinite, and may, conceivably, occur later than 21 years after a life in being, the rule against perpetuities has been violated. We agree with this contention.

Section 715.2 of the Civil Code, enacted in 1951, St.1951, p. 3442, provides: "No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. * * * It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities."

[8] Although this statute was not enacted until 1951, the rule stated therein has been the rule in this state since the adoption of Article XX, section 9, of the state Constitution. In re Estate of Sahlender, 89 Cal.App.2d 329, 201 P.2d 69; Dallapi v. Campbell, 45 Cal.App.2d 541, 114 P.2d 646. The code section did no more than to put into statutory form the rule already in effect by virtue of the constitutional provision. Victory Oil Co. v. Hancock Oil Co., 125 Cal.App.2d 222, 270 P.2d 604.

[9] There can be no doubt that leases fall within the rule requiring estates to vest within the prescribed period. Epstein v. Zahloute, 99 Cal.App.2d 738, 222 P.2d 318; Dallapi v. Campbell, 45 Cal.App.2d 541, 114 P.2d 646; see cases collected 41 Am.Jur. p. 78, § 34.

[10] It is also well settled that, in determining whether or not the rule applies, the courts have no power to consider reasonable probabilities or possibilities, or to consider what has happened after the creation of the interest. If, at the time of the creation of the interest, there exists any possibility at all that the interest involved may not vest within the prescribed period, the rule has been violated, and the grant must fail. This well-settled rule is stated as follows in 38 Cal.Jur.2d p. 481, § 29:

"The question whether the rules forbidding perpetuities are violated is to be determined in the light of the possibilities existing at the time of creation of the interest, and mere probabilities have no relevance. If, at that time, any possibility exists that the ownership will not vest within * * * the permissible period, a violation results, though such possibility be extremely remote. The fact that events have occurred subsequently to such creation which establish that the initial possibility of violation cannot occur is immaterial."

As late as November of 1956 the Supreme Court restated this rule in a case involving the related rule prohibiting restraints on alienation (see § 715.1 of the Civil Code) in the case of In re Estate of Johnston, 47 Cal.2d 265, 303 P.2d 1. At page 270 of 47 Cal.2d, at page 4 of 303 P.2d the court stated:

"It is likewise settled that it is not the probability of a violation of rules against remoteness or restraints on alienation that brings such rules into operation, but only the bare possibility as such possibility exists at the date of the inception of the trust."

In the In re Estate of Sahlender, 89 Cal.App.2d 329, 201 P.2d 69, there was involved a remainder bequest to the possible issue of one Dora, who was 55 years of age and a childless widow at the time of the death of the grantor. It was held that such a bequest violated the rule. At page 348 of 89 Cal.App.2d, at page 81 of 201 P.2d the court stated:

"These possibilities render the remainder bequests to the possible issue of Dora * * void because in violation of the rule against remoteness of vesting. This is so even though Dora was 55 years of age at her father's death and was then a childless widow. The possibility of her having issue is extremely remote. But on the issue of validity of a trust it is never presumed that a woman, no matter how aged, is incapable of bearing children. [Citing a case.] Moreover, it is not the 'probability' of a violation of the rules against remoteness or restraints on alienation that brings such rules into operation, but only the bare 'possibility' as such 'possibility' exists at the date of the inception of the trust. [Citing 2 cases.]"

[11–13] How do these rules apply to the instant case? In paragraph 2 the lease provides that the term shall be 10 years from the commencement of the term as prescribed in paragraph 14. That paragraph provides that when the building is substantially complete and ready for occupancy the Port of Oakland shall give written notice to the lessee. The term is then to commence from the first day of the calendar month next succeeding thirty days after the notice is given. Thus, the commencement of the term of the lease is dependent upon the completion of the building. That event is uncertain and indefinite, and subject to many possible delays. Obviously, there is a "bare possibility" that the estate granted by the lease will not commence within 21 years. Thus, the rule has been violated.

In an attempt to escape the logic of this reasoning, the defendant argues that the lessee obtained a vested right upon the final adoption of the ordinance awarding the lease, and then contends, correctly, that the rule against perpetuities does not apply to a vested interest even though that interest may not come into possession within the period of the rule. The difficulty with this argument is that the interest created by the lease is not a vested interest.

Civil Code, section 694 provides that a "future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest." Section 695 of that code provides that a future interest "is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain." In the instant case the person who has the right is certain, but the right is not to take effect upon the ceasing of any intermediate interest, that is, the lease is not to take effect upon the termination of any present possessory interest. But the event upon which the tenancy is to take effect is limited upon an uncertain event, that is, the completion of the building. Such an interest is not vested.

There seem to be relatively few cases discussing this problem, but the recognized legal authorities in the field of future interests agree that such an interest is not vested, and that, if a lease for years is granted to take effect on a condition precedent which may not occur within the period of the rule, it violates the rule and must fall. (See Simes and Smith, The Law of Future Interests (2nd ed.) p. 153, § 1242; Gray, The Rule Against Perpetuities (4th ed.) p. 353; 2 Tiffany, Real Property (3rd ed.) p. 170, at p. 171, § 406.)

The case of Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001, 1003, 10 L.R.A., N.S., 564, is closely in point. There a testatrix devised realty to a trustee for "twenty-five (25) years from and after the date of the probate of this will." Obviously, the possibility that the will would not be probated within 21 years was extremely remote. Nevertheless, the court held that, since the date of this event was uncertain, the devise was void because in violation of the rule against perpetuities. The court stated (80 N.E. at page 1004): "Terms of years may be created to commence in futuro; but if the condition upon which they are to arise is uncertain, and may not happen within the limits fixed by the rule against perpetuities, such terms are void."

In the instant case the only question presented is whether, when the lease was executed, there was any possibility, no matter how remote, that the estate might not vest within 21 years. With an uncertain and unfixed commencement date such a possibility exists. The possibility may be extremely remote and highly improbable, but that is not the question. The court should not and properly cannot speculate on this problem. If the slightest possibility exists that the estate will not vest within the prescribed period, the rule has been violated.

The argument to the contrary is ingenious. It is that the lease requires the Port to plan and to construct the building with "due diligence." This means, it is argued, that there must be implied a provision that this must be done within a "reasonable time." Twenty-one years, it is contended, is an unreasonable time. If, because of any emergency now not foreseeable, the building is not completed within 21 years, the purpose of the contracting parties would be frustrated and the lease would fail. Thus, it is argued, the lease must either vest or fail within 21 years. It is implied that the argument to the contrary is purely legalistic, and formalistic.

[14] This argument is deceptively simple, and is unsound. The courts are not permitted to relax the rule against perpetuities. The people have spoken by adopting the constitutional provision, and the Legislature has reaffirmed that position as late as 1951. The rule itself contains no exceptions, and the courts should not create them. The rule has developed over a long period of time. It is predicated on fundamental principles of public policy. Once an exception is created to the application of the rule, no matter how innocuous it may seem, no one can foretell where it may lead, or how it may be abused. It may be that, tested by practical considerations, no particular harm would result if this court were to except this case from the application of the rule because we know that in all probability the lease will vest long before 21 years. But that is not the test. It is equally true that we know that it is practically impossible for an aged woman to have children, but we also know that the "bare possibility" that she might, invalidates the trust. If these baby cases were correctly decided, and it is submitted that they were, then the present lease must fail. Otherwise, the public policy of this state would be thwarted by judicial legislation. Under the circumstances, we must impose upon the parties the penalty that is the result of their own oversight, and require them, if they so desire, to re-negotiate the lease.

The judgment appealed from is reversed.

FRED B. WOOD, J., concurs.

BRAY, Justice.

I dissent from that portion of the majority opinion which holds that there is a possibility under modern conditions and concepts of the lease existing for 21 years without either vesting (that is, its term commencing) or failing. I agree with everything said in the majority opinion concerning the rule against perpetuities, the advisability of preserving it, and that it applies where there is only a "bare possibility" of the 21 year period being exceeded. Where I differ with the majority is in their holding as a fact that there is such possibility here. In considering this lease we first must determine its starting date. While it contains no definite starting date, it does provide: "The Port shall and will in good faith immediately after the execution of this lease proceed with plans for the construction and construct a convention and banquet hall building upon said premises, and shall thereafter prosecute the same to completion with all due diligence."[1] When the building is substantially completed and ready for occupancy, lessor is required to notify lessee and on the first day of the calendar month next succeeding 30 days thereafter, the term of the lease commences. The construction of the building must be started and the building completed with all due diligence. Provisions of this kind are construed as requiring performance within a reasonable time. See 17 C.J.S. Contracts § 360, p. 819; see, also, Imperial Water Co. No. 8 v. Cameron, 67 Cal.App. 591, 228 P. 678. No one would contend that taking 21 years to build the building required by the lease would be building it within a reasonable time. As stated in the majority opinion, section 715.2, Civil Code, applies to leases and the vesting of an interest in real property required by that section will not occur here until the building is constructed and notice of its readiness for occupancy given. (Civ.Code §§ 694, 695.) Nevertheless there is no possibility that the vesting would be prolonged 21 years. To bring the lease within the "bare possibility" rule, it has been suggested that there might be a possibility, before the building is completed, of our country becoming engaged in a war that might last 21 years, delaying the completion that long, thereby violating the rule against remoteness of vesting. Assuming, however, that there is a "bare possibility" of the construction of the building being held up by war for 21 years (something that never has occurred in the history of this country, and something which if it occurred would so change conditions of the country that all leases and contracts would go by the board), there is another rule applying to the vesting rule which would be applicable here. That rule is expressed in The Law of Future Interests, Simes and Smith, 2d ed., section 1231: "* * * a contingent future interest need not be certain to vest within the period of the rule in order to be valid, but merely must be certain *to vest or fail* within that period * * *" (Emphasis added.) A 21 year war or one extending anywhere near that length of time, or any other delay of construction for such period, would cause a complete termination of the lease and therefore there would be a failure of vesting, long before the statutory period would end. It is inconceivable and beyond a "bare possibility" that both parties in the event of such a protraction of the starting date of the lease would not be completely frustrated, thereby terminating it. It is also inconceivable that conditions or the position of the parties would be such that the lease would not fall of its own weight long before 21 years had elapsed. Obviously it is the object of both parties to this lease that its term begin within a reasonable time. A protracted postponement of that term would necessarily constitute a "frustration" in law and would bring the situation within the following quotation from Brown v. Oshiro, 68 Cal.App.2d 393, 397, 156 P.2d 976, 978: "Williston on Contracts (rev. ed., vol. 6, pp. 5486, 5487) states the rule in this language: 'Even more clearly with respect to leases than in regard to ordinary contracts the applicability of the doctrine of frustration depends upon the total or nearly total destruction of the purpose for which, *in the contemplation of both parties,* the transaction was entered into.' (Italics added.)" [2] There is no possible construction of the requirement of the lease that the building be completed within a reasonable time that would hold that more than 21 years is a reasonable time. The only possible construction is that the term must commence (that is, the building must be completed) long before the expiration of 21 years, or the lease will fail.

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[1] The construction is to be substantially in accordance with preliminary drawings, plans and specifications on file with the board.

The situation here is different from that in cases where the question of remoteness of vesting depends upon the possibility of issue. There for various reasons including that of having a "convenient rule of practice" (see Fletcher v. Los Angeles Trust & Savings Bank, 182 Cal. 177, 182, 187 P. 425), the common law adopted the conclusive presumption that a possibility of issue is commensurate with life. This rule has been continued in America, although it is no longer rigidly enforced in England as to termination of trusts. See Fletcher v. Los Angeles Trust & Savings Bank, supra, 182 Cal. 177, 182, 187 P. 425. There is no presumption applicable in our case.

To hold that under modern economic conditions there is even a bare possibility that a landlord and tenant, and particularly a landlord which is a political subdivision of the state and a tenant who is a business man, would ever wait over 21 years for their lease to take effect, is unrealistic, fantastic and even absurd. After all, there has to be some common sense in the rulings of courts.

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[2] For the rule of commercial frustration in the event that war causes a failure of the consideration or a practically total destruction of the expected value of the performance, see 20th Century Lites, Inc., v. Goodman, 64 Cal.App.2d Supp. 938, 149 P.2d 88; Autry v. Republic Productions, Inc., 30 Cal.2d 144, 148, 180 P.2d 888; Lloyd v. Murphy, 25 Cal.2d 48, 153 P.2d 47; McCullouch v. Liguori, 88 Cal.App.2d 366, 199 P.2d 25; Brown v. Oshiro, supra, 68 Cal. App.2d 393, 397, 156 P.2d 976.

Simes and Smith, The Law of Future Interests, section 1228, states: "Occasionally one finds cases where vesting is, in effect, to take place 'in a reasonable time,' and the court sometimes presumes that a reasonable time will necessarily be within twenty-one years." Although the authors do not approve of this practice, their objection seems to deal primarily with interests in real property other than chattels real (leases) which they state (§ 331): "* * * though arising out of land, are treated for most purposes as personalty, and therefore are not subject to most doctrines peculiarly applicable to freehold interests in land." While it is true that the rule against remote vesting is hoary with age and is an excellent rule, and that in some situations in the past it has been applied rather fantastically (witness the rule of possibility of issue above discussed), those facts do not require a construction of the lease in question which would be completely out of step with modern possibilities. Applicable here is the following from the Restatement, Property, section 375: "When a limitation is ambiguous and, under the rule against perpetuities, is legally more effective under one of the two or more possible constructions than it would be under any of the other possible constructions, then the legally more effective construction is adopted." I am not seeking to change the rule against remote vesting. I am merely construing the provision in the lease which deals with the commencement of the term as meaning the term must commence or the lease fail within a reasonable time which under no circumstances could mean 21 years.

I have been unable to find any case (and have been cited to none) in which a provision in a lease to the effect that the term is to commence within "a reasonable time," nor any grant of a future interest to vest within "a reasonable time," has ever been held violative of the rule against remote vesting nor the rule against perpetuities. To so hold is legalistic formalism completely out of step with modern concepts and conditions.

I would affirm the judgment.

161 Cal.App.2d Supp. 850

PEOPLE of the State of California, Plaintiff and Respondent,

v.

SHOGO IWASAKI et al., Defendants and Appellants.

Cr. A. 3825.

Appellate Department, Superior Court, Los Angeles County, California.

June 11, 1958.

Defendants were convicted of violating statute proscribing deceptive display of fruits. From judgments rendered by the Municipal Court of the Los Angeles Judicial District, Harold C. Shepherd, J., and from orders granting probation, defendants appealed. The Superior Court, David, J., held that the statute making it unlawful to prepare or display a deceptive pack of fruit or vegetables is violated when the fruit on the top of a box on display is not substantially representative of essential character of that on bottom of box, even though all of fruit is of acceptable quality.

Affirmed.

1. Food 🔑15

The statute making it unlawful to prepare or display a deceptive pack of fruit is violated when the fruit on the top of a box on display is not substantially representative of essential character of that on bottom of box, even though all of fruit is of acceptable quality. West's Ann.Agric. Code, § 784.1.

2. Food ⚷**21**

Evidence showing, inter alia, that 15% of grapes beneath the top layer of those on display were decayed was sufficient to sustain conviction for violation of statute making it unlawful to display deceptive packs of fruits or vegetables. West's Ann. Agric.Code, § 784.1.

3. Evidence ⚷**20(1)**

Court would take judicial notice of practice of fruit sellers of arranging or putting most attractive fruit on top of packs, loads, lots or market arrangements or displays. West's Ann.Agric.Code, §§ 784.1, 784.6.

4. Food ⚷**22**

In prosecution for violation of statute making it unlawful to deceptively pack or display or sell fruits, vegetables, nuts, etc., how far a given fruit display is deceptive is for the trier of the facts who may consider to what extent any housewife or other purchaser would tend to be deceived, under the circumstances. West's Ann.Agric.Code, § 784.1.

◆

Hugh E. MacBeth, Jr., Los Angeles, for appellants.

Roger Arnebergh, City Atty., Philip E. Grey, Asst. City Atty., William E. Doran, Deputy City Atty., Los Angeles, for respondent.

DAVID, Judge.

Shogo and Naomi Iwasaki were each tried and convicted of violating Agricultural Code sec. 784.1 and were fined $100 each, with the alternative of one day in the Los Angeles City Jail for each $5 unpaid; and as to each defendant, the execution of sentence was suspended, and summary probation was granted for one year, upon condition that there be no further violations, and that a fine of $25 be paid. From the final judgments of conviction and sentence and the orders granting probation, these appeals are taken.

The essence of the charge was that grapes were so arranged and displayed by defendants that in the exposed surface there were grapes "which were in quality, size and condition, and in other respects, so superior to those concealed and in the unexposed portion thereof, as to materially misrepresent a part of said arranged and displayed fruit." Agricultural Code sec. 784.1 reads: "It is unlawful to prepare, pack, place, deliver for shipment, load, ship, transport, or sell a deceptive pack, bulk lot, bulk load, load, arrangement, or display of fresh or dried fruits, nuts, or vegetables."

By stipulation, the testimony received was the report of the arresting officer, Raymond Newbill, as follows:

> "Def.—Shogo & Naomi Iwasaki dba. Three Crown Produce Co. 317 S. Broadway, L. A. Ma. 9-2864.
>
> "Violation: 784.1 of Agric.Code of Calif.
>
> "Deceptive display of grapes.
>
> "Complaining Witness: Raymond Newbill
>
> "Date of Offense: January 13, 1958
>
> "Address: Room 295 Wholesale Terminal Bldg.
> "784 S. Central Ave., L. A.
>
> "Telephone: Va. 4577
>
> "Will testify that he is an agricultural inspector employed by the L. A. County Agricultural Commissioner, assigned to Fruit & Vegetable Standardization. That on January 13, 1958, at approximately 11:30 A.M., while making inspections in the Grand Central Public Market, he and Inspector Robert Dingfelder inspected a display of grapes at a stall owned and operated by Shogo and Naomi Iwasaki. That the grapes making up the face of the display exposed to the view of the customer appeared to be of good quality. That the grapes in the rear or unexposed portion of the display from

which the customers were being served contained 15% decay.

"Witness: Robert Dingfelder

"Will testify approximately the same."

No further or additional evidence was presented. While appellants state a number of contentions, they center in the principal contention, which as stated by appellants is, that the trial court erred in finding the defendants guilty "in the absence of evidence that the unexposed portion of the grapes was below the standards expressly provided by statute."

In other words, if all the fruit displayed meets the requirements for quality, size, etc., it is contended that there can be no violation of Agricultural Code sec. 784.1.

Where there are displays of strawberries, or individual fruits such as oranges, the problem of standards is simpler than with bunches of grapes, where there may be considerable differences between an individual grape and the bunch it is in; and variations as to color, size of grape berries, presence or absence of mildew, sugar content, and firmness or softness in the individual fruit, capacity for handling or shipment and resistance to decay. It is not necessary, as defendants contend, to consider such matters on this appeal for violation of Agricultural Code sec. 784.1.

[1, 2] This section relates to deception in the display. Every bit of fruit concerned may be of acceptable quality. But if fruit on the top of the box is not substantially representative of the essential characteristics of that on the bottom there may be, as here, a violation of the section. In this case 15% of the grapes underneath were decayed. It is immaterial whether this was by weight, volume, or count of grape berries affected. The trial court is not unreasonable in considering this difference in quality to be substantial. Nor does it matter whether the manner of the exhibition of the fruit for sale was by pack, bulk load, load, arrangement or display. It is the deceptive element that is controlling. The evidence is sufficient. People v. Soffer, 1939, 34 Cal.App.2d 301, 304, 93 P.2d 183. The complaint charging a series of acts, is proper, as conviction may be as to any one of them. No demurrer was taken.

[3, 4] Counsel have urged the importance of our determination, referring no doubt to the widespread practice, of which we take judicial notice, of arranging or putting the most attractive fruit on the top of packs, loads, lots or market arrangements or displays. But the statute apparently has this in mind. Cf. also, Agricultural Code sec. 784.6. How far a given fruit display is deceptive or deceiving is for the trier of the fact, who may consider to what extent any housewife or other purchaser will tend to be deceived under the circumstances.

Judgments and orders granting probation each are affirmed.

BISHOP, P. J., and SWAIN, J., concur.

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